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The Minnesota Plan: A Responsible Alternative to No-Fault Insurance

John E. Simonett* David J. Sargent**

I. INTRODUCTION

In the April, 1970 issue of this journal,1 Senator Jack Davies proposed a new automobile insurance plan, the central language of which reads:

Liability for damages arising from the negligent operation of a motor vehicle within this state is abolished except as to damage to property other than motor vehicles and their contents. Sec. 2, subd. (1).

No longer, if this proposed bill were enacted, would a motorist in Minnesota be held responsible for his carelessness in causing injury to another. A proposal so contrary to what people now generally consider to be their legal and moral obligation, and which would alter the structure of auto insurance in this state so radically, merits pause and, perhaps, prompts skepticism.

Senator Davies calls his bill the “Minnesota Plan for No-Fault Auto Insurance.” As a substitute for tort liability the bill proposes compulsory, first party, no-fault insurance. In an attempt to limit the cost of the insurance, the bill would broaden eligibility for coverage but greatly restrict recoverable benefits. While there is proper concern for needed reform, one wonders if there is any widespread public support for no-fault insurance. A United States Department of Transportation survey of heads of car-owning families disclosed that 65 percent were satisfied with their present auto insurance and only 22 percent were dissatisfied2 and concluded that “it appears that there is receptivity to change but that as of now there exists neither overwhelming support for, nor overwhelming opposition to, a change in the insurance system toward some no fault alternative.”3

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1. Davies, The Minnesota Proposal for No-Fault Auto Insurance, 54 MINN. L. REV. 921 (1970). Senator Davies proposed essentially the same plan as was set out in the article at the 1969 legislative session as Senate File ’753; it was voted down, 10 to 5, in the Senate Commerce Committee.
3. Id. at 77. The DOT studies, while helpful, must be interpreted with caution. For example, the same study reports that toward the end of the interview, after various features of auto insurance were dis-
Jack Davies assigns “four-fifths” of the ideas in his proposed bill to Professors Keeton and O'Connell, whose pioneering work, Basic Protection for the Traffic Victim, was published in 1965. Since then, studies have continued; several states are considering “no-fault” and Massachusetts has passed a no-fault law. The striking characteristic of most “no-fault” plans is their ambivalence toward fault. Indeed, frequently the appellation “no-fault” is a misnomer. Of the seven best known plans, five retain some measure of fault liability. Some, if not all, of the plans also give weight, if less directly, to personal accountability for accidents in the setting of insurance rates.

This article proposes to examine some of the assumptions underlying the “no-fault” plans, particularly the Minnesota proposal, and to suggest a better Minnesota plan, already being implemented, for automobile accident reparations.

II. SOME BASIC ASSUMPTIONS UNDERLYING NO-FAULT

The Davies bill rests on several basic suppositions. It assumes that personal responsibility in causing auto accidents is outmoded; that negligence is often difficult to prove; that negligence is often difficult to prove; and that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often difficult to prove; that negligence is often diff...
gence in tort bears little relationship to personal fault, and that, in any event, most accidents are really not anyone's fault.

Denying the ability of the trier of fact in litigation to make a fair determination of fault cast doubt upon the efficacy of the jury and court system. If fault is really unfathomable, one might suppose that the same is true of guilt in the criminal case; yet no one suggests abolishing our system of criminal justice on this ground. It is true that a jury bases its findings on evidence adduced at trial, evidence which often consists of conflicting statements colored by faulty memories, imperfect observations, self-interest and even fraud. But the difficulty in fact finding is more theoretical than practical. Any experienced trial judge or lawyer can testify that as a trial unfolds, with its rhythm of direct and cross-examination, a fairly reliable reconstruction of the salient events emerges. Being themselves acquainted with the vicissitudes of automobile driving, jurors generally arrive without too much trouble at a sensible verdict. This is borne out by a jury study project which found that in 80 percent of personal injury cases the presiding judge agreed with the jury as to the findings of liability.

There is nothing esoteric about the fault concept; it is a proposition which, especially in automobile cases, lends itself well to the common sense of jurors. In most accidents it is likely that each party is negligent to some degree, and the doctrine of comparative negligence, recently adopted in Minnesota, recognizes this. The Minnesota jury can now apportion responsibility and so better fashion a just result.

