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Automobile Insurance: The Rockefeller-Stewart Plan

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Introduction

The announcement of a "new" automobile insurance proposal developed by New York's insurance commissioner, Richard E. Stewart, and governor, Nelson A. Rockefeller, was typical of other announcements of other "new" plans and proposals which had come before it.[1] A news release was issued.[2] It, as others had before it, began with a recitation of all of the "shortcomings" of the present automobile insurance and accident reparation system — too slow, too costly, too inequitable, too impractical, and not in tune with modern times. The possibility of improving the present system was termed impossible because of basic failings "traceable to its fundamental principles." What is needed, the release claimed as others had before it, is the adoption of the "new" plan which will not only solve all of the problems that exist and make everyone happy (with the possible exception of lawyers), but would do so for half the cost (in this case 44%) of the present system.

The Rockefeller-Stewart proposal (hereafter referred to as the Plan) is not much different than other "new" auto insurance proposals which have been thoroughly analyzed over the course of the past few years.[3] It offers nothing really new. However, it does shift benefits and adds innovations which make it necessary to examine it carefully so as to clearly establish what it will and will not do.

No-Fault vs. No-Responsibility

The Plan, developed by the New York Insurance Department staff, is the result of a little less than five months' work.[4] It is amazing that the monumental job of analyzing the present system and developing a new plan could have been accomplished in so short a time. Keeton and O'Connell took nearly two years to do the same work; the American Insurance Association spent nearly sixteen months; and Congress thought the task so difficult and complex that it gave the Department of Transportation two years and an appropriation of $1.6 million to conduct a similar study. At any rate, what occurred in New York was a speedy condemnation of the present system and the proposal of a "no-fault" automobile accident reparation plan based on the research and cost studies of other groups. Its timing gives it a distinct political flavor.

Actually the Plan and other proposals upon which it is patterned should be referred to as "no-responsibility" rather than "no-fault" plans. Careless and reckless drivers would still speed, pass on hills, cross center lines and otherwise violate the rules of the road. What would be different is that the careless and reckless drivers would not be held responsible for the injuries and damage caused by their conduct. A motorist could run a stop light and collide with another vehicle without being held responsible for the injuries to the people in the other car or damage to the other vehicle. The passengers would have

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[1]The plan is outlined in a report, Automobile Insurance . . . For Whose Benefit? (Feb 12, 1970) [hereafter cited as Stewart Report] which was prepared by the New York Insurance Department staff. Enabling legislation was also drafted and introduced into the New York Senate as Senate Bill 8922 (Mar 16, 1970).

[2]Dated February 16, 1970 and issued by Governor Rockefeller's press secretary.

[3]The Plan contains basic features of both the Keeton-O'Connell and American Insurance Association proposals. See, Basic Protection — Diminished Justice At High Cost, 8 For The Defense 73 (Dec 1967); Keeton Plan — Analysis of Major Elements, 8 For The Defense 75 (Dec 1967); The Keeton-O'Connell Plan — Some Questions And Answers, 9 For The Defense 25 (Apr 1968); DRI Special Report, An Analysis And Critique of an Automobile Insurance Proposal Prepared for Study and Comment by the American Insurance Association (Feb 1969) [hereinafter cited as AIA Critique].

[4]Stewart Report, note 1 supra at iii-iv.

to look to the insurer of the car in which they were riding for the limited benefits the Plan provides.

Mini-benefits — Maxi-price

What the Plan proposes is that the present system be scrapped and that, in its place, each car owner be required to carry insurance that will pay benefits to passengers injured while in his car and pedestrians hit by his car.[5] The benefits are limited to medical and hospital expenses, wage loss and rehabilitation expenses *not compensated from other sources.*[6] "Other sources" include personal accident & health insurance, accumulated sick leave, wage continuation benefits, union health and welfare benefits, workmen's compensation and any other source of benefits — with the exception of those sources which are funded "from general public revenues." Although not defined, it would appear that sources funded "from general public revenues" might include Medicare, Medicaid, Social Security and other public welfare programs. Why persons receiving benefits from public sources will be allowed what amounts to a double recovery and those who receive similar benefits from private sources will not, is unexplained.

