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NO-FAULT FOR NORTH CAROLINA—A PENDING PROPOSAL

ROBERT G. BYRD†

THE FAULT CONCEPT

Automobile accidents and the injuries caused by them have become a major problem in our society. Over the years a recognition of the need to provide a system of reparations for personal injuries and property damage that arise out of automobile accidents has evolved. The reparation system in effect in North Carolina and most other states is the tort or fault system. To recover compensation under the fault system, an injured person must show that his injury was caused by the negligence of the person from whom he seeks recovery.

Traditionally, the primary function of the fault system has been to allocate losses between persons involved in accidents; compensation for injuries, although significant, has been incidental to this basic function. Increasingly, however, the need to provide compensation for automobile-accident victims has been identified as an important objective in itself. Recognition of this need is evidenced in North Carolina by the adoption of financial responsibility laws,¹ compulsory liability insurance,² legislative provision that uninsured-motorist coverage be made available to the public,³ and the general availability of medical-payment coverage. Further, these responses are simply indicia of the mounting public concern about the plight of automobile-traffic victims, both as individuals and as a composite group of our society that is constantly increasing in size.

In addition to loss allocation and compensation, deterrence has been an objective that many believe the fault system helps to achieve. Faulty driving is a major factor that threatens public safety, and a system that places the burden of losses on the faulty driver may serve to deter such conduct. Such an allocation of losses not only may affect the future conduct of the individual upon whom this burden is placed but also may serve as a deterrent to faulty driving generally.

The incompatibility of these broad objectives has surfaced as greater emphasis has been placed upon the need for compensation. To

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¹N.C. GEN. STAT. ch. 20, art. 9A (1965), *as amended*, (Supp. 1971).

²*Id.* ch. 20, art. 13 (1965), *as amended*, (Supp. 1971).

³*Id.* § 20-279.21(b)(3) (Supp. 1971).

the extent that reimbursement of losses is conditioned on fault, a large number of injured persons are automatically excluded from receiving compensation. The tort system is not even called into operation in many situations, such as accidents involving only a single person, in which personal injuries are sustained. In other situations a result of effective performance of the function of loss allocation is a denial of compensation to the injured person. These instances include cases in which proof of the other person's negligence is insufficient and those in which the injured person's own negligence has contributed to cause his injury.

The incompatibility of these objectives is further increased when the theory of the system is put into practice. When the right to receive compensation is conditioned on fault, whether fault exists becomes a major determination that must be made. This means that in most cases an investigation of the facts and circumstances must be made, that these facts and circumstances must be evaluated, and that a judgment about the presence or absence of fault must be rendered. These things are likely to be done whether or not the case is litigated. In some of these instances attorneys will be retained. In some extended negotiations will occur. In a smaller number, a civil suit will be brought, and the decision about recovery will not be made until a trial is held. All of these procedures take time. What all this means, of course, is that significant delay will occur in many instances between the time of injury with its consequences of medical bills and loss of wages and the time the injured person is compensated.

These same procedures, which are fairly standard in the operation of the fault system, have other consequences as well. They are expensive to the injured person, to the one against whom recovery is sought, to insurance companies and to the state. Although these facts will not be fully explored, the observation can be made that under the fault system both direct and indirect costs absorb a large amount of funds, a part of which might otherwise be used for compensation of personal injuries.

The conflict of goals can be illustrated by another example. When state law requires that all motorists carry liability insurance, the objective of compensating victims of automobile accidents is furthered. The existence of liability insurance assures the injured person who is entitled to recover for his losses that funds will be available to compensate him. However, if it is assumed that placing liability on the faulty driver is an effective way to deter accidents—an assumption that is debatable, it seems fairly apparent that this deterrent is substantially weakened when the insurance company, rather than the faulty driver, pays the bill.

In determining the thrust of the reparations system in the automobile-accident area, a basic policy decision must be made as to which of these objectives is to be primary. The fault system has come under heavy attack in recent years. Although the major emphasis in the fault system is upon fairness in allocating losses between individuals, serious questions have been raised about whether tort doctrine is in fact the principal factor that affects allocation of losses arising out of automobile accidents.⁴ The questioning has been far-ranging: the concept of negligence is vague; the reconstruction of an accident through witnesses with poor opportunity to observe long after it occurred is haphazard; the presence of insurance causes juries to ignore the fault requirement; the framework in which settlements are made by insurance companies, while affected by the legal structure, is influenced by many nonlegal factors.

A more critical question, however, is whether, in light of the number of persons injured in automobile accidents and the consequences of these injuries to victims and their families, the fault system can provide an effective and efficient means of compensation for personal injuries. Studies have shown that less than one-half of those injured in automobile accidents receive compensation through the tort system.⁵ These studies also show that compensation under the tort system is incomplete⁶ and inequitable.⁷ They reflect a rather consistent pattern under which small claims are overcompensated and more serious claims are

⁴Criticisms of the fault system are summarized in R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 15-34 (1965) [hereinafter cited as KEETON & O'CONNELL].

⁵The Conard Study in Michigan showed that only 37% of those who suffered economic loss in automobile accidents received compensation from a tort claim. Of those more seriously injured, only 55% received payment under tort law. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* table 4-11 at 149, figure 6-5 at 188 (1964) [hereinafter cited as CONARD, et al.]. The Morris and Paul study in Philadelphia showed that less than 55% received compensation through the tort system. Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, figure 1 at 917 (1962). The Department of Transportation study indicated that 52% of the injured persons who received compensation from some source received no tort recovery. 1 U.S. DEP'T OF TRANSPORTATION, *AUTOMOBILE INSURANCE AND COMPENSATION STUDY, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* 47 (1970).

⁶E.g., the Conard study indicates that only 53% of economic loss suffered in automobile accidents is compensated from any source and that only 55% of this compensation comes from tort settlements. CONARD, et al. 152-53, table 4-9 at 147.

⁷The Morris and Paul study showed that one-half of all claimants received compensation for less than 50% of their economic loss and that about one-third received more than twice the amount of their economic loss in tort recoveries. Morris & Paul, *supra* note 5, at 916-18. Somewhat comparable data is revealed in the Conard study. CONARD, et al. 196-98.

underpaid.⁸ Finally, they reveal that the tort system is an inefficient way to provide compensations for automobile-accident injuries.⁹ Less than one-half of the insurance-premium dollar for personal injury protection goes to compensate injured persons. Almost one-half of the amount used for compensation is applied to compensation for general damages rather than economic loss.

While general agreement seems to exist that the fault system in its present form is inadequate, opinion is divided concerning what should be done. Some advocate that the fault system be replaced with a no-fault system of reparations;¹⁰ others contend that the fault system should be modified and retained. In North Carolina, the Governor's Study Commission on Automobile Insurance and Rates recommended to the 1973 General Assembly a modified no-fault system of reparations.¹¹ A bill¹² incorporating the basic recommendations of the Commission was passed by the Senate and will be pending in the General Assembly when it reconvenes in January, 1974. This article reviews the no-fault concept generally and some provisions of the Commission's proposal in particular.

THE CONCEPT OF NO-FAULT AUTOMOBILE INSURANCE

The need to provide an effective system of reparations for personal injuries and property damage that arise out of automobile accidents has focused nationwide attention on no-fault automobile insurance. A number of states¹³ have enacted some form of no-fault statute, and legisla-

⁸CONARD, et al. figure 6-14 at 197; Morris & Paul, *supra* note 5, at 917-18.

⁹These studies are cited and analyzed in detailed in P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS*, 513-19 (1971).

¹⁰*E.g.*, KEETON & O'CONNELL; AMERICAN INSURANCE ASSOCIATION, *REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS* (1968).

¹¹Eckhardt, *No-Fault Legislation Lacks Humane and Equitable Answers*, *TRIAL*, May-June 1971, at 43; Gillespie & Klipper, *Cost or Equity?*, *TRIAL*, July-Aug, 1972, at 39; Lee, *From the President*, *TRIAL*, May-June 1973, at 7; Preston, *The Automobile Needs the Tort System*, *TRIAL*, May-June 1971, at 44.

¹²S. 137, 1973 N.C. General Assembly (Engrossed, April 23, 1973) [hereinafter cited as Proposed § _____].

¹³CONN. GEN. STAT. ANN. §§ 38-319 to -351a (Supp. 1973); DEL. CODE ANN. tit. 21, § 2118 (Supp. 1972); FLA. STAT. ANN. §§ 627.730 -.741 (Supp. 1972); MASS. ANN. LAWS ch. 90, §§ 34A, M, N, O, ch. 231, § 6D (Supp. 1972); MICH. STAT. ANN. §§ 24.13101-.13179 (Supp. 1973); N.J. STAT. ANN. § 39:6A (Supp. 1973).

