THE BASIC PROTECTION PLAN—ROBERT E. KEETON AND JEFFREY O'CONNELL*

I.

The present automobile insurance system is ripe for reform. It is wastefully expensive and indefensibly unfair in the way it distributes both the benefits and costs of insurance against personal injuries suffered in traffic accidents. Also, merely adopting better rating and marketing methods and providing for victims of uninsured and unidentified motorists, though improving the system, would leave us still saddled with the basic problems of gross injustice and intolerable expense. More basic reform is needed.

Early in 1963, we began a broad study of this whole problem, with a staff assembled at Harvard Law School and supported by a grant from the Walter E. Meyer Research Institute of Law. We have had the continuing help of a panel of advisers, and the encouragement and cooperation of public officials, especially those to whom we have turned in Massachusetts. Also, insurance executives and practicing lawyers in Massachusetts and elsewhere, have been generous in responding to our requests for information and advice. Throughout this study it has been understood that, after hearing and considering different viewpoints, we were to arrive at an independent judgment about the best way to meet this problem, and report our findings and conclusions for consideration by whatever persons and groups may be interested.

II.

The major shortcomings of the present system can be stated in five points.

First, measured as a way of compensating for personal injuries suffered on the roadways, the system we have falls grievously short. Some injured persons receive no compensation. Others receive far less than their economic losses. Partly this gap is due to the role of fault in the system—to the need for the injured person to assert both that another was at fault in causing the accident and that he himself was legally blameless. In advancing these contentions a traffic victim faces severe problems

* This paper, prepared jointly by Professor Keeton of the Harvard University Law School and Professor O'Connell of the University of Illinois, was delivered orally by Professor Keeton, a guest of the Society. Professors Keeton and O'Connell are the co-authors of *Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance,* published by Little, Brown and Company, 1965. An analysis of the insurance cost of the Basic Protection Plan by Frank Harwayne, a Fellow of the Society, is one of the papers in this issue of the *Proceedings.*

of proof. Nearly always he finds it difficult to show what actually happened, and occasionally he cannot even identify the person responsible, because the accident was hit and run. Another major factor contributing to the gap between amounts of loss and amounts of compensation is that a person legally responsible for an injury may be financially irresponsible—uninsured and with inadequate assets of his own available to satisfy a claim. The size of the accumulated gap from these two and other causes varies significantly from state to state. Probably it is somewhat smaller in the states with compulsory motor vehicle liability insurance (Massachusetts, New York, and North Carolina) than in others. But even in these states it is still substantial.

Second, the present system is cumbersome and slow. Prompt payments of compensation for personal injuries are extraordinary indeed. And delays of several years before final payment—or determination that no payment is due—are common, especially in metropolitan areas. The backlog of automobile personal injury cases presents a serious community problem of delay in the courts, affecting other kinds of cases as well. And often justice delayed is justice denied. An injured person needing money to pay his bills cannot wait, as can an insurance company, through the long period necessary to press and recover his claim, and he may be forced to settle for an inadequate amount in order to obtain immediate recovery.

Third, the present system is loaded with unfairness. Some get too much —even many times their losses—especially for minor injuries. To avoid the expenses and risks of litigation insurance companies tend to make generous settlements of small claims. This largesse comes out of the pocket of all who are paying premiums as insured motorists. Others among the injured, as we have just suggested, get nothing or too little, and most often it is the neediest (those most seriously injured) who get the lowest percentage of compensation for their losses. Their larger claims are more vigorously resisted, and their more pressing needs induce them to give up more in return for prompt settlement. This disparity between losses and compensation is not explained by differences in fault in different cases. It is true that under the theory of the present system, in general, only an injured person innocent of fault is entitled to recover, and then only against a motorist who was at fault. But the practical results are more often inconsistent with this theory than consistent. In short, the results are branded unfair by the theory of the system itself, and one searches in vain for any substitute standard of fairness that gives these results a clean bill of health.