The argument that actual negligence is divorced from personal fault is more difficult to understand. Tort law provides that a motorist is held to the objective standard of care of the reasonably prudent person; breach of that standard is negligence. Critics argue that this standard overlooks personal behavior or conditions, such as personality traits, poor eyesight, age or psychological pressures, which should excuse fault in the personal moral sense. It should be remembered, however, that the stand-

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11. Professor Keeton concedes that most trial lawyers agree negligence is provable without undue difficulty in auto accident cases. See R. Keeton, Venturing to Do Justice 130 (1969).
13. James, supra note 9, at 395-97.
ard of reasonable care is the care a reasonable person would use "under like circumstances" and that a jury, while it applies an objective standard, does so in a human context and takes into account the myriad "circumstances" of the parties, thus adjusting abstract rules to fit the particular case.

When no-fault advocates talk about the difficulties of assessing fault, many of them really are saying fault is irrelevant. This is, paradoxically, both the main point and the weakest point in the no-fault case. The contention, it would seem, runs contrary to the deep-seated conviction of most people that a person should be responsible for his conduct. Negligence is really a sort of carelessness, and carelessness is not a technical legal concept. The idea of negligence is not an exclusive preserve of judges and lawyers; rather, it is a principle society as a whole has derived from its common experience as a sensible rule of decent conduct. It should come as no surprise then, that a Minnesota Poll in 1968 reported that 60 percent of the Minnesota residents questioned thought a Keeton-O'Connell plan which would eliminate fault-finding in auto accidents to be a poor idea.14

Perhaps the first question asked at the scene of an auto accident is "Who is hurt?" and the second question is "How did it happen?" The tort system seeks to find the answers to both questions. The no-fault system considers the second question unimportant.15 It is doubtful that the public would agree. Even Professor Keeton admits that "we shall not soon exorcise the concept of negligence from the interrelated legal and ethical thought of our community."16

If fault is irrelevant, one might expect the sole remaining question of compensation to be treated in similarly fatalistic terms. We find this to be true with no-fault advocates. Only net economic loss is compensated. Nothing is awarded to vindicate innocence, for innocence is irrelevant, and nothing is al-

14. Minneapolis Tribune, Sept. 8, 1968, § B, at 12, col. 1. A balanced sampling of 600 adult men and women were asked: "It has been suggested when there is an accident involving two cars, that each driver be paid damages by his own insurance company without trying to determine if one driver was at fault. Does that sound like a good idea or a poor idea to you?" Sixty percent said it was a poor idea, 34 percent said the suggestion sounded like a good idea, and six percent made no evaluation.

15. "No-fault auto insurance will eliminate most auto injury law suits by removing the fact issues relating to liability and damage evaluation which make dispute and litigation inevitable." Davies, supra note 1, at 945.

16. R. KEETON, supra note 11, at 156.
allowed for pain and suffering or physical loss, for traffic victims are not victims of irresponsible drivers but mere casualties of an impersonal fate. Motoring becomes simply a health hazard like exposure to measles. An auto accident, however, unlike getting ill and unlike other kinds of accidents, is a violent occurrence usually involving two or more motor vehicles. The conduct of the drivers generally has at least something to do with the violence occurring. To tell the participants the injury to their persons and property was due to uncontrollable fate and no one's fault is unrealistic.

Thus, the Keeton-O'Connell plan does not tell the auto victim that the person who caused his injuries is never accountable for his conduct. Keeton-O'Connell retains negligence suits in cases where pain and suffering exceed $5000 or other damages exceed $10,000. If, as Davies says, this is "logically inconsistent," it does confirm Holmes' observation that the life of the law is not logic but experience. Under the new Massachusetts "no-fault" law, an injured plaintiff can still sue in tort for pain and suffering if he can show such whimsical criteria as a "fracture" or $500 in medical bills; indeed, it would seem the Massachusetts "no-fault" law preserves fault in all cases of any consequence. Senator Philip Hart's bill filed in the 91st Congress would preserve the negligence action for "catastrophic harm," a term which is liberally defined.

The Davies bill, on the other hand, more nearly eliminates personal responsibility, but even it makes exceptions. The durability of the fault concept apparently accounts for a curious provision in the Davies bill. Section 2, subd. (3), says:

A person injured by the grossly negligent driving of another may recover punitive damages from the grossly negligent driver.