In addition, a number of states have required insurers to offer first-party coverage which may under a particular statute be either optional or compulsory to motorists. MD. ANN. CODE art. 48A, §§ 538-46 (Supp. 1972); MINN. STAT. ANN. § 65B.26 (Supp. 1973); ORE. REV.

tion is pending or in preparation in other states. A uniform state law has been adopted,¹⁴ and proposals for a federal law are being considered.¹⁵

Although the no-fault concept is not new to the area of automobile accident reparations,¹⁶ only in the last few years has it commanded serious legislative consideration in this country. The first no-fault statute went into effect in Massachusetts on January 1, 1970.¹⁷ Before and since that time an inestimable amount of time and energy has been devoted to its study. Books¹⁸ and articles¹⁹ have been written about it; legislative commissions²⁰ and other groups²¹ have studied it; and interest groups have aligned themselves for²² and against²³ it. No-fault has almost become a household word.

The basic aim of a no-fault system of reparations is to provide compensation to persons injured in automobile accidents without regard to fault. Compensation is to be paid even though another person's negligence did not cause the accident and even though the injured person's negligence caused or contributed to cause it. A no-fault system of reparations incorporates two basic ideas: (1) abolition of tort liability and (2) adoption of a substitute method for compensating accident victims. Its effect is that the individual is protected from suit by others under the tort system and is provided a means for recovery for his own injury other than recovery in tort.

STAT. §§ 743.800-.835 (1971); S.D. COMPILED LAWS ANN. §§ 58.23-6 to -8 (Supp. 1973).

¹⁴UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT.

¹⁵S. 945, 92d Cong., 2d Sess. (1972).

¹⁶KEETON & O'CONNELL 124-240.

¹⁷Ch. 670, [1970] Mass. Acts 529, amending MASS. ANN. LAWS ch. 90 (1967) (codified at MASS. ANN. LAWS ch. 90, §§ 34 A, M, N, O, ch. 231, § 6D (Supp. 1972)).

¹⁸P. GILLESPIE & M. KLIPPER, NO-FAULT: WHAT YOU SAVE, GAIN, AND LOSE WITH THE NEW AUTO INSURANCE (1972); KEETON & O'CONNELL; W. ROKES, NO-FAULT INSURANCE (1971).

¹⁹*Symposium on Nonfault Automobile Insurance*, 71 COLUM. L. REV. 189 (1971) (contributions from Young, State of New York Insurance Department, Bombaugh, Keeton, O'Connell Calabresi); *Symposium: No-Fault Automobile Insurance*, 44 MISS. L. REV. 1 (1973) (contributions from Keeton, Spangenberg, Pearson, Henderson, Magnuson, Coombs, Brainard).

²⁰E.g., STATE OF NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? (1970).

²¹E.g., AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS (1971); AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT PREPARATIONS (1968) [hereinafter cited as AIA REPORT].

²²E.g., AIA REPORT; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE PLANS: THE "NO FAULT" PRINCIPLE (1972).

²³See authorities cited note 11 *supra*.

The substitute method of compensation is usually a form of first-party insurance. The concept of first-party insurance is a familiar one since it is the traditional form of coverage in accident, hospital, life, and fire insurance. Further, its use in the automobile accident area is not new. Collision, medical-payment, and uninsured-motorist coverages are types of first-party insurance intended to protect the insured against losses from personal injury or property damage that arise out of automobile accidents. Under the tort system now in effect in North Carolina a motorist is required by law to purchase liability insurance for the protection of others who may be injured by his negligent driving.²⁴ Under a no-fault system he purchases insurance basically for the protection of himself and the members of his family.

The central thrust of no-fault is prompt and certain compensation to automobile accident victims. The aim is to provide immediate compensation as losses caused by injury accrue in order to avoid undue hardship to the injured person and members of his family.

Compensation is paid for economic losses only. Losses for which compensation is provided in most plans include medical and hospital expenses, loss of wages, expenses incurred for services that the injured person would have performed for the benefit of himself and his family but for the injury, and funeral expenses. Less frequently provision is made for recovery of economic losses of a decedent's survivors. First-party benefits are not provided for pain and suffering, physical impairment, and other general damages.

Most statutes and plans now in existence modify the pure no-fault concept. Restrictions may be placed upon the types of losses to be compensated, the total benefits to be paid, and in some instances, upon the amounts to be paid for particular types of losses. For example, total first-party benefits are limited to five thousand dollars in Florida²⁵ and Connecticut,²⁶ two thousand dollars in Massachusetts²⁷ and approximately ten thousand dollars, exclusive of medical expenses, in New Jersey.²⁸ Limitations upon wage loss and replacement service loss may restrict recovery to a stated percentage of the actual loss incurred, to a fixed weekly or monthly amount, to a limited time period, or to some

²⁴N.C. GEN. STAT. § 20-309(a) (1965).

²⁵FLA. STAT. ANN. § 627.736(1) (Supp. 1972).

²⁶CONN. GEN. STAT. ANN. § 38-320(d) (Supp. 1973).

²⁷MASS. ANN. LAWS ch. 90, § 34A (Supp. 1972).

²⁸N.J. STAT. ANN. § 39:6A-4 (Supp. 1973).

combination of the above.²⁹

The absence of complete abolition of tort liability is another modification of the pure no-fault concept made in existing plans and statutes. For the most part, tort exemption for economic losses exists only to the extent that such losses have been compensated by first-party benefits.³⁰ In addition, immunity from suit to recover general damages is provided only for less serious injuries. The injured person may maintain a tort action to recover general damages when he has sustained a serious injury³¹ and, under some plans, when medical expenses incurred by him in connection with his injury exceeds a fixed sum, such as five hundred or one thousand dollars.³² Usually, if either the serious injury or medical expense threshold is met, no restriction is placed upon the amount of general damages that may be recovered.³³

²⁹CONN. GEN. STAT. ANN. § 38-320(e) (Supp. 1973) (compensation for work loss, defined to include wage loss and replacement services loss, is limited to 85% of the value of such loss; also combined benefits for work loss and survivor's loss may not exceed \$200 per week); DEL. CODE ANN. tit. 21, § 2118(a)(2) (Supp. 1972) (compensation for earnings loss and reasonable replacement services expense is limited only by the \$10,000 ceiling on all benefits); FLA. STAT. ANN. § 627.736(1)(b) (Supp. 1972) (insured can recover all reasonable replacement services loss and 100% of any loss of gross income unless income loss recovery is deemed not includible in gross income for federal income tax purposes, in which event insured is limited to 85% recovery of income loss); MASS. ANN. LAWS ch. 90, § 34A (Supp. 1972) (compensation for wages actually lost by reason of the injury and for replacement services loss is limited by the \$2,000 overall ceiling on personal injury protection benefits; also weekly wage loss benefits cannot exceed 75% of the insured's weekly wages); MICH. STAT. ANN. § 24.13107(b) (Supp. 1973) (replacement services loss is limited to \$20 per day for a maximum period of 3 years; wage loss compensation is limited to 85% of insured's income unless he can show the tax advantage is less than 15%; wage loss recovery is further limited in that such benefits combined with other earned income cannot exceed \$1000 for a single 30-day period; also work loss recovery cannot be had after 3 years from the date of the accident); N.J. STAT. ANN. § 39:6A-4 (Supp. 1973) (Wage loss benefits are limited to \$100/week and \$5,200 total per person; replacement services loss compensation to injured parties is limited to \$12/day with a maximum total recovery per person of \$4,380).

³⁰CONN. GEN. STAT. ANN. § 38-323 (Supp. 1973); FLA. STAT. ANN. § 627.737(1) (Supp. 1972); MASS. ANN. LAWS ch. 90, § 34M (Supp. 1972); MICH. STAT. ANN. § 24.13135(2) (Supp. 1973); N.J. STAT. ANN. § 39:6A-8 (Supp. 1973).

³¹CONN. GEN. STAT. ANN. § 38-323 (Supp. 1973) (somewhat similar to Florida); FLA. STAT. ANN. § 627.737(2) (Supp. 1972) (injury or disease consist in whole or in part of permanent disfigurement, a fracture to weight-bearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function, or death); MASS. ANN. LAWS ch. 231, § 6D (Supp. 1972) (somewhat similar to Florida); MICH. STAT. ANN. § 24.13135 (Supp. 1973) (death, serious impairment of body function or permanent serious disfigurement); N.J. STAT. ANN. § 39:6A-8 (Supp. 1973) (somewhat similar to Florida).