Fourth, operation of the present system is excessively expensive. It is burden enough to meet the toll of losses that are inescapable when in-

juries occur. It is intolerable to have to meet the additional burden of administrative waste built into our methods of shouldering inescapable costs. To some extent, it is true, costs of administration are part of the inescapable burden. But because of the role of fault in the present system, contests over the intricate details of accidents are routine. Often these contests are also exercises in futility, since all drivers must continually make split-second judgments and many accidents are caused by slight but understandable lapses occurring at unfortunate moments. Such contests, and all the elaborate preparations that must precede them, wastefully increase the costs of administration. In cases of relatively modest injury, the expense of the contest often exceeds the amount claimed as compensation. All this expense, of course, is added to automobile insurance costs and, together with a mark-up for the insurers through whose treasuries the premium dollars must pass, is reflected in the premium of every insured.

Fifth, the present system is marred by temptations to dishonesty that lure into their snares a stunning percentage of drivers and victims. To the toll of physical injury is added a toll of psychological and moral injury resulting from pressures for exaggeration to improve one's case or defense and indeed for outright invention to fill its gaps or cure its weaknesses. These inducements to exaggeration and invention strike at the integrity of driver and injured alike, all too often corrupting both and leaving the latter twice a victim—injured and debased. If one is inclined to doubt the influence of these debasing factors, let him compare his own rough-and-ready estimates of the percentage of drivers who are at fault in accidents and the percentage who admit it when the question is put under oath. Of course the disparity is partly accounted for by self-deception, but only partly. And even this self-deception is an insidious undermining of integrity, not to be encouraged.

This, in capsule, is the way the present automobile claims system looks when we stand back and view its performance in gross. It provides too little, too late, unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrepect for law.

III.

In our study, we have proceeded on the premise that a first major step toward reform is to develop a full-scale plan that open-minded persons, whether specialists in automobile claims or simply interested citizens, can examine, either generally or in whatever detail they wish, and can see as a distinct improvement over present ways of compensating traffic victims.

The basic protection system is designed to effect such an improvement as to each of the key shortcomings of the present system. The Basic Protection proposal is a blueprint for prompt reimbursement of losses month by month as they occur, for reimbursement at reduced overhead and administrative cost because of the avoidance of a multitude of contests over fault and the value of pain and suffering in cases of less severe injury, and for reimbursement through standards and procedures that minimize inducements to dishonesty and causes of disrespect for law in its day-to-day practical application.

IV

There are two principal features of our proposal: (1) Development of a new form of compulsory automobile insurance (called basic protection insurance), which in its nature is an extension of the principle of medical payments coverage. It compensates all persons injured in automobile accidents without regard to fault for all types of out-of-pocket personal injury losses up to limits of $10,000 per person. Whenever an insured's automobile is in an accident and he, or a guest, is injured, his own insurance company will compensate him or his guest. (2) Enactment of legislation granting to basic protection insureds an exemption from tort liability to some extent – an exemption eliminating tort liability entirely in those cases in which damages for pain and suffering would not exceed $5,000 and other tort damages would not exceed the $10,000 limit of basic protection coverage. In all other cases, the effect of the exemption is to reduce the tort liability of basic protection insureds by approximately these same amounts.

Although this new coverage is like workmen's compensation in calling for payments on a basis of liability without fault and for periodic payments as losses occur, it is nonetheless very different in other important respects. Unlike workmen's compensation acts generally, the proposed basic protection plan does not require a separate marketing system or a separate system of administrative machinery like a workmen's compensation board. Rather, we propose that the new coverage be marketed through the same channels of private enterprise now used for automobile liability insurance and that claims be processed through present institutions and procedures – including jury trial of not only the tort claims that are preserved but also the more substantial basic protection claims (involving at least $5,000 of economic loss). Further, the proposed act does not provide a schedule of fixed benefits for each specific type of injury, as does workmen's compensation. Rather, reimbursement is based only on actual losses as they

accrue. Thus, basic protection insurance bears more similarity to current tort liability insurance than to workmen's compensation insurance. The closest analogy in present insurance, however, is medical payments coverage.

V.