A great number of persons injured in New York auto accidents would recover nothing if the Plan were enacted. They would fall within the classification of those "compensated from other sources." According to the insurance commissioner's own report, 91 percent of the workers in New York are covered by health insurance and most are covered by income continuation plans as well.[7] The Plan promises lower premiums for these people. However, for these persons the Plan would be too expensive no matter how cheaply it could be offered. They would be forced, because of the compulsory nature of the plan, to buy insurance from which they could never benefit. The operation of the plan would force a person to look to his sick leave benefits for wage loss reimbursement resulting from an automobile accident. However, such a person would have no source of wage loss reimbursement if the accumulated sick leave were used up as the result of the auto accident and he later sustained an illness or suffered an injury not connected with an auto accident.

There would be others for whom the Plan would be the equivalent of *Last Resort* or *End-Of-The-Road Insurance.* These would be the persons who would have some of the expenses which result from an auto accident paid by private insurance and benefit plans. Their automobile insurance would only be effective to pay whatever portions of those expenses were not taken care of by the private sources.

The persons who would seem to benefit the most from the Plan would be those who would be covered by Medicare, Medicaid, Social Security, and other public welfare programs. Presumably, many of these persons would not own vehicles and therefore would not be forced to buy the insurance. However, if one of these persons was injured in some form of automobile accident, he would apparently be able to have his expenses paid by the various public welfare programs and also recover benefits from the vehicle's insurer. This would all be without cost to these persons. In addition, the improvident person who uses his income for things other than the purchase of accident & health insurance, wage continuation plans, and the like, would benefit the most under such a plan.

Owning The Right Type Of Property

The manner in which the Plan handles property damage arising from motor vehicle accidents is similar to that used by other no-responsibility plans.[8] As to damage to motor vehicles, the Plan is truly one of no-responsibility. Each vehicle owner must bear the cost of damage to his own auto.[9] For example, if an auto is properly parked in its owner's driveway when it is struck by a reckless driver, the auto's owner or his insurer would be responsible for the cost of repair. The reckless driver could go merrily on his way without any responsibility for the property damage he caused. Vehicle owners would have to buy collision and comprehensive coverage to ease the burden of shouldering auto repair costs. However, it would have to be bought as a separate coverage and its cost is not included in the alleged "savings" of

[5]Id at 83-4.
[6]Senate Bill 8922, note 1 supra § 673.
[7]Stewart Report, note 1 supra at 30.
[8]See, e.g., AIA Critique, note 3 supra at 10.
[9]Stewart Report, note 1 supra at 89.

the Plan.[10] Collision coverage comes with a deductible so that the motorist would shoulder the first fifty, one hundred dollars or more of the automobile repair costs caused by the negligent or careless driving of another.

While innocent vehicle owners must foot the auto property damage bill for the driving habits of the careless and reckless driver, the Plan is more benevolent to owners of non-vehicular property. If a motorist is driving down the street when one of his tires unexpectedly blows out, for example, and he loses control of his car which jumps a curb and strikes and damages a building, his insurer will pay all of the repair costs of the building owner.[11] The question of whether the driver was actually at *fault* for the damage would not be considered. In this case, the liability of his insurer is absolute. All that is needed is that damage to non-vehicular property occur as the result of the use of a vehicle. The insurer of the vehicle is totally responsible for that damage — deserved or not. Thus, a motorist could strike a parked car and his insurer would be liable for damage to the car's contents but not to the car itself.

Recently released statistics indicate that as much as 55 percent of the automobile insurance premium dollar goes to pay for property damage coverages, including damage to automobiles.[12] In some areas of the country the figure is as large as 70 percent of the premium dollar (in Queens, New York, 69%).[13] The Plan does nothing to prevent automobile accidents and thus the cost of the insurance protection needed for property damage would not be lowered, but rather is increased, with its enactment. The shifting of responsibility for non-vehicular property damage to innocent motorists who are not responsible for it should increase the cost even more. Any increase in accident frequency or the cost of repairing damaged property will cause insurance costs to skyrocket. The proponents of the Plan claim that the cost of motor vehicle *property damage liability insurance* would be reduced with their proposal. This promise is true but illusory. Tort liability for motor vehicle property damage is eliminated, but the cost of repairing motor vehicles is actually shifted to collision coverage which each motorist would have to buy so as to provide protection for his own vehicle from damage. The cost of this insurance would surely increase.