³²CONN. GEN. STAT. ANN. § 38-323 (a)(7) (Supp. 1973) (\$400); FLA. STAT. ANN. § 627.737(2) (Supp. 1972) (\$1,000); MASS. ANN. LAWS ch. 231, § 6D (Supp. 1972) (\$500); N.J. STAT. ANN. § 39:6A-8 (Supp. 1973) (\$200 exclusive of hospital expenses, x-rays, and other diagnostic medical expenses).

³³See notes 98-101 *infra*.

In the change from a tort to a no-fault system, a number of basic shifts will occur. One difference, already noted, is that the motorist will purchase insurance primarily for the protection of his own interests rather than for the benefit of others whom he may negligently injure. Under a no-fault system a significant increase in the number of persons who receive compensation will probably occur.³⁴ Persons injured in single-car accidents and those who negligently contributed to cause their own injuries, although barred from recovery under the tort system, will be entitled to compensation. Estimates about the increase in the level of claim frequency have varied considerably.³⁵

Balanced against the increased amounts that will be paid in compensation are savings that will arise from other features of a no-fault system. A reduction in investigative, administrative, and litigation costs should occur³⁶ so that the amount available for payment of economic losses will be greater. The limitation upon recovery of general damages will make additional funds available for payment of economic losses.³⁷

A BRIEF DESCRIPTION OF THE STUDY COMMISSION'S PROPOSAL

Partial Abolition of Tort System.

The Commission's proposal partially abolishes tort liability³⁸ and substitutes for that part abolished first-party insurance as the method for compensating persons injured in automobile accidents.³⁹ Under it a person injured in an automobile accident can receive compensation for

³⁴Mr. Dale R. Comey, associate actuary for the Hartford Insurance Group, in an unpublished memorandum of June 8, 1972 estimated an increase in claim frequency of appropriate 50% if a Florida-type no-fault plan went into effect in North Carolina.

³⁵In preparing cost estimates for a plan under consideration by the Conference of Commissioners on Uniform State Laws, the Allstate actuary projected an increase in claim frequency of 80% to 100%, the American Mutual Insurance Alliance actuary estimated an increase of 65%, and the American Insurance Association actuary estimated an increase of 27%. These estimates appear in an unpublished statement of opinion by the American Mutual Insurance Alliance, the National Association of Independent Insurers, and State Farm Mutual Insurance Company which is entitled "Estimated Effect on Automobile Insurance Premiums of Shifting from the Present System to the UMWARA System."

³⁶AIA REPORT, exhibit I, sheet 3; Harwayne, *Insurance Costs of Basic Protection Plan in Michigan*, 1967 U. ILL. L.F. 479, 480-82.

³⁷Mr. Dale R. Comey, associate actuary for the Hartford Insurance Group, in an unpublished memorandum of June 8, 1972 estimated that the percentage of loss costs for pain and suffering to total costs under the present system would be reduced from 56.3% to 25% if a Florida-type no-fault plan were in effect in North Carolina.

³⁸Proposed § 58A-6.

³⁹*Id.* §§ 58A-3, -8.

his injuries without regard to the presence or absence of fault.⁴⁰ The insured is protected from suit by others under the tort system and is provided a means for recovery for his own injury against his own insurance company.

The proposal seeks to provide immediate compensation as losses caused by injury accrue. Compensation is payable when reasonable proof of a claim is filed with an insurer, and claims are overdue if not paid within thirty days.⁴¹ The insurer must pay interest of one and one-half per cent a month on overdue payment⁴² and, if suit is necessary to enforce payment, reasonable attorney fees incurred by the claimant.⁴³

First-Party Benefits Available Under Act.

An injured person can recover a maximum of five thousand dollars in first-party benefits⁴⁴ under insurance every motorist is required to buy.⁴⁵ Additional benefits are available on an optional basis.⁴⁶ The injured person cannot maintain a tort action to recover for economic losses in an amount of five thousand dollars or less. If economic losses over five thousand dollars are sustained, the injured person may sue in tort to recover for losses in excess of that amount.⁴⁷

Compensation is to be paid for economic losses only; no benefits are provided for pain and suffering and other general damages.⁴⁸ Recovery of general damages in tort is also precluded unless the medical expenses of the injured person exceed one thousand dollars,⁴⁹ or a serious injury is incurred by him.⁵⁰ When either threshold is met, no restriction is placed upon the amount to be recovered in general damages in a tort action.

Basic reparation benefits are made primary except for workmen's

⁴⁰*Id.* § 58A-4.

⁴¹*Id.* § 58A-18(a).

⁴²*Id.* § 58A-18(b).

⁴³*Id.* § 58A-19(a).

⁴⁴*Id.* § 58A-2(e).

⁴⁵*Id.* § 58A-8.

⁴⁶*Id.* § 58A-13.

⁴⁷*Id.* §§ 58A-2(e), -6(a).

⁴⁸*Id.* § 58A-2(c).

⁴⁹The amount was reduced to \$750 by amendment in the Senate. *Id.* § 58A-6(b).

⁵⁰A serious injury exists when "the injury is a permanent one or results in death, permanent disfigurement, loss of a body member, permanent loss or impairment of a body function (including but not limited to sight, hearing, taste and smell), permanent physical or mental impairment, or more than two months of inability of the injured person to work in an occupation." *Id.*

compensation.⁵¹ The injured person's benefits are not to be reduced by payments that he receives from accident and health insurance, wage-continuation plans, or other collateral sources even though the payments are made because of injury in an automobile accident.⁵²

Extent of Protection Afforded by Insurance.

The insured and members of his family residing in the same household are covered by the insured's policy in all in-state and out-of-state accidents.⁵³ The occupant of a car, if he is not an insured under another policy, is covered in in-state and out-of-state accidents by the security on the vehicle of which he is an occupant.⁵⁴ A pedestrian or other person, who is not the occupant of a car or an insured under another policy, is covered in in-state accidents only by the security on any vehicle involved in the accident.⁵⁵ In case of commercial, passenger-carrying vehicles⁵⁶ and vehicles furnished by employers,⁵⁷ the security on the vehicle will always be the primary source of payments to injured occupants.

Benefits for Vehicle Damage.

In relation to damage to motor vehicles, the act again partially abolishes the tort system and substitutes for the part abolished first-party insurance as the method for compensating for vehicle damage.⁵⁸ The owner of a motor vehicle must provide protection against damage to his vehicle of five hundred dollars or less and can maintain an action in tort against a person at fault in causing the accident only for damages in excess of that amount. The owner has two options available to him.⁵⁹ He may obtain full collision coverage for his car or he may secure coverage that will entitle him to compensation only if another person was at fault in causing the damage to his vehicle. Regardless of which option he elects, he will have no tort action for damages of five hundred dollars or less. The second or "fault" option is designed to give the owner a right to compensation when such a right would have existed

⁵¹*Id.* § 58A-2(d)(1).

⁵²*Id.* § 58A-2(d)(3).

⁵³*Id.* §§ 58A-1(a)(2), -3, -5(c)(1).

⁵⁴*Id.* §§ 58A-3, -5(c)(2).

⁵⁵*Id.* §§ 58A-3, -5(c)(3).

⁵⁶*Id.* § 58A-5(a).

⁵⁷*Id.* § 58A-5(b).

⁵⁸*Id.* §§ 58A-33(a), (c).

⁵⁹*Id.* § 58A-33(b).

under the tort system and can be obtained at relatively low premium rates.

The act affects only vehicle damage and leaves damage to property other than vehicles within the tort system.

Requirements Relating to Insurance.

The requirement for security for basic reparation benefits applies to all types of motor vehicles, subject to a few exceptions, and includes passenger cars and commercial vehicles.⁶⁰ The owner of a motorcycle may elect to exclude first-party benefits from insurance coverage on the motorcycle.⁶¹

Basic reparation security must be provided for all vehicles operated in the state and not just for vehicles registered in North Carolina.⁶² First-party vehicle damage insurance must be provided by owners of vehicles required to be registered in North Carolina.⁶³

The act does not affect provisions of existing law which require liability insurance for personal injury and property damage caused by the insured's negligence.

The North Carolina motorist would be required to provide security for payment of basic reparation benefits, for damage to his own vehicle, and residual liability insurance to provide compensation to others for personal injury or property damage for which no tort exemption is provided in the act. Of course, all of this coverage will be available in a single policy. As a substantial part of personal injury and vehicle damages is removed from the tort system by the Act, the residual liability insurance will be much cheaper than existing liability insurance.

Subrogation.