A number of pervasive problems must be faced in translating the general principles underlying the basic protection concept into a workable plan. One of these concerns *pain and suffering*. Basic protection benefits are limited to reimbursement of economic losses and provide no compensation for pain and suffering; a policyholder may purchase an optional added protection coverage for pain and inconvenience benefits. Although basic protection does not provide compensation for pain and suffering, it does provide compensation for any resulting economic loss, such as loss of wages because pain is so severe that it prevents work. The special provisions concerning optional benefits for pain and inconvenience go beyond this coverage of economic losses. Insurers are authorized, but with one exception are not required, to offer pain and inconvenience coverage in any reasonable form they wish to develop. They are required to offer coverage providing such benefits at a selected monthly rate to an injured insured, or an injured relative residing in the same household, during any period in which the injured person is completely unable to work in his occupation. The benefits may range from $100 to $500 per month. This statutory form of coverage also provides for payment proportional to partial inability in cases in which the injured person is able to do some but not full work in his occupation. Under this statutory form of coverage the limit of liability for combined benefits during both complete and partial inability is 25 times the amount stated as the monthly benefit for pain and inconvenience during complete inability.

Whether it is desirable to extend basic protection to *property damage* is a debatable question. On balance, we have chosen not to do so. Most property damage in automobile accidents is to the automobiles themselves. This damage is already covered by a system reimbursing the owner without regard to fault, since the majority of the automobiles in use today are covered by collision insurance. Thus, though subject to improvement in its details, that system already applies a principle of compensation comparable to that which we propose for personal injuries. It should also be noted that extending basic protection to vehicle damage would greatly increase the level of compulsory automobile insurance premiums and might significantly affect the distribution of insurance business. The total package

of basic protection will probably be written by one insurer, whereas tort liability coverage and collision coverage on the same car are now frequently written by separate and unrelated companies, especially when the collision coverage is written at the request of a secured party from whom the car owner has borrowed the purchase money. It may be that such a change in customary marketing arrangements would simplify the distribution and administration of insurance coverage, but at least during the introduction of the basic protection system it seems wise to limit reform to the major social problem now produced by automobile accidents – the problem of ways and means of compensating the victims of personal injuries.

Another problem of implementation concerns the definition of loss for which benefits will be provided.

Basic protection benefits are designed to reimburse net economic loss only; overlapping with benefits from other sources is avoided by subtracting these other benefits from gross loss in calculating net loss.

Gratuities are disregarded, but with few exceptions benefits one is entitled to receive from other sources, such as payments from a sick leave program, Blue Cross, or an accident insurance policy, are subtracted from loss in calculating the net loss upon which basic protection benefits are based.

It is expected that basic protection benefits will not be treated as taxable income. In some cases, however, the victim will claim as economic loss a sum that would be taxable if the victim received it in the ordinary course. In such a case it is fair to limit the victim's award to the amount he would have received after the tax due had been paid. As an administrative convenience, it is presumed, subject to proof of a lower value by the claimant, that the value of this tax advantage equals 15 per cent of the loss of income. Thus, a person losing $100 gross wages is presumed to suffer an $85 loss of take-home pay.

Another important problem faced in implementing the basic protection concept concerns the choice between lump-sum and periodic benefits as the usual method of compensation. Basic protection payments are designed to reimburse losses as they occur, rather than by the lump-sum payment customary in settling or paying a damages judgment. Provision is made, however, for lump-sum awards by court order if the present value of all benefits expected to come due in the future does not exceed $1,000 or if a court makes a finding supported by medical evidence that a final disposition will contribute substantially to the health and rehabilitation of the injured person. This may be done if there is persuasive medical testi-

mony that, because of a "compensation neurosis," the injured person will not get well before final disposition of his claim. Furthermore, a claim is subject at any time to final settlement (as opposed to an award by court decision) for benefits claimed to be due for future loss, by an agreement for a lump-sum payment not exceeding $1,000 or by an agreement for future payment not exceeding $1,000 per month. With judicial approval, upon a finding that the form of settlement is in the best interests of the claimant, a claim may be settled for a larger lump sum or larger installments. Since the disposition is here being made by agreement, the standard is more permissive than when it is being ordered by a court over opposition by another party.