[10]Id at 109 n 187.
[11]Id at 89.
[12]Journal of American Insurance (Nov-Dec 1969).
[13]Ibid.

Give Up A Lot To Get A Little

Not only is the Plan typical of other no-responsibility plans in the type of limited benefits it offers; it is also typical of the other plans in terms of what it would require New York residents to give up for the privilege of having such a plan — even if many of them don't really need or want it.

Innocent traffic victims, injured through the careless and reckless conduct of others, would have to give up the right to seek full compensation for all damages suffered in return for a plan that promises to pay limited benefits *only* if compensation is not received from other sources. Under the Plan an innocent traffic victim would be denied compensation for partial and permanent disability, loss of earning capacity, disfigurement, dismemberment, loss of bodily senses, or the pain, inconvenience and suffering associated with injury.[14] All of this would have been borne with Spartan endurance because damages for these items of loss are not easy to compute and are therefore eliminated. A person might suffer the loss of a hand in an auto accident caused by another's carelessness and receive little or nothing from the Plan because economic loss in such a case is relatively small and payments from "other sources" would reduce any payments to be made under the Plan. Yet, he would receive no compensation for the pain and suffering associated with the terrible trauma and the inconvenience and humiliation involved in being deformed for the rest of his life. Proponents of the Plan, as do proponents of other no-responsibility plans, intimate that there is something wrong or dishonest about claiming damages for non-economic loss associated with personal injuries.[15] However, this type of loss is just as real to the person who suffers it as is the medical bill that would have been covered except for the fact that it was paid by another source. Thus, because of the Plan's curious features, a pedestrian

[14]Stewart Report, note 1 supra at 84; Senate Bill 8922, note 1 supra § 675.
[15]Stewart Report, note 1 supra at 29 n 47.

would receive no compensation for his disfigurement or dismemberment but any personal property he was carrying at the time of the accident would be repaired or replaced by the insurer of the motorist who struck him. Many New York residents would give up a great deal more than they could ever get. Many would be forced to buy insurance they don't need, to give up their present rights under the law and, in case of an accident, would get nothing in return.

The Plan would give all New York motorists a license to injure any person or damage any motor vehicle found in their state without any responsibility to the person damaged by their conduct — a benefit of questionable value. While you may use your car to injure and maim all you want to under the Plan, you will still be responsible in tort, to the survivors of those of your victims whom you kill. The insurance commissioner's report does not state the position that a person who uses a car to kill has a greater responsibility than one who uses it only to cripple or dismember. Rather, the different treatment for the two types of drivers was occasioned by the belief that absolving the killer of responsibility would be in violation of the New York constitution.[16] The report states that the abolition of responsibility for causing another's death would have to await a future constitutional amendment.[17]

The Plight Of The Commercial Vehicle

The commercial vehicle has been singled out for special treatment (or mistreatment). Owners of commercial vehicles will be absolutely liable to reimburse insurers of other vehicles for all the benefits which have been paid as the result of an accident involving a commercial vehicle.[18] The owners of commercial vehicles would also be responsible for property damage to "any other kind of motor vehicle."[19] The definition of "commercial vehicle" used by the Plan is that found in the state's Vehicle And Traffic Law. Section 376 (11) (b) of that Law defines "commercial vehicle" as:

> Every type of motor-driven vehicle used for commercial purposes on the highways, such as the transportation of goods, wares and merchandise and motor coaches carrying passengers; including trailers and semitrailers, and tractors when used in combination with trailers and semitrailers, and excepting such vehicles as are run only upon rails or tracks.