Under the proposal only a limited right of subrogation is available to the insurer that has paid first-party benefits for personal injury⁶⁴ or vehicle damage.⁶⁵ No claim for subrogation arises or can be contracted for except when the person who suffered loss has a tort action against

⁶⁰ " 'Motor vehicle' means a vehicle of a kind required to be registered under Article 3 of Chapter 20 of the North Carolina General Statutes." *Id.* § 58A-1(a)(5).

⁶¹ *Id.* § 58A-8(c).

⁶² *Id.*

⁶³ *Id.* § 58A-33(a).

⁶⁴ *Id.* §§ 58A-7(a), (b).

⁶⁵ *Id.* §§ 58A-33(c)(5), (d).

the wrongdoer causing the loss. Thus, to the extent that tort exemption is authorized, no subrogation claim exists.

MAJOR QUESTIONS INVOLVED IN COMMISSION'S NO-FAULT PROPOSAL *Benefits To Be Provided.*

The Commission's proposal limiting benefits to economic loss reflects the view that the losses that are critical to the injured person are his out-of-pocket losses. The limitation also recognizes that many losses, such as pain and suffering, representing non-economic detriment are difficult to measure both in determining the extent of the loss and in placing a monetary value upon it. These characteristics of non-economic detriment not only pose obvious practical difficulties under a first-party system but also present a real danger that a nuisance-value payment for pain and suffering would become a part of the reparations system just as it has under the tort system.

The Commission's proposal, like most other statutes and plans, provides for reimbursement of (1) medical and hospital expenses, (2) income and wage loss, (3) replacement service loss, and (4) funeral expenses.⁶⁶ Provision is also made for reimbursement of (5) survivors' economic loss.⁶⁷

The Commission adopted a five thousand dollar limit on total first-party benefits⁶⁸ to be provided under compulsory insurance.⁶⁹ This limit is an amount within which the losses of a large majority of accident victims will fall. A Michigan study indicated that sixty-four percent of persons involved in automobile accidents suffered losses of less than five hundred dollars and that losses of ninety-three percent were less than three thousand dollars.⁷⁰ A study in Philadelphia showed that losses of sixty-eight percent were below three hundred dollars and those of ninety-two percent below three thousand dollars.⁷¹ A closed claim study in seven states by the American Insurance Association indicated that losses of seventy-nine percent were less than five hundred dollars.⁷²

No restriction is placed upon the amount to be paid for any type

⁶⁶*Id.* § 58A-2(b)(1)-(4).

⁶⁷*Id.* §§ 58A-2(b)(5), (6).

⁶⁸*Id.* § 58A-2(e).

⁶⁹*Id.* § 58A-8.

⁷⁰CONARD, et al., *supra* note 5, at 2.

⁷¹Morris & Paul, *supra* note 5, at 933-34.

⁷²AIA REPORT, *supra* note 21, exhibit X.

of loss except for funeral expenses for which benefits are limited to 750 dollars⁷³ and for wage loss which is limited to eighty-five percent of gross income if the benefits are held not to be taxable income.⁷⁴ The Commission rejected other limitations upon recovery of first-party benefits. This seems justified because limitations that exclude from first-party coverage losses for a prescribed period after injury and that fix maximum dollar limits upon benefits for medical expenses, work loss, and replacement services may operate to allocate these excess losses to the injured person. This result will clearly follow if tort exemption is provided for them. Even if tort exemption does not extend to these uncompensated losses, the practical possibility of the injured person enforcing payment of them seems slight. A decision to place these losses upon the injured person does not seem justified by any premium savings that might result from such limitations. A second but equally undesirable possibility is that a failure to establish tort exemption for these excess losses will create many small claims which because of their nuisance value, will carry forward some of the abuses now existing in the tort system.

In contrast, the limit of wage loss benefits to eighty-five percent of gross income seems justifiable. Since an individual's wages are subject to income tax while first-party benefits for wage loss are not, this limitation will not as a practical matter have the effect of requiring the injured person to absorb part of his own loss. The percentage limitation is a conservative one and for most individuals the amount received to reimburse wage loss is likely to exceed the take-home pay, after taxes, that he would have received had he continued to work. If no limitation is placed upon wage loss recovery the injured person will receive more from first-party benefits than he would have received from earnings. In light of these facts, the significant reduction in premiums for first-party coverage that will result from the limitation seems to warrant its adoption.

The limitation upon the amount to be recovered for funeral expense is consistent with other statutes and plans. In other statutes the amount of the limit varies from five hundred to two thousand dollars. Any amount fixed is somewhat arbitrary. The question will probably be raised whether 750 dollars, even when combined with benefits available from social security, will provide an adequate amount for funeral expen-

⁷³Proposed § 58A-2(b)(2).

⁷⁴*Id.* § 58A-2(d)(2).

ses. However, if no limit is placed upon benefits for funeral expenses or if the limit is fixed too high, a real danger exists that their availability will cause an unjustifiable increase in the costs of funerals.

The Commission's proposal does not limit benefits for wage loss to wages earned at the time of the injury. It provides for reimbursement of what the injured person would have been able to earn at the time the loss accrues had he not been injured.⁷⁵

The proposal provides benefits for survivors when the injured person dies from injury arising out of the use or maintenance of a motor vehicle.⁷⁶ To authorize recovery of survivors' benefits on the no-fault principle carries through the idea of providing immediate reparation for economic loss arising out of automobile accidents. The need for reparations without delay seems as great in case of death as it does in case of injury.

Prompt Payment of Benefits.

The central thrust of no-fault is prompt and certain compensation to automobile accident victims. The objective is to provide periodic payments so that benefits are received on a continuing basis as medical expenses and wage loss are incurred. The overall goal is to place the injured person as nearly as possible in the same position he would have been in had no injury occurred so that undue hardship to him and the members of his family is avoided.

A number of provisions in the proposal are designed to achieve this goal. Loss is not determined at the time of injury but as expenses are incurred or work is not performed because of the injury.⁷⁷ Compensation is payable when reasonable proof of a claim is filed with an insurer and claims are overdue if not paid within thirty days.⁷⁸ The insurer must pay interest of one and one-half per cent a month on overdue payments⁷⁹ and, if suit is necessary to enforce payment, reasonable attorney fees incurred by the claimant.⁸⁰ Restrictions are placed upon lump sum and installment awards in an attempt to assure that they are consistent with the above objectives or otherwise in the interest of the injured persons.⁸¹

⁷⁵*Id.* § 58A-2(b)(3).

⁷⁶*Id.* §§ 58A-2(b)(5), (6).

⁷⁷*Id.* § 58A-18(a).

⁷⁸*Id.*

⁷⁹*Id.* § 58A-18(b).

⁸⁰*Id.* § 58A-19(a).

⁸¹*Id.* § 58A-21.

A number of provisions are intended to ensure that benefits are in fact received by the injured person. Generally, rights to future benefits are not assignable.⁸² Subject to limited exceptions, benefits are exempt from execution or garnishment to the extent that applicable state or federal law provides for exemption to wages.⁸³ Benefits are to be paid without any deduction or set-off by the insurer.⁸⁴

The proposal also contains discovery provisions to ensure that information relevant to a claim is readily accessible so that benefits may be determined accurately and paid promptly. Since benefits are provided for economic losses only and these losses are susceptible to satisfactory proof, the discovery provisions should go far to eliminate disputes about the extent and amount of loss that has been sustained.

The proposal provides for the medical examination of the injured person who claims first-party benefits.⁸⁵ Although some no-fault statutes require a claimant, upon request by an insurer, to submit to medical examination, the Commission's proposal does not make submission of the claimant to medical examination mandatory. Instead, provision is made for petition to a court with opportunity for notice and hearing on the determination of the need for examination and the extent of disclosure to be made. Insurers are required to provide copies of medical reports to the insured.

Employers are required to furnish, upon request of the claimant or insurer, statements of the work record and earnings of an employee upon whose injury the claim is based.⁸⁶ The claimant is required to submit to an insurer reports of medical treatment and examination, to give the names of attending physicians, and to authorize inspection by the insurer of relevant medical records.⁸⁷ Again, the purpose of the provisions is to provide ready access to information relevant to a claim for benefits and to facilitate determination and processing of claims.

The goal of prompt and certain compensation for accident victims is furthered by the ease with which an injured person can file a claim for benefits. However, a problem arises because an injured person may be covered by more than one policy of insurance. Overlapping coverage may exist because the injured person is under a policy of his own or of

⁸²*Id.* § 58A-23.

⁸³*Id.* § 58A-25.

⁸⁴*Id.* § 58A-24.