No insurer may contract to indemnify for punitive damages awarded under this subdivision. A principal is not liable under this subdivision for the grossly negligent driving of his agent.

If the Davies bill sought to bury fault, this is resurrection with a vengeance. Not only does the proposal expose any motorist to a lawsuit for "grossly negligent driving"—the term is nowhere defined in the bill—but it prohibits a motorist from obtaining insurance to cover himself for the risk. The intoxicated driver in Minnesota may or may not be grossly negligent, but

17. Davies, supra note 1, at 932.
in either event, under the no-fault plan, he recovers compensation on the same basis as the party he harms. 20

It has been said that “[t]he concept of liability based on fault is deeply rooted in our society and will not be lightly cast aside.” 21 Why this is so—and the statement is that of no-fault proponents—is perhaps a question better suited to the disciplines of moral philosophy and psychology than law. However, it seems that one reason has been the belief that accountability for personal conduct is a deterrent to misconduct; thus fault advocates argue that tort liability is a deterrence to auto accidents. No-fault proponents contend that fear of a lawsuit or judgment is no more a deterrent than fear of injury, a traffic ticket or a license suspension and that, in any case, the negligent driver does not pay his judgment—his insurer does it for him.

It would seem unprofitable to push either view to an extreme. Concern for tort liability would, at least, seem to reinforce the other incentives to drive safely and to encourage the motorist to see to it other members of his household also drive safely. Moreover, tort liability tends to remind the motorist that he bears a responsibility for persons other than himself. While the negligent driver’s insurance company may pay the judgment, the possibility of personal exposure over the policy limits and higher insurance premiums remains a stimulant to prudent driving. 22

Even more important than deterrence, however, is the idea that personal responsibility is a desirable social good and that the operation of a motor vehicle is a kind of human activity for which it is reasonable to hold a person responsible. Thus James C. Mancuso, a psychologist, hypothesizes that to deprive a person of the need to justify and defend his decisions is to deprive him of the chance to become morally mature and that “there would be loss to the general society when we legally inform people that in many crucial instances they will be excused from the need to

21. R. Keeton & J. O’Connell, supra note 8, at 271. The authors concede that tort litigation recognizes the principle “that negligent motoring should be surcharged because of its added contribution to the toll of injuries,” and that in cases of catastrophic proportions and clear fault (for example, the drunk driver who permanently disables his victim) “there is much to be said for visiting all that tort damages entail on the person at fault.” Id.
explain and justify their decisions about how to manage their automobiles.”

Keeton speaks of the need to “exorcise” the concept of negligence, implying that, like an evil spirit, it is something bad. But to insist on responsibility and accountability in managing an automobile would not seem to be “bad”; on the contrary, it would seem to be a good much to be desired. If a critical moral judgment is to be pronounced, it should be redirected. It should be addressed, first of all, to the climbing rate of auto accidents which produce the need for reparations and, secondly, not against personal responsibility in causing harm but against the lack of society's collective responsibility to provide adequate reparations for the harm. These two responsibilities are not mutually exclusive; indeed, it would seem that for society to meet its collective responsibility, it is important that the individual's responsibility be maintained.

III. REPARATION INSURANCE UNDER THE MINNESOTA NO-FAULT PLAN

As a substitute for insurance tied to personal conduct, Senator Davies' motorist is compelled to purchase first party insurance. This is not a liability policy but basically a health and accident policy which pays to the insured his loss plus paying for losses of others injured in auto-involved accidents. The cost of the policy is directly related to what the policy proposes to pay out as benefits. Consequently, the plan hopes to strike a balance, arriving at "a basic level of insurance which is socially responsible, but not so generous as to be inappropriate for compelled purchase through government sanction."24

A. COVERAGE AND BENEFITS

As a result of this compromise between complete coverage and reasonable cost, the Davies compulsory policy does not cover, for example, damage to automobiles or their contents (which apparently would include a trucker's cargo). Instead, "[a]s to motor vehicles, property damage insurance will be voluntarily-pur-