The Plan, however, specifically excludes the owners of "a motor coach for carrying passengers" from its absolute liability.[20] The reason for the exclusion is that the drafters of the plan believe that "motor coach" owners will have enough of a burden.[21] Under the Plan they will be responsible to pay benefits to all of their injured passengers. In an accident involving a large bus, the exposure of the bus owner or its insurer could be great. Interestingly, the Plan and the Vehicle And Traffic Law are both silent as to the definition of "motor coach," although the latter defines "bus" in Section 104 as:

> Every motor vehicle designed for carrying more than ten passengers and used for the transportation of persons; and every motor vehicle, other than a taxicab, designed and used for the transportation of persons for compensation.

It would appear that trucks, taxis, and passenger cars "used for commercial purposes" would be subject to the plan's absolute liability provision. There will unquestionably be a number of lawsuits to judicially determine whether certain vehicles are or are not "used for commercial purposes" or come under the term "motor coach." As with the insurer of any vehicle involved in a collision with non-vehicular property, the liability of the owner of a commercial vehicle is not based upon responsibility for the accident. Rather, a collision between a commercial and non-commercial vehicle is all that is needed for the liability of the owner of the commercial vehicle to be established. After that, the only question to be determined is the number of dollars and cents involved. The utter inequity of this feature of the Plan can be shown by the following illustration:

> Two passenger car drivers become involved in a drag race and run an arterial stop sign. Both collide with a taxi that enters the intersection on the arterial. The cab

[16]Id at 86 n 139.
[17]Ibid.
[18]Senate Bill 8922, note 1 supra § 671(3).
[19]Id § 671(3)(b).
[20]Note 18 supra.
[21]Stewart Report, note 1 supra at 91 n 150.

driver, his passengers and the drivers of the speeding cars are injured. All three vehicles are total wrecks. The cab owner would have the following responsibility:

1. To reimburse the insurers of the two speeding cars for the Plan's benefits paid to the drivers.
2. To pay the two speeding drivers for the loss of their vehicles.
3. To pay the Plan's benefits to the passengers of the cab if they were not compensated from other sources.
4. To pay the Plan's benefits to the cab driver if he was not compensated by workmen's compensation or some other source.
5. To pay for the loss of the cab.

Unless one of the cab's passengers or its driver died as a result of the accident, those persons would have no right to hold the speeding drivers responsible for the damages they had caused. Why should commercial vehicles in New York be singled out for such outrageous treatment? If the proponents of the Plan believe that a no-responsibility plan is the answer to present automobile accident reparation problems, they are inconsistent in their resort to complete responsibility in the case of commercial vehicles. Perhaps the claimed cost savings for the "average motorist" is accomplished by shifting the cost to the commercial vehicle — like robbing Peter to pay Paul.

Pity The Career Pedestrian

A person who does not own a motor vehicle and who would be "compensated from other sources" should he be injured in a motor vehicle accident would lose the most as the result of the enactment of the Plan. It provides that the insurer of a motor vehicle involved in an accident with a pedestrian would pay the Plan's benefits to the pedestrian.[22] However, this would be no help to the pedestrian who has his out-of-pocket expenses "compensated from other sources." He would not be entitled to benefits and would not be able to seek damages from the motorist whose reckless or careless conduct caused injury. Motorists are absolved of all responsibility to this type of pedestrian — unless they were so thoughtless as to kill one.

The career pedestrian who would be "compensated from other sources" really gets the worst of the bargain. He is not only forced to give up the right to recover damages from the careless motorist, but retains personal responsibility for any damages caused to others by his own careless or reckless conduct as a pedestrian. The Plan only abolishes actions "based on negligence in the use or operation of a motor vehicle."[23] Thus, a pedestrian who suddenly darted into the street and caused a motorist to swerve his car into a tree, for example, would be liable to the motorist for auto damage and personal injuries just as if the Plan had never been enacted. On the other hand, the motorist who runs down a pedestrian with "other sources" of compensation would have no responsibility as long as the pedestrian was not killed.

The Drunk And The Drugged

Many of the no-responsibility plans which came before the Rockefeller-Stewart proposal have been criticized because they would allow the drunken driver, the escaping criminal, or the driver who is operating under the influence of a narcotic drug to recover benefits on the same basis as the innocent traffic victim who is injured by such use of a motor vehicle. It is clear that the proponents of the Plan sought to meet and avoid this type of criticism. The approach they use is novel, but does not strike at the heart of the issue.