⁸⁵*Id.* § 58A-26.

⁸⁶*Id.* § 58A-27(a)(1).

⁸⁷*Id.* § 58A-27(a)(2).

a member of his household and in addition is protected by the security on the vehicle of which he is an occupant or by which he is struck.

One solution to the problem is to place primary responsibility on the insurer of the vehicle in which the injured person was an occupant or by which he was struck.⁸⁸ The insured and members of his household look to his insurer for protection only when injured in an accident involving the insured vehicle or a vehicle that was uninsured. This approach focuses upon the involvement of the vehicle in accidents as the basis for allocating liability to insurers. Perhaps, some thought exists that "involvement in accidents" roughly parallels fault and thus tends to place the loss on the basis of responsibility for the injury. As a solution to this problem the Commission adopted a system under which in the majority of cases the insured and members of his family will proceed against the insured's own insurer to recover compensation for injury.⁸⁹ A major advantage of this arrangement is that the injured person files his claim with an agent with whom he customarily deals rather than one who is a stranger to him.

Although the Commission adopted the principle that the injured person should make claim for benefits against his own insurer, two exceptions to this principle are made. The insurer of a vehicle used in the business of transporting fare-paying passengers is primarily liable for claims arising from injury to passengers in the vehicle.⁹⁰ Thus, a passenger in a bus or taxicab will recover from the insurer of that vehicle rather than his own insurer. The insurer of a vehicle furnished by an employer to this employee is primarily liable for claims arising from injury to the employee while an occupant of the vehicle.⁹¹ These exceptions represent a policy decision that the owners of these vehicles should bear the costs of injury to occupants under these circumstances.

Tort Exemption and Limitation of Liability.

In any attempt to establish a first-party system of reparations for automobile-accident victims the relationship between that system and the existing tort system must be determined. No existing statute or plan has completely substituted the first-party system of reparations for the tort system. A number of statutes⁹² leave the tort system completely

⁸⁸*E.g.*, MASS. ANN. LAWS ch. 90, § 34A (Supp. 1972).

⁸⁹Proposed § 58A-5(c).

⁹⁰*Id.* § 58A-5(a).

⁹¹*Id.* § 58A-5(b).

⁹²*See* jurisdictions cited *supra* note 13, second paragraph.

intact so that a cause of action continues to exist for both economic losses and general damages sustained by the injured person. Usually, under these statutes provision is made for reduction of the tort recovery by amounts received in first-party benefits for economic losses or for subrogation of the first-party insurer that has paid these benefits to the rights of the injured person against the tortfeasor to the extent of payments made by it.

Four approaches, or some combination of them, have been taken in regard to the restriction of recovery in tort of general damages: (1) no modification of the right to recover general damages in a tort action;⁹³ (2) a limitation upon the amount that may be recovered in general damages;⁹⁴ (3) an exclusion from recovery in tort of a fixed dollar amount in general damages;⁹⁵ and (4) a provision that establishes a threshold that must be met before any recovery for general damages is allowed.⁹⁶ Two types of thresholds have been adopted and both are commonly provided for in the same statute. One permits the recovery of general damages only when a serious injury is shown to exist. The other is keyed to the amount of medical expenses incurred by the injured person. The basic purpose of either type of threshold is to attempt to identify cases in which claims of general damages are likely to be genuine and of enough magnitude to be recognized.

Under a first-party system of reparations an increase in the amount of compensation paid will result because of increase in the frequency of claims.⁹⁷ Increased claim frequency is due to the payment of benefits to persons who could not collect under the tort system—those unable to prove fault of another person, the victim of the single-car accident, and the person barred from recovery because of his own negligence. If increased amounts of compensation are to be paid, one of two things must occur. Either premium costs must increase or a savings must be effected.

Savings can be effected through lower costs incident to the administration of a first-party system.⁹⁸ Traditionally, costs of administering reparations for automobile-accident victims under the tort system have been high, and a complete or partial shift from the tort system to a first-

⁹³DEL. CODE ANN. tit. 21, § 2118 (Supp. 1972).

⁹⁴An Illinois statute, held unconstitutional in *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), limited general damages to a percentage of medical expenses incurred by the injured person.

⁹⁵UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 5.

⁹⁶See notes 31-32 and accompanying text *supra*.

⁹⁷See notes 34-35 and accompanying text *supra*.

⁹⁸See note 36 and accompanying text *supra*.

party system is likely to reduce costs in relation to attorneys' fees, adjustment expenses, and the bargain value of many small claims that have been consistently overpaid under the tort system. Whether these same savings can be realized under a first-party system in which full tort liability is retained is uncertain. Since under these circumstances both the fault and general damages issues remain, a confident projection of cost savings clearly cannot be made. It would seem that cost savings can be realized only if the injured person, once he received compensation from first-party benefits, voluntarily chose not to pursue his tort remedy.

Significant savings under a no-fault system of reparations can be realized through a limitation of recovery of general damages.⁹⁹ The decision to restrict the recovery of general damages is not simply a choice that prefers reimbursement of economic loss over compensation of general damages. Undoubtedly this choice would be a significant part of a decision to abolish completely the right to sue for general damages. However, it is likely that nuisance-value payments are reflected in the rather consistent overpayment of small claims under the tort system and that these payments constitute an important part of the sums that are used for compensation of general damages. To the extent that these payments can be directed to the payment of economic loss a more effective reparations system can be achieved without depriving injured persons of compensation for real losses they have sustained.

Again, if no restriction is placed upon the recovery of general damages, the likelihood that these savings can be realized is substantially reduced and depends totally upon the choice of the injured person whether to pursue his tort claim.

Another possible consequence of a plan that provides first-party benefits without placing any restriction upon tort suits should be noted. Its effect upon injured persons' pursuit of the tort remedy is likely to be uneven. Two factors seem crucial in determining the likelihood whether an injured person might pursue his tort remedy. Education and status are likely to affect significantly the individual's knowledge of his tort claim and of the means available to pursue it. Earnings level is likely to affect both the incentive for and the practical feasibility of pursuit of any tort claim.

The Commission's proposal limits recovery of general damages by adoption of a serious injury and a medical threshold.¹⁰⁰ In this way an

⁹⁹See note 37 and accompanying text *supra*.

¹⁰⁰Proposed § 58A-6(b).

attempt is made to provide immunity from suit for general damages for less serious injuries only. The injured person may maintain a tort action to recover general damages when he has sustained a serious injury or when medical expenses incurred by him in connection with his injury exceed one thousand dollars.¹⁰¹ If either the serious injury or the medical threshold is met, no restriction exists upon the amount of general damages to be recovered. These thresholds, it is believed, preserve a tort action for larger claims in which general damages are likely to be a significant part of the loss the injured person has sustained.

Questions have been raised about the constitutionality of no-fault in general and about the threshold provision in particular. However, existing legal precedents support the view that the no-fault concept in the Commission's proposal is constitutional. The Massachusetts no-fault statute, which is similar to the Commission's proposal, denies recovery for general damages except when a serious injury exists or when medical expenses exceed a fixed amount. The Massachusetts Supreme Court held that the Massachusetts statute was constitutional.¹⁰² Compulsory workmen's compensation statutes completely abolish the injured employee's right to sue the employer and certain other persons in tort, and they have been held constitutional by state courts¹⁰³ and the United States Supreme Court.¹⁰⁴ Curtailment or elimination of the right to sue in tort has been held constitutional in other situations in which no substitute remedy was made available to the injured person. Guest statutes that permit a gratuitous automobile passenger to sue the driver only for gross or wilful conduct have been held to be constitutional.¹⁰⁵ "Heart balm" statutes that abolish tort actions for breach of promise, alienation of affections, seduction, and criminal conversation have also been held to be constitutional.¹⁰⁶

The Massachusetts decision¹⁰⁷ deals squarely with and rejects three of the arguments that have been used most frequently to attack the constitutionality of no-fault legislation: (1) the limitation upon recovery

¹⁰¹The amount was reduced to \$750 by amendment in the Senate. *Id.*

¹⁰²*Pinnick v. Cleary*, ____ Mass. ____, 271 N.E.2d 592 (1971).

¹⁰³*State v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645 (1913), *cert. denied*, 243 U.S. 219 (1917).

¹⁰⁴*Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

¹⁰⁵*Silver v. Silver*, 280 U.S. 117 (1929).

¹⁰⁶*Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47, *appeal dismissed*, 302 U.S. 641 (1937) (no substantial federal question).