24. Davies, supra note 1, at 922-23.
chased, first-party collision coverage." Pragmatically, however, collision coverage will not be "voluntarily" purchased and its cost should be calculated as part of the cost of the Davies plan. Most automobiles on the road today represent a substantial investment to the owners. A motorist under the Davies plan is compelled either to purchase separate collision coverage to protect that investment or to bear the entire loss of his auto when it is damaged, even if destroyed by another driver who is wholly to blame. No-fault advocates admit auto accident cases with small injuries are now well compensated but are critical of compensation in the serious injury case. But consider:

(I) A 60 year old man loses his left leg above the knee in an automobile accident. His hospital bill is $1500, his prosthesis is $500 and his doctor bill is $500. He is an accountant earning $2000 per month, and he loses two months from work. His social and recreational activities are permanently impaired. Under the tort system, his damage award might be $75,000 to $150,000, including compensation for loss of earnings, medical expenses and pain, suffering and disability. Under the Davies bill the accountant would have his doctor and hospital bills paid; he would receive $1500 of his $4000 wage loss (the maximum $750 a month for two months), and he would receive a medical impairment benefit of $3,510 ($5850 maximum for loss of leg less two percent for each year of age in excess of 30 years at the time of injury up to a maximum reduction of 60 percent).

(II) A 30 year old housewife and mother is severely disfigured as a result of facial burns in an auto accident. Her hospital and medical expense is $15,000. She is disabled for six months during which time she hires help at $400 per month. Prior to her marriage, she had been employed as a registered nurse but has had no employment outside the home for eight years. Under the Davies plan, the housewife would be paid $15,000 for her medical expense, and $2400 for household help. She would also receive for her disfigurement an amount "not to exceed $2500." Her total payments come to $19,900. Her cause of action in negligence would be many times that amount.

(III) A 50 year old railroad switchman sustains a ruptured disc in an auto accident. He is permanently disabled from his work as a switchman, but he is capable of being employed at other work. The doctors agree he has a 25 percent permanent partial disability of the back. His hospital and medical bills total

25. Id. at 924.
He was earning $12,000 per year at the time of his accident and is able, after six months, to return to employment other than that of a switchman at less pay. The Davies plan takes care of his $2000 medical expenses and pays him $4500 loss of earnings ($750 per month maximum for six months) and medical impairment benefits of $3750 (25 percent of $25,000 maximum for total back disability less two percent per year for 20 years). His total award under the no-fault plan is $10,200, substantially less than an award under the tort system.

These three cases are perhaps sufficient to illustrate several points:

(1) No allowance is made for loss of future earning capacity. Work loss is limited to a maximum of $750 per month and is paid only for "loss of income from work the injured person would have performed had he not been injured" (Sec. 6, subd. (3)). The housewife, the unemployed laborer, the non-working student, receive no recognition for their earning potential even though their disability may be life-long.

(2) No allowance is made for pain or suffering; however, an arbitrary sum—generally 50 percent of the Minnesota workmen's compensation schedule—is allowed for an anomalous benefit called "medical impairment," which is defined as "consisting of permanent bodily injury, whether or not affecting earnings or earning power, including loss of members, loss of function, and disfigurement." The same provision (Sec. 6, subd. (5)), specifically says, "[p]ain, suffering and inconvenience are not loss." On the other hand, Davies in a later comment says medical impairment benefits are "designed for cases in which there is significant loss which transcends pure economic loss." Nothing is allowed the injured party's spouse.

(3) Adoption of no-fault would also create new inequities in differentiating between traffic and non-traffic victims. The small child who is struck by a negligently operated automobile and loses a leg will receive her "net economic loss," but it may be difficult to explain to the parents why their neighbor's child, who loses a leg in a boating mishap or farm machinery accident, receives substantially more in a tort award.

26. In connection with workmen's compensation, it is interesting to note that "[t]here is also a tendency to use the permanent partial disability award section of the workmen's compensation act to compensate for pain and suffering." Dahl, Seeing State Workmen's Compensation Programs in the 70's, in A.B.A., SECTION OF INS., NEGLIGENCE & COMPENSATION LAW, 1970 PROCEEDINGS 129, 132.

27. Davies, supra note 1, at 938.
B. Cost

There are really two consumers in auto injury reparations. One is the victim, the person who is injured in an auto accident and seeks adequate reparations. The other is the car owner who, at least until he has experienced an auto injury of his own, is likely to be more interested in what his insurance will cost him.