The Plan provides that the drunken or drugged driver, the person operating a vehicle while committing a felony, and the person operating a vehicle with the specific intent of causing injury or damage will be absolutely liable, without regard to fault, to reimburse insurers of other vehicles for benefits paid and for property damage to other vehicles.[24]

Persons belonging to those four classes become, for the purpose of the plan, absolutely liable in the same manner that owners of commercial vehicles are absolutely liable. It is not necessary that the drunk or drugged condition be shown as the cause of the accident. All that is needed is an accident between a car operated by a person in one of the four classes and another vehicle. Thus, an intoxicated driver could be struck from the rear while

[22]Senate Bill 8922, note 1 supra § 671(1).

[23]Id § 675.

[24]Id § 671(4).

stopped at a stop light and he would be held responsible to repair the car of the person who struck him and pay the insurer of the other car for any benefits it paid the careless driver. Everyone would admit that those four types of drivers are a menace and should be kept off our roads, but the Plan ignores highway safety and only seeks to redistribute losses caused by these unsafe drivers. In fact, because of the compulsory nature of the Plan, these individuals are assured of insurance.

Even with this provision designed against drunken and drugged drivers, etc., the Plan still provides them with the same type of beneficial treatment that has subjected other plans to criticism. Even though a drunken driver may be liable to reimburse another insurer for benefits paid to persons he injured by his drunken operation of a motor vehicle, he is still allowed to recover benefits from his own insurer. He may not even be liable to another insurer since the person he injured may be one who has received benefits from another source and therefore would not be entitled to benefits. The proponents of the Plan recognized the problem of the drunk and the drugged driver but they did not adequately deal with the issue.

The Problem Of Gaps And Cost

The proponents of the Plan claim that if their proposal were enacted and motorists bought their basic coverages rather than present coverages, significant savings would result from present auto insurance premium costs. The Plan calls for three basic compulsory coverages:

1. The first party, no-responsibility coverage.
2. $10,000/20,000/5,000 liability coverage for out-of-state BI and PD claims and for in-state wrongful death claims.
3. Non-vehicular property damage coverage.[25]

It would be clear to the prudent motorist that the Plan would leave certain coverage gaps which he would want to fill. These would include:

1. Coverage for situations in which strict liability is imposed because of drunken or drugged driving or while committing a felony or driving with an intent to cause injury.
2. Collision coverage for property damage to owned vehicles.
3. Comprehensive coverage to provide for theft, vandalism, fire and windstorm damage.
4. Coverage for situations in which absolute liability is imposed upon commercial vehicles.
5. Additional liability insurance protection over the plan's basic rates of $10,000/20,000/5,000 for out-of-state BI and PD and for in-state wrongful death.
6. Uninsured Motorist Coverage. (The proponents of the Plan stated that the role of the New York Motor Vehicle Accident Indemnification Corporation (MVAIC) would be changed if the Plan is adopted. How MVAIC will be involved in uninsured motorist situations is not clearly spelled out. However, at the least, some form of U.M. coverage would be taken out by a prudent motorist for driving out of New York state.)[26]

The purchase of any of these additional coverages would, of course, reduce any saving that could be achieved if the plan was enacted. Any additional coverages, such as the proposal for optional first party insurance to offset elimination of pain and suffering recoveries, would have a similar effect.[27] The number of additional coverages purchased would have a direct relation to the financial status of the insured.

Will the Plan be made available for 56 percent less than is presently paid for auto insurance in New York? The cost saving estimates of the proponents of the Plan speak of savings of "as much as" 56 percent and therefore, even if the Plan lives up to their optimistic expectations, all insurance buyers will not gain such savings.[28] The first reaction that one has to the cost prediction of the proponents is that it would be very inequitable for a plan with benefits as limited as those to charge any more than the estimates. In some cases, insurers that charge rates even on the 56 percent reduction figure might be criticized. Clearly, the Plan would be grossly expensive for those who will be unable to receive its benefits because they are "compensated from another source." For those who will be unable to recover for the disability, disfigurement, dismemberment,

[25]Stewart Report, note 1 supra at 109 n 187.