¹⁰⁷*Pinnick v. Cleary*, ____ Mass. ____, 271 N.E.2d 592 (1971).

of general damages is unconstitutional; (2) the use of the medical threshold to limit recovery of general damages is unconstitutional; and (3) a limitation upon the common law tort action violates the state constitutional provision that provides for free recourse to the courts and laws. In this case the plaintiff was unable to meet either the serious injury or the medical threshold but offered proof to establish general damages in the amount of eight hundred dollars. He contended that the provisions of the Massachusetts statute that took away his right to recover these general damages were unconstitutional. Rejecting all three of the above contentions, the Court held that the statute provided an adequate substitute for his right to recover for general damages. The right to recover first-party benefits and the exemption from tort liability were regarded as a reasonable substitute for the right to sue for general damages.

Although a no-fault statute in Illinois was held unconstitutional by its trial¹⁰⁸ and appellate¹⁰⁹ courts, these decisions seem to raise no serious question about the constitutionality of the Commission's proposal. Under the Illinois statute, insurance coverage was not compulsory, but the limitation on the right to recover general damages in tort applied to all persons. The trial court found this limitation upon tort suit unconstitutionally discriminated against uninsured persons who would have no right to recover first-party benefits. The court noted that in this respect the Illinois statute differed critically from the Massachusetts statute under which insurance was compulsory.¹¹⁰ Commercial vehicles were excluded from the provisions of the Illinois statute. The court found the statute unconstitutionally discriminated against occupants of commercial vehicles for whom first-party benefits were not provided. Finally, the trial court held that the provision of the Illinois statute that limited all general damage recovery to a percentage of medical expenses was unconstitutional. The Court did not decide whether a medical threshold was constitutional; instead, it decided that a limitation of general damages in all cases to a percentage of medical expenses incurred was invalid. This difference may be a crucial one in light of the fact that insurance was not compulsory and a large percentage of Illinois motorists were uninsured and thus not entitled to recover first-party benefits.

The objections relied upon by the Illinois trial court do not apply to the Commission's proposal. The Commission's proposal applies to

¹⁰⁸Grace v. Howlett, Civil No. 71CH4737 (Cir. Ct. of Cook Co., Ill., Dec. 29, 1971).

¹⁰⁹Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

¹¹⁰Grace v. Howlett, Civil No. 71CH4737 (Cir. Ct. of Cook Co., Ill., Dec. 29, 1971).

all vehicles¹¹¹ and provides for compulsory insurance¹¹² and hence neither of the classifications found objectionable by the court is created by the proposal.

The grounds for decision in the Illinois Supreme Court¹¹³ seem equally inapplicable to the Commission's proposal. That court held that the exclusion of commercial vehicles from the Illinois statute violated a provision of the Illinois constitution that prohibited special legislation. The basis for the court's decision was that for purposes of compensation of automobile-accident victims no valid distinction exists to justify treating commercial and private-passenger vehicles differently. The Court also held that a provision for mandatory arbitration of certain automobile accident tort claims was unconstitutional because it entailed de novo proceedings prohibited by the Illinois constitution, because it deprived the parties of a jury trial, and because it created a fee office contrary to the Illinois constitution. None of these features are present in the Commission's proposal which applies to all vehicles and contains no provision that requires arbitration of tort claims.

Persons, Vehicles, and Accidents To Be Covered.

In broad terms the Commission's proposal provides that every person who suffers loss from injury arising out of the maintenance or use of a motor vehicle is entitled to first-party benefits.¹¹⁴ Entitlement to benefits in no way depends upon the existence of another person's fault or the absence of fault of the injured person.¹¹⁵

To achieve this broad application a number of specific provisions are necessary. First-party insurance is made compulsory.¹¹⁶ The obligation of insurers to pay is expressly stated to exist without regard to any immunity from liability or suit which might otherwise be applicable.¹¹⁷ The state, municipal corporations, and other public agencies are required to provide security for the payment of first-party benefits.¹¹⁸ The requirement to provide security is made applicable to a nonresident when his vehicle is operated in the state by him or with his permission.¹¹⁹

¹¹¹Proposed § 58A-8.

¹¹²*Id.*

¹¹³*Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

¹¹⁴Proposed § 58A-3.

¹¹⁵*Id.* § 58A-4(a).

¹¹⁶*Id.* § 58A-8.

¹¹⁷*Id.* § 58A-4(b).

¹¹⁸*Id.* § 58A-8(a).

¹¹⁹*Id.* § 58A-8(c).

A fund, called the Assigned Claims Fund, is created to provide a source of compensation for injured persons when insurance or other security is not available for payment of their losses.¹²⁰

Several important reasons exist for extending the application of the no-fault principle to nonresidents. The primary purpose of partially replacing tort law with a no-fault plan is to provide a more efficient and effective compensation system. Although North Carolina's main concern is with its residents, it also has an interest in providing a better compensation system for non-residents who are injured in North Carolina. Another important objective is to provide tort exemption to North Carolina residents for injuries they negligently inflict upon nonresidents. A reduction in the impact of the no-fault plan is likely if it is not extended to cover the nonresident since nonresidents will have tort actions against negligent residents, and residents will have tort actions against negligent nonresidents.

To provide that the proposal shall apply to nonresidents who come into the state may pose no serious legal problem. Today the nonresident who comes into North Carolina is subject to its tort law. Whether or not he has liability insurance, he is obligated to pay damages for injuries to others he negligently causes. Further, the compulsory liability insurance laws of North Carolina are made applicable to nonresidents after a waiting period prescribed by statute.¹²¹ The proposal also provides that liability insurance policies covering vehicles of nonresidents are converted into security for payment of first-party benefits.¹²² A question about the legality of this particular provision may be raised.¹²³

The requirement that the state and municipal corporations provide security for the payment of first-party benefits is consistent with the objectives of the proposed statute. To exclude the State and municipal corporations from the proposal seems unjustified in light of the recognition of the need for a more effective reparations system for compensation of automobile accident victims and of the fact that the system is made compulsory upon the general public. As the state and its agencies contribute to and benefit from the motoring activity, they should bear a fair share of the costs in accident losses that arise from that activity. Exclusion of the state and its agencies from a no-fault law will reduce

¹²⁰*Id.* § 58A-15.

¹²¹N.C. GEN. STAT. § 20-309(a) (1965); *Id.* § 20-83(b) (Supp. 1971).

¹²²Proposed § 58A-11(b).

¹²³For a discussion of this issue, see UNIFORM MOTOR VEHICLES ACCIDENT REPARATIONS ACT § 9, Comment at 34.

not only the first-party protection available to the general public but also the exemption from tort liability provided to it. A likely consequence will be a greater financial burden upon individual members of the general public.

The no-fault principle applies to private-passenger and commercial vehicles.¹²¹ The Commission's original proposal also required first-party security for motorcycles also. However, the proposal was later modified to permit the owner of a motorcycle to elect to exclude from the security covering the motorcycle all coverage for first-party benefits.¹²⁵ The primary reason for this change seems to have been a concern that premium costs for first-party coverage on motorcycles would be so great as to make insurance practically inaccessible.

First-party benefits are available to all persons injured in automobile accidents occurring in the state.¹²⁶ Benefits are provided for losses incurred in out-of-state accidents for an insured, members of his family and occupants of an insured vehicle.¹²⁷ Of course, the tort remedy of a person injured in an accident occurring in another state is determined by the law of that state.

Under the provisions of the proposal establishing the right to receive first-party benefits, situations will arise in which an injured person is entitled to receive benefits when no source is available for payment. This would be the case when a passenger is injured and neither he nor the owner of the automobile in which he was riding has insurance. It would also be true when a pedestrian, who is not covered by insurance, is struck by an uninsured or unidentifiable vehicle.

An Assigned Claims Plan is created to provide a source from which benefits can be paid in these situations.¹²⁸ All insurers must participate in this plan and must share equitably in the costs arising from loss payments and expenses of operation. Benefits cannot be obtained through the plan by motorists and members of their family who have failed to obtain insurance as required by law.¹²⁹

The Problem of Collateral Sources.

The aim of a reparations system is to compensate for losses caused

¹²¹Proposed §§ 58A-1(a)(5), -8.

¹²²*Id.* § 58A-8(c).

¹²⁵*Id.* § 58A-3(a).

¹²⁷*Id.* § 58A-3(b).

¹²⁸*Id.* § 58A-15.

¹²⁹*Id.* § 58A-16(a).

by accidental injury. However, a variety of compensation plans exist in North Carolina and other states, and an injured person may be entitled to receive compensation from more than one of these sources for the same injury. When payments are made from several sources, the benefits received may exceed the losses suffered. Generally, duplication of benefits, to the extent that it results in payments in excess of losses suffered, is undesirable since it increases the costs of the compensation plan and may promote malingering.