Senator Davies' article offers no cost estimates. Studies of the Keeton-O'Connell proposal have suggested to some estimated cost savings of 17 percent to 26 percent,\(^2\) while others estimate no savings and greater costs.\(^3\) The American Insurance Association has estimated that its plan, which is a complete no-fault, would reduce costs of basic bodily injury coverage 25 percent, while the Alliance Actuarial Committee's study of the AIA plan found it would increase costs some 29 percent.\(^4\) Part of the difficulty in estimating costs would seem to be the wide variety of variable assumptions that any cost study can make.

It should be kept in mind, too, that the prudent motorist is unlikely to be satisfied with the coverage of the Basic Reparation Policy, whatever its cost. As already stated, he also will want collision coverage, and this adds to his premium. The average repair bill for a damaged car in Minnesota has risen about 75 percent in the last decade, from $170 to $350, and rising repair costs are reported to be the key reason for increasing insurance rates.\(^5\) Indeed, one auto insurance company now advertises "a 20% discount on collision insurance for any car the manufacturer certifies, through independent tests, can take a five-mile-an-hour crash into a test barrier (front and rear) without sustaining damage."\(^6\) It has been estimated that two-thirds of the auto insurance premium is for property damage losses;\(^7\) the cost of the Basic Reparation Policy does not include this item. In this con-

\(^5\) Minneapolis Tribune, Nov. 29, 1970, § C, at 1, col. 2. The same article quotes an insurance company representative as saying, "when a three-year-old car is in a 10-mile-an-hour collision, it is cheaper for us to replace it with another car or reimburse the owner for its value." Id. at 5, col. 3.
\(^7\) 1969 Defense Research Institute Bulletin, No. 12, at 8. Moreover, a study in Wisconsin reveals approximately 56 percent of all property damage incurred was paid for by the other party in the accident which would no longer be the case under no-fault. W. Hold, The
connection it is also interesting to note that in Minnesota there was a 27.3 percent increase in property damage accidents in 1969 as compared with 1968.\(^3\)

Moreover, a prudent driver probably also would want to buy Added Reparation Coverage, a separate, optional policy provided for in Section 8 of the Davies bill. This “deluxe” coverage, as Davies calls it,\(^3\) may cover, in addition to collision coverage, medical expense and work loss not covered under basic protection as well as additional benefits for “medical impairment.” Apparently there are no estimates as to what this premium would be, as the Davies bill would simply invite “the insurance marketplace to develop whatever additional coverages are desired by insurance buyers.”\(^3\) While we cannot know the extra cost for this coverage, it would seem probable, if not certain, that a majority of motorists would believe, as a matter of prudence, that Added Reparation Coverage was necessary, and any discussion of insurance costs must consider this coverage as a further cost item.

The Minnesota motorist will have another decision to make in buying his Basic Reparation Policy. Section 7, subdivision (2), provides for deductibles from the basic coverage for the named insured or a relative residing in the same household. Davies predicts that a substantial savings in premiums would result if the policyholder chose to take deductibles. This is probably true, but it means a further uncompensated loss the injured person endures, a loss that would have been compensated under the tort system. Ironically, the poor person who buys deductible insurance to save on premium costs is the person who can least afford to absorb a $100 to $300 loss out of his own pocket.\(^3\)

While the Basic Reparation plan restricts benefits paid, it expands the number of eligible claimants. The driver in the com-

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34. Property damage accidents increased from 64,255 in 1968 to 81,769 in 1969. Interestingly enough, fatal and non-fatal injury accidents decreased 18.2 percent in the same period. MINN. DEPT. OF PUBLIC SAFETY, HIGHLIGHTS OF MINNESOTA MOTOR VEHICLE TRAFFIC ACCIDENTS FOR JANUARY 1 THROUGH DECEMBER 31, 1969.
35. Davies, supra note 1, at 940.
36. Id. at 939-40. “Deluxe” coverage may be limited, however, to the named insured or relatives residing in the same household. Others injured would be limited to the basic minimum benefits.
37. See Hold, supra note 33, at 194.
mon one-car accident and the claimants who are at least 50 percent at fault, who do not presently recover under the tort system, would now recover. Estimates on the increase in claims have varied from 40 percent to 200 percent.8