[26]Id at 85 n 137.

[27]Id at 95.

[28]Note 2 supra.

pain, suffering and inconvenience caused by the negligent or careless driving of others the Plan will also be too expensive.

Whether the Plan will actually achieve the reduced cost structure predicted of it is open to debate. The actuarial data used by the New York Insurance Department for its cost analysis was taken primarily from the study conducted by the American Insurance Association to cost its own proposal. The validity of this study by AIA has been seriously challenged.[29] Independent actuaries retained by a New York Senate committee have studied the cost analysis of the New York Insurance Department and have concluded that the actual cost of the Plan would be significantly higher than that which was predicted.[30] The fact that there is a disagreement as to the actual cost of the Plan should, of itself, be a sufficient reason to move cautiously. Further, any savings which could possibly be achieved would result only from a reduction in benefits.

Who will pay the most for the insurance coverage offered by the Plan? It seems certain that, as with other proposals of a similar nature, premiums charged would not depend upon whether the insured has a good or poor driving record — whether an insurer is forced to pay the Plan's benefits is not dependent on the fault of its insured. With protection from "other sources" being equal, the safe driver may end up paying more for the Plan's coverage than a highway menace simply because he and his passengers may be entitled to recover more benefits under the plan than the person who caused the accident in which they were injured. "Bad risks" under the plan would be insureds with large families, cars capable of holding many passengers, working wives, above average incomes, and other characteristics indicating a large benefit pay-out in case of an accident — even if it was caused by another motorist. "Good risks" would be those who are unemployed or have small incomes, have small or inexpensive cars, and have other characteristics which indicate a small pay-out of benefits in case of an accident — even if they cause the accident by their careless driving. The whole process of merit rating and good driver discounts would be turned around under a program such as the one offered by the Plan.

It has been recognized that the Plan seeks to lower insurance costs by making its coverages secondary to the "other sources" which were discussed previously. This method of cost reduction will only last as long as the "other sources" or those who offer them are content to allow the Plan to have this free ride. If those who offer the "other sources" would revise their programs or contracts to provide that they would pay no benefits in automobile accident cases or would pay them only after benefits from applicable auto insurance had been exhausted, the Plan would become the primary source of benefits and the cost savings achieved by the "other sources" setoff would disappear.

Legal Problems

All of the various no-responsibility proposals presented to date claim, as one of their aims, to end "the automobile accident litigation that is crowding our courts."[31] Claims that most jurisdictions are troubled with court congestion and that the average automobile accident claimant must wait a long time for compensation have been more than adequately shown to be without merit and need not be discussed further.[32] There is court delay in some areas of New York, but to be considered is whether the Plan itself will have an impact on litigation.

First, it should be clear that all litigation arising from automobile accidents will not be eliminated by the stroke of the pen which would sign the plan into law. By its own terms, the plan would do nothing to affect wrongful death actions which result from motor vehicle accidents. New York has common borders with Canada and five other states. Many of New York's large population centers abut these borders. New Yorkers would remain liable in tort for any injuries or damages caused by their operation of motor vehicle outside of their

[29]See, e.g., Report of the American Mutual Insurance Alliance Committee on the Adequacy of the Costing of the American Insurance Association's "Complete Personal Protection Automobile Insurance Plan" (May 2, 1969).

[30]Woodward & Fondiller, Review and Summary Report, New York Insurance Department, "Automobile Insurance . . . For whose Benefit?" (Apr 28, 1970).

[31]See, e.g. Keeton & O'Connell, Basic Protection For The Traffic Victim at 14 (1965).

[32]Ross, DRI Studies Refute Court Delay Claims of Critics, 36 INS COUNSEL J 46 (Jan 1969).

home state. In addition, the reasoning followed by many state courts in cases involving conflict of laws questions would lead one to believe that a person from New Jersey, for example, could find a court in his home state willing to hear a negligence action resulting from an accident in New York involving a New York driver. In fact, the rulings of New York courts on conflict of laws issues would indicate that a New Yorker injured in an auto accident in another state would be allowed to use the New York courts for his action against the responsible motorist. Since the Plan would only eliminate negligence actions based upon the use or operation of a motor vehicle "in this state,"[33] two New Yorkers could collide in New Jersey or Connecticut and use the New York courts to resolve their dispute.