Statutory compensation plans now in effect include workmen's compensation, social security, unemployment compensation, and in a few states,¹³⁰ non-occupational temporary disability benefits. Private sources of compensation include health, accident, hospital, disability, and other forms of insurance, wage-continuation plans, gratuities, and others. These plans have been established separately and in some instances duplication of benefits occur. Under tort law an injured person generally is permitted to obtain the full amount of his losses from a tortfeasor although he also receives compensation from collateral sources for the same injury.¹³¹ In the area of statutory compensation plans, concern about duplication of benefits is becoming evident and increasingly efforts are being made to coordinate benefits received from several sources. Overcompensation from duplication of benefits from statutory compensation plans, which are financed through compulsory charges that, directly or indirectly, are passed on to the public, is difficult to justify. Although increased cost to the public is probably not a valid objection to duplication of benefits from private sources, it seems probable that most individuals, if given the opportunity for an informed choice, would prefer a reduction in premium costs to a duplication of benefits.

These considerations pose the question whether provision can be made in an automobile-accident-reparations plan that will permit insurers to lower premium costs by eliminating duplication of benefits. Two techniques have been used in other no-fault plans for this purpose. One is to make automobile-accident reparation benefits secondary to some or all collateral sources so that no-fault benefits will be reduced to the extent that losses have been compensated by one of these sources.¹³²

¹³⁰CAL. UNEP. INS. CODE §§ 2800-04 (West 1972); N.J. STAT. ANN. §§ 43:21-25 to -55 (1962); N.Y. WORKMEN'S COMP. LAW §§ 200-42 (McKinney 1965); R.I. GEN. LAWS ANN. §§ 28-39-1 to -40, 28-40-1 to -18, 28-41-1 to -32 (1957).

¹³¹D. DOBBS, REMEDIES, DAMAGES—EQUITY, RESTITUTION § 8.10, at 581 (1973).

¹³²CONN. GEN. STAT. ANN. § 38-333(c) (Supp. 1973) (workmen's compensation); DEL. CODE

Another approach to the elimination of duplication of benefits is to make optional deductibles available to the insured.¹³³ In theory, the insured can take into account collateral sources available to him, elect a deductible in an appropriate dollar amount to reflect these sources of compensation, and thereby reduce the premiums that he will have to pay for automobile insurance.

For the most part, the Commission rejected the idea of including any coordination of benefits provision in its no-fault proposal. Several reasons for this rejection may exist. Provision for optional deductibles in effect permits the insured to modify for himself and members of his family the requirement for compulsory first-party benefits. This type of deductible is not tied to the existence of a specified and existing collateral source. Thus while it may serve to permit the insured to eliminate duplication of coverage, it also gives him the option to remove himself and members of his family from first-party coverage when he has no collateral sources of compensation. This feature of the optional deductible substantially reduces its attractiveness if the goal of providing an effective reparation system remains an important one. The possibility seems great that many persons, who have a significant need for protection, may elect high deductibles to avoid premium costs. The use of a deductible contingent upon the actual availability of collateral sources to the insured has been suggested.¹³⁴ However, the practical problems of ascertaining what collateral sources are available to an insured, what benefits they provide, what exclusions or deductibles they may be subject to, and how all of this will affect an individual insured's premium seem too great for such a deductible to be feasible.

Under the Commission's proposal only workmen's compensation is made primary to first-party, automobile insurance benefits.¹³⁵ Workmen's compensation benefits are a statutory substitute for the em-

ANN. tit. 21, § 2118(f) (Supp. 1972) (workmen's compensation); FLA. STAT. ANN. § 627.736(4) (Supp. 1972) (workmen's compensation); MASS. ANN. LAWS ch. 90, § 34A (Supp. 1972) (workmen's compensation); MICH. STAT. ANN. § 24.13109(1) (Supp. 1972) (any benefits required to be provided under the laws of any state or the federal government); N.J. STAT. ANN. § 39:6A-6 (Supp. 1973) (workmen's compensation, statutory employees temporary disability benefits, medicare provided under federal law).

¹³³DEL. CODE ANN. tit. 21, § 2118(a)(b) (Supp. 1972) (deductible authorized but amounts not specified); FLA. STAT. ANN. § 627.739 (Supp. 1972) (\$250, \$500, \$1000 deductibles authorized); MASS. ANN. LAWS ch. 90, § 34M (Supp. 1972) (\$100, \$250, \$500, \$1000, \$2000 deductibles authorized); MICH. STAT. ANN. § 24.13109(3) (Supp. 1972) (deductibles up to \$300 may be offered; any others require prior approval of the commissioner).

¹³⁴UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 14(b)(2).

¹³⁵Proposed §§ 58A-2(d)(1), (3).

ployee's common law tort action. First-party benefits under the no-fault plan are also in effect a substitute for the injured person's tort suit. Under these circumstances duplication of benefits for the same injury does not seem to be justified. Further, in a broad sense, subordination of first-party benefits to workmen's compensation has the effect of placing the costs of injury to employees upon the employer rather than to finance them through automobile-insurance premiums. The result will be a reduction in the cost of first-party automobile insurance.

Subrogation.

In some instances an injured person will have two sources of recovery for losses arising out of the maintenance or use of an automobile: a claim for basic reparation benefits and a cause of action, usually in tort, against a third person. Under existing law a first-party insurer may be subrogated to the injured person's rights against the third person to the extent it has paid losses of the injured person.¹³⁶ The ultimate effect of subrogation is to require the third-party wrongdoer to pay the total amount of the loss by reimbursing the insurer for the amount it has paid and by paying to the injured person any recovery in excess of the amount he received from the insurer.

Several considerations bear upon the questions whether to provide for subrogation in a no-fault plan and, if so, in what way it is to be effected. The first major consideration is that of cost. The overall costs of providing reparations to injured persons is increased by subrogation because additional legal and administrative costs must be incurred to effect it. Some people assert that subrogation provides little financial advantage to insurers because over a period of time the benefits and losses they experience in the absence of subrogation will balance out and that, for this reason, expenditures made to enforce subrogation rights cannot be justified.

The second consideration involves the insurance process itself. Proponents of subrogation suggest that subrogation is necessary to place upon each insurer the risks it has undertaken and to permit effective rating of drivers by insurers. The suggestion that subrogation is needed to accomplish proper risk distribution among insurers is probably in conflict with the contention of opponents of subrogation that the bene-

¹³⁶*Safeguard Ins. Co. v. Wilmington Cold Storage*, 267 N.C. 679, 149 S.E.2d 27 (1966) (property); *Security Fire & Indemnity Co. v. Barnhardt*, 267 N.C. 302, 148 S.E.2d 117 (1966) (collision); *General Ins. Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 647 (1963) (fire).

fits and losses experienced by insurers in the absence of subrogation will balance out over a period of time.

Two different situations in which the subrogation question arises should be identified. In one, tort exemption exists under the no-fault statute for the person whose fault has caused injury to another person. In this situation some plans maintain the fault concept at the insurer level and require the liability insurer of the person at fault to reimburse the insurer that has paid first-party benefits to the injured person.¹³⁷

The other situation in which the subrogation problem arises is when no tort exemption is granted by the statute to the wrongdoer. Nonexempt persons primarily consist of those connected with the maintenance or use of a motor vehicle for which basic reparation security has not been provided, manufacturers, lessors, repairers, and railroads. Most statutes provide for subrogation or reimbursement of the first-party insurer in these situations.¹³⁸ One argument for maintaining subrogation here is that it brings additional money into the automobile-reparation system as the wrongdoer frequently is not a motorist.

The Commission's proposal originally provided for subrogation in both of these situations. However, the members of the Commission were divided on the question whether subrogation should exist when the person who caused the accident is immune from tort suit and the proposal was subsequently amended to limit subrogation to situations in which the injured person has a tort claim.¹³⁹

Vehicle Damage.

The Commission's recommendation includes the provision of first-party benefits for vehicle damage. The effect of its recommendation is to abolish partially the tort system and to substitute for the part abolished first-party insurance as the method for compensating for vehicle damage. Some no-fault statutes exclude vehicle damage from their coverage.¹⁴⁰ One factor that may have influenced the decision to make this exclusion is that the savings brought about by a shift from the tort to a first-party system in relation to personal injury cannot be expected in relation to physical damage. A second factor may be that first-party coverage for vehicle damages creates some problems relating to the

¹³⁷MASS. ANN. LAWS, ch. 90, § 34M (Supp. 1972).