The question whether any kind of deductible should be used is another problem of implementation. The basic protection plan includes a standard deductible that excludes from reimbursable losses the first $100 of net loss of all types or 10 per cent of work loss, whichever is greater. The term "deductible" has customarily been used to signify the provision in present-day collision coverage under which the insured owner of the vehicle is himself expected to bear the loss from damage to his vehicle up to a specified amount (commonly $50) and the insurer reimburses him for loss in excess of that amount. In small cases the standard deductible of basic protection coverage operates in the same way; the insured himself bears the first $100 of his net loss of all types. The purpose of this provision is to hold down the cost of basic protection by excluding the very small claims as to which the modest benefits of reimbursement are outweighed by the relatively high costs of processing.

A second feature of the standard deductible comes into operation only in the larger cases when 10 per cent of the work loss proved exceeds $100. In that event, the only applicable deductible is 10 per cent of the work loss proved; the remainder of all net loss is covered up to the limits of basic protection coverage. This 10 per cent deductible does not apply to medical and hospital expenses, which are the principal out-of-pocket expenses arising from injuries sustained in automobile accidents. It does apply not only to work loss of a wage earner or a self-employed person but also to the expenses incurred in replacing the services of an injured housewife. Since the principal work loss caused by automobile accidents is wage loss, this deductible in practice will ordinarily amount to roughly 10 per cent of wages lost due to accident. In addition to directly reducing the cost of basic protection coverage to this extent, this deductible will reduce costs indirectly by diminishing the likelihood that the reimbursement allowed will induce malingering. A wage earner injured in a traffic accident

might be tempted to stay out of work beyond any period of genuine disability if by doing so he could receive exactly the same income as work would bring. To the extent that staying out of work results in a decrease in income, the inducement to return to work is greater. We have chosen 10 per cent of gross work loss as a deductible that will reduce the temptation to malinger while providing nearly full reimbursement of wages lost by a genuinely disabled victim. The combined effect of deducting this 10 per cent and further reducing the claim by an amount equal to the tax advantage of a non-taxable award produces benefits totaling about 75 per cent of gross wages, or a little less than 90 per cent of take-home pay. For example, suppose during the third month of disability gross wage loss was $500 and no proof was offered contrary to the presumption that the tax advantage equals 15 per cent of income lost. In this case the standard deduction is $50 – 10 per cent of $500; the tax advantage is $75 – 15 per cent of $500; and the benefits received total $375.*

There is little need to apply a deductible provision to out-of-pocket losses, since even full reimbursement of such losses produces no profit for the victim. He pays the doctor or other person serving his needs – for example, a taxi driver or a temporary domestic employee – and then receives as a benefit precisely the same amount. The problem of excessive charges for out-of-pocket loss is better dealt with by other devices, such as a provision allowing the expenses only if reasonable in amount and comparable to charges in cases not involving insurance. Such statutory controls will be supplemented in practice by the considerable power of the insurance industry to resist being overcharged.

The problems of implementation discussed above are a few among many such problems. Many others are treated in the full presentation of the basic protection proposal in the book referred to earlier.

VI.

We have attempted in this study to consder the underlying principles and general characteristics appropriate for a modern system of compen-

* The deductible for the first and second month's loss of wages, also, would have been $50 in each instance, unless a different result was required by the provision for a minimum deductible of $100 of net loss to a claimant arising from one accident. If, for example, no other basic protection benefits had yet been paid by the insurer when the claim for the first month's loss of wages was being paid, the applicable deductible would be $100, not $50. In that event, no further deduction would be made in paying benefits for the second month's loss of wages (since 10% of the cumulative wage loss would equal but not yet exceed $100), and the third month's payment for loss of wages would be the first occasion when the deductible was computed at exactly 10% of the wage loss for that period.

sating traffic victims. We have sought at the same time to formulate in detail a draft statute, not only as a way of testing the validity of general principles and improving their formulation, but also as an aid to those whose political action is necessary if legislation incorporating these principles is enacted. We offer, then, both a set of principles and a plan of detailed execution that we are prepared to recommend. We urge enactment of this legislation.