Also, the plan would only do away with personal injury and property damage claims "based on *negligence* in the *use* or *operation* of a motor vehicle."[34] Therefore, it would not prevent a person injured in an automobile accident from making a claim against the manufacturer of one of the vehicles involved on the theory that defective design or construction caused the accident. Claims against automobile garages and service stations alleging faulty repair or maintenance would still be possible. Suits such as these are becoming more prevalent, even without no-responsibility plans, and one can surely forecast more interest in this type of litigation should normal automobile liability claims be eliminated.

Suits against other classes of persons, not engaged in the "use or operation of a motor vehicle," would still be possible. The plight of the career pedestrian who is found responsible for the damage and injury caused in a motor vehicle accident has been discussed. Those who operate bicycles or ride horses would "enjoy" a similar status with the pedestrian. The persons who sell intoxicants to motor vehicle operators would, under a Dram Shop Law,[35] remain liable to persons injured by intoxicated drivers. Suits which allege that an auto accident occurred because of an alleged defect in a road, improper road design or signing would also be possible. In addition, since the Plan only eliminates negligence actions, there would be nothing to prevent suit against a motor vehicle operator on the ground that he intentionally, recklessly or wantonly caused the injury or damage. The question may also arise as to whether actions involving conduct designated as "grossly negligent" would be held as being "based on negligence" within the meaning of the Plan's provisions.

Since certain classes of persons would remain liable to motor vehicle accident victims a question arises which relates to the rights which an individual in one of those classes would have against a negligent motorist. For example, if a passenger is injured in an automobile accident and brings suit against the automobile's manufacturer claiming defective design, can the manufacturer assert that the accident was actually the fault of the passenger's driver? Can the manufacturer ask, that should the accident be found to be caused jointly by its fault and that of the driver, that it be allowed contribution from the driver for a portion of the passenger's damages? If the contribution claim is eliminated will the manufacturer be liable for all the damages or only a portion attributable to its negligence? These types of problems will surely keep New York courts and lawyers busy for some time.

Will the provisions of the Plan itself result in disputes between claimants and insurers? One does not have to be an expert in insurance law, but only has to examine some of the Plan's provisions[36] to see the types of questions which will surely call for judicial interpretation:

1. Were the medical and hospital expenses of the claimant "reasonable"?
2. Were the medical and hospital treatments received by the claimant "necessary"?
3. Were the expenses for medical and hospital treatment actually "incurred" by the claimant?

(Questions 1, 2 and 3 can be repeated as far as physical and occupational rehabilitation are concerned)

4. Would the money sought by the claimant for loss of income have actually "been earned but for the injury"?
5. What amounts would have "been earned but for the injury" by a student who

[33]Senate Bill 8922, note 1 supra § 675.
[34]Ibid.
[35]NY Gen Obligation Law § 11-101 (Supp 1967).
[36]Senate Bill 8922, note 1 supra § 673.

is totally and permanently disabled by an auto accident and unable to complete school or pursue the occupation for which he was being trained?

6. Is the loss of income from an investment which would have been made except for an automobile accident injury an amount which would have "been earned but for such injury"?
7. Just what are "all other expenses *reasonably* and *necessarily* incurred on account of such injury"?
8. Is the claimant entitled to benefits at all because his expenses were reimbursed "from other insurance or similar sources"?

These few questions bring to mind the words of a famous jurist:

> The intrinsic difficulties of language and the emergence, after enactment, of situations not anticipated by even the most gifted legislative imagination reveal the doubts and ambiguities in statutes that so often compel judicial construction.[37]

It would appear that the Plan may even produce business for attorneys who specialize in tax law. The plan provides for payment of lost income less "taxes which would have been payable on such lost earnings."[38] A person receiving a reimbursement for lost earnings "less taxes" would assume that the net amount received is not subject to tax. However, there is no gross income benefit from which the insurer subtracts taxes. Rather, it only pays a net sum on the theory that the sum paid is not subject to taxes. No funds are transferred by the insurer to the government. The Internal Revenue Code stipulates that "the amount of any damages received (whether by suit or agreement) on account of personal injuries" need not be included in gross income.[39] The Internal Revenue Service may not be inclined to agree that a direct, first party reimbursement of lost income falls within that definition.