¹³⁸E.g., UNIFORM MOTOR VEHICLES ACCIDENT REPARATIONS ACT § 6(b).143.

¹³⁹Proposed § 58A-33(a).

¹⁴⁰CONN. GEN. STAT. ANN. §§ 38-319 to -351 (Supp. 1973); N.J. STAT. ANN. § 39:6A (Supp. 1973).

availability or cost of insurance in regard to certain commercial vehicles and to older private-passenger vehicles. Finally, losses arising out of vehicle damage may be regarded as less critical to the injured person so that the need to provide prompt and certain compensation is less urgent.

On the other hand, failure to include vehicle damage will create a dual system under which personal injury and vehicle damage are handled in different ways. The splitting up of losses that arise out of an automobile accident creates obvious problems of administration and is likely to frustrate reasonable expectations of the public in regard to the system.

Under the Commission's proposal an owner of a vehicle is required to provide protection for his own vehicle and, if damage is caused to it, will collect from his own insurer.¹⁴¹ Two options¹⁴² are available to the owner: he may obtain full collision coverage for his vehicle or he may elect coverage that entitles him to recover from his insurer only if another person's fault caused the damage to his vehicle.¹⁴³ Under the first option the owner will be entitled to recover from his own insurer whether or not another person was at fault in causing the damage to his vehicle. The second or fault option gives the owner a right to compensation when such a right would have existed under the tort system and can be obtained at relatively low premiums. Although his right to recover under this option is conditioned upon the fault of another person, his recovery will be against his own insurance company.

Limited tort exemption is provided for vehicle damage and, regardless of which option an owner elects, he will have no tort action for damages of five hundred dollars or less.¹⁴⁴ A negligent party remains liable for vehicle damage in excess of five hundred dollars and will provide security against this obligation through liability insurance. The first-party insurer is entitled to reimbursement from the liability insurer of a person at fault in causing the damage only for amounts paid out by it in excess of five hundred dollars.¹⁴⁵

The proposal affects only vehicle damage and leaves damage to property other than vehicles within the tort system.

¹⁴¹Proposed § 58A-33(a).

¹⁴²At one time the Commission's proposal provided a third option under which the owner could choose to provide no coverage for his vehicle. This option would in effect give the owner the choice to become a self-insurer.

¹⁴³Proposed § 58A-33(b).

¹⁴⁴*Id.* § 58A-33(c)(5).

¹⁴⁵*Id.* § 58A-33(d).

SOME OBSERVATIONS

The no-fault idea deserves careful consideration and deliberate decision by the North Carolina legislature. The Commission's proposal is the product of two years of study and provides full opportunity for examination of the issues involved. The choice of simple rejection of the Commission's proposal without any further action for reform of the automobile-accident reparation system is no longer a viable one. Almost everyone admits the existence of serious shortcomings in the tort system and, if the General Assembly is to meet its obligation to the public, action must be taken to change the existing system. If the Commission's modified no-fault plan is rejected, meaningful alternatives for improving the reparations system must be presented.

Doubt exists whether the needed reform can be achieved by an add-on, no-fault plan under which additional first-party coverage is made compulsory but no modification of the tort system is effected.¹⁴⁶ First-party coverage in the form of collision, medical-payment, and uninsured-motorist insurance is already prevalent in the state and, despite its existence, deficiencies in the reparations system remain. Obvious inefficiencies will exist in a dual, overlapping system of first-party and tort coverage.¹⁴⁷

No-fault can no longer be dismissed as a theoretical scheme for reform. A recent report indicates that some form of no-fault law now covers forty-two percent of the nation's population and that coverage of an additional thirty-four percent of the people will result if pending legislation, with favorable chances of passage, is enacted.¹⁴⁸ Further, preliminary reports on the operation of no-fault plans in other states suggest that many of the benefits claimed for no-fault can in fact be realized.¹⁴⁹ A tentative report on the Florida system shows that claim processing is more expeditious under no-fault than under the tort system and that significantly less delay occurs between the time of injury and the initial receipt of compensation by the injured person.¹⁵⁰ The report

¹⁴⁶An add-on, no-fault bill was introduced in the 1973 General Assembly. S. 226, 1973 N.C. General Assembly.

¹⁴⁷Some of the difficulties likely to be encountered if modification of the tort system is not made were discussed earlier. See text accompanying notes 97-100 *supra*.

¹⁴⁸*Auto Reform in No-Fault Moves Ahead 76% of U.S. Population Covered*, TRIAL, July-August 1973, at 5.

¹⁴⁹Coombs, *The Massachusetts Experience Under No-fault*, 44 Miss. L.J. 158 (1973); Little, *How NoFault Is Working in Florida*, 59 A.B.A.J. 1020 (1973); Short, *No-Fault in Delaware—One Year Later*, TRIAL, Mar.-April 1973, at 53.

¹⁵⁰Little, *supra* note 149, at 1022-3.

verifies the fact that nuisance-value payments associated with small claims under the tort system are virtually eliminated under the no-fault system.¹⁵¹ Data available when the report was made also indicates a substantial reduction in tort claims, in litigation, and in the employment of attorneys by claimants.¹⁵² This data, however, is considered incomplete since it suggests that some larger claims, more likely to give rise to tort recoveries, have not yet been filed—somewhat comparable experiences are revealed in preliminary reports from Massachusetts¹⁵³ and Delaware.¹⁵⁴

The primary objective of no-fault is to provide a more efficient and effective reparations system. The Commission's proposal for a modified no-fault system is designed to insure that substantially all automobile-accident victims will be compensated for economic losses and that in case of the seriously injured, in which genuine general damages are likely to exist, a tort action will be available. The often asserted defense of the tort system that it was never designed to compensate all traffic victims, while accurate, ignores the recognized need for a reparation system to provide broader compensation coverage. If the provision of compensation is identified as a primary objective of the reparation system, this limiting feature of tort law becomes a serious obstacles to its accomplishment.

No one can question the fact that no-fault will provide more benefits for economic losses. Although savings in administration and claims costs will be a source of some funds for extended benefits, the major source of funds for this purpose will probably come from curtailment in payments for general damages.¹⁵⁵ Opponents of no-fault argue that a limitation upon recovery of general damages merely reduces the compensation of one victim in order to compensate another. However, this statement oversimplifies the matter and to call attention to other factors that bear upon the issue some observations made earlier are repeated here. The decision to restrict the recovery of general damages is not simply a choice that prefers reimbursement of economic loss over compensation of general damages. It seems clear that substantial nuisance-

¹⁵¹*Id.* at 1023.

¹⁵²*Id.* at 1021-22.

¹⁵³See Coombs, *supra* note 149, at 166-73.

¹⁵⁴Short, *supra* note 149, at 53.

¹⁵⁵Brainard, *The Threshold Impact on Injury Victims' Recoveries*, TRIAL, July-Aug. 1972, at 32. (Although basically critical of the threshold approach, this article shows the savings realized by elimination of general damages for small claims.)

value payments are reflected in the rather consistent overpayment of small claims and that these payments constitute an important part of the sums that are used for compensation of general damages. To the extent that these payments can be directed to the payment of economic loss a more effective reparations system can be achieved without depriving injured persons of compensation for real losses they have sustained.

Savings in premium costs to the public has probably been overemphasized as a goal to be achieved by a no-fault system. Experience in Massachusetts¹⁵⁶ and Florida¹⁵⁷ demonstrates that reduction in premium costs can be realized; however, additional time is probably needed in each situation before a complete evaluation of this experience can be made.¹⁵⁸ Premium savings will result in the operation of the no-fault system only to the extent that savings exceed the additional amounts paid out because of the projected increase in claims frequency. In neither Florida nor Massachusetts has the projected increase in claims frequency occurred. Beyond these considerations, another factor needs exploration. At some point, if significant savings are realized through no-fault, reasonable premium levels may be reached and thought should be given to their utilization for further improvement in the reparation system. Finally, even if significant premium savings are not realized, no-fault still holds the promise for a more effective reparations system under which prompt compensation will be available and more dollars will go to compensate for critical economic losses.

¹⁵⁶Coombs, *supra* note 149, at 166-68.

¹⁵⁷TRIAL, Nov.-Dec. 1972, at 41. (A 15% rate reduction went into effect when the Florida law became effective on January 1, 1972 and an additional 11% rate reduction is to become effective on January 31, 1973.)

¹⁵⁸For analysis of some of the uncertainties inherent in the Massachusetts experience, see Brainard, *The Impact of No-Fault on the Underwriting Results of Massachusetts Insurers*, 44 Miss. L.J. 174 (1973).