Will The Plan Solve The Problems?

One must ask if the adoption of the Plan would solve New York's auto insurance problems.

One major problem is the cost of automobile insurance. There are two basic reasons why the cost of automobile insurance has increased: 1) more accidents and 2) inflation. Rather than proposing legislation which will get the drunks, drug addicts and habitual traffic law violators who cause accidents off the road, the Plan reduces the amount of damages their victims can recover. It treats the effects and not the cause.

One of the major items of expense in the automobile insurance premium bill is the cost of repairing physical damage to motor vehicles. Rather than pressing for automobiles that are more easy to repair, the Plan proposes that each vehicle owner be responsible for his own property damage. It treats the effects and not the cause.

There is a constant increase in litigation in all areas of the law which has resulted in crowding of court calendars in certain metropolitan New York jurisdictions. Rather than creating new judgeships to keep pace with population growth, the Plan would close the courthouse doors to certain litigants and bring forward a proposal so complex that more new litigation may arise than the plan would eliminate.

The Plan does not appear to answer the problems that beset the present automobile accident reparation system. It offers a system of no-responsibility motor vehicle insurance in the face of empirical research which shows that such a system would lead to an increase in motor vehicle accidents.[40] It offers too little and asks for too much to be given up in return. Other proposals which call for improvement of the present system appear more realistic.[41] They seek to solve the problems which exist without denying basic legal rights.

The Plan, presented as a socially oriented proposal to aid the insurance consumer, is, at the same time, discriminatory against the poor, blue and white collar workers, the young and that large group of citizens who would be unable to fill all of the gaps left open by its provisions. It forces a person to use up all of the fringe benefits he and his union have worked so hard to

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[37]Frankfurter, J., in Baltimore & Ohio R.R. Co. v. Kepner, 314 US 44, 59 (1941).

[38]Senate Bill 8922, note 1 supra § 673.

[39]Internal Revenue Code § 104(a)(2).

[40]DRI Special Report, Fault — A Deterrent To Highway Accidents (Vol 1969 No 10 Dec 1969).

[41]See, e.g., DRI Special Report, Responsible Reform — A Program To Improve The Liability Reparation System (Vol 1969 No 8 Oct 1969); Report of the American Bar Association Special Committee on Automobile Accident Reparation (June 1969).

earn so that the motorist who injures him can be free of responsibility. It leaves the auto accident victim disabled, in pain, and faced with a lifetime to consider the personal sacrifice he was forced to make to help lower the cost of insurance premiums for negligent and careless drivers. It seeks to lower the cost of insurance by denying most people insurance benefits or by conditioning the payment of benefits upon a series of events which will rarely occur. This can only be considered as a meaningful solution to all the problems of automobile accident reparation if mercy killing is considered a meaningful solution to all injury, sickness and disease.

Promote Positive Legislation

For many months, the DRI Board of Directors and Legislative Committee have worked to forge numerous sample statutes, which if enacted, would provide a public service and strengthen the defense position. These statutes have been prepared for action by Local Defense Groups to meet specific needs in their areas; the statutes are of no consequence if they merely fill the files at DRI headquarters. A survey of any state shows that the legislative activity inimical to the defense effort is prevalent.

Available, with supporting research, are sample statutes on the following topics: *Ad Damnum,* Advance Payments, Comparative Negligence, Contingent Fee, Demand To Admit/Offer Of Judgment; Double Payment (Collateral Source); Highway Safety; Mandatory Arbitration; Physician Patient Privilege; Split Trials; Summary Judgment; Supersedeas Bond; and Voluntary Dismissal.

To gain a broad view of the overall DRI positive program, which involves legislation in many of the above named areas, defense attorneys are asked to review the tenets of the special report "Responsible Reform—A Program To Improve the Liability Reparation System" and to make its promise a reality at the state level.

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