The balance struck between benefits and cost will need continual adjustment, most likely upwards. For example, the Massachusetts no-fault law, enacted in August, 1970, required insurance companies to reduce their rates across the board 15 percent. Soon after the Massachusetts court invalidated this requirement, the state insurance commissioner granted a 38.4 percent rate increase for property damage coverage. The experience with workmen's compensation is also interesting. Workmen's compensation was originally intended to replace a certain percentage of the employee's lost wages, usually some 50 percent to 66-2/3 percent. But between 1940 and 1966, as wage rates and the standard of living increased, maximum weekly total disability benefits failed to keep up so that the ratio of benefits to average weekly wages fell; for example, in Minnesota the ratio fell from 77.4 percent to 40.8 percent. Under the tort system, however, the size of jury verdicts tends to reflect changes in the general economy so that compensation paid tends automatically to keep pace with changing economic conditions.

IV. CONSTITUTIONALITY

The key provision of the Davies bill is Section 2, subdivision (1), which abolishes liability for damages arising from ordinary negligence in the operation of motor vehicles. Davies observes, "Were this subdivision enacted, and nothing more, no-fault reform would be accomplished." The trouble, however, is that with "nothing more" the law would be unconstitutional.

Article I, Section 8, of the Minnesota Constitution provides, in part: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person,

38. Bailey, supra note 28, at 558. A 1955 Temple University study of New Jersey auto accidents estimated an increase in claims of about 100 percent. Id.
42. Davies, supra note 1, at 922.
property or character . . . .” As our supreme court has said, this provision was “not inserted in the constitution as a matter of idle ceremony.”\(^4\) To leave an injured motorist with no remedy, not even his common law tort action, would seem to deprive him of a “certain remedy” for the injury or wrong to his person. Of course, the Davies bill does more, but the question may still be put whether the injured motorist has been afforded, constitutionally, a remedy. The remedy proposed is the Basic Reparation Policy, presumably to be offered for sale by private insurance companies. The only persons required to purchase the insurance are auto vehicle owners (Section 3). An owner who knowingly fails to maintain the insurance is denied any benefits. (Section 10 (4)).

The analogy to workmen’s compensation immediately comes to mind. The Minnesota Workmen’s Compensation Act also provides an insurance program in exchange for abrogation of the employee’s common law tort action; and that act has been held to be constitutional. The Minnesota Supreme Court has ruled that fixed liability regardless of fault and the schedule of benefits provided under the Workmen’s Compensation Act are an “adequate substitute” for the employee’s common law action against his employer.\(^4\)

Workmen’s compensation and no-fault auto insurance are not, however, entirely parallel plans. The employee who gives up his right to sue the employer does not have to buy workmen’s compensation insurance. Insurance coverage is provided for him by his employer, and, indeed, if the employer fails to insure or self-insure, the employee keeps his right to sue for damages at common law.\(^4\) On the other hand, the motor vehicle owner who gives up his right to sue a negligent motorist is afforded no remedy by the Davies bill other than self-help. The car owner is told to protect himself by buying his own first party insurance; if he fails to do so, he is denied any protection and has no “remedy.”\(^4\)

It also might be argued that requiring the car owner to buy his

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\(^4\) Rhodes v. Walsh, 55 Minn. 542, 549, 57 N.W. 212, 213 (1893).
\(^4\) Breimhorst v. Beckman, 227 Minn. 409, 436, 35 N.W.2d 719, 735 (1949). See also Fairview Hosp. Ass’n v. Public Bldg. Serv., 241 Minn. 523, 64 N.W.2d 16 (1954).
\(^4\) MINN. STAT. § 176.031 (1969).
\(^4\) The employee under workmen's compensation gives up only his right to common law damages for personal injury or death. He can still sue his employer for property damage loss. The car owner under no-fault has no remedy for property loss, only the option to buy collision coverage insurance at his own expense.
own benefits violates Article I, Section 8, which further states a person "ought to obtain justice freely and without purchase."

Undoubtedly, at times the legislature can constitutionally require persons to protect themselves, whether it be by wearing safety helmets when riding motorcycles or by buying compulsory insurance if owning a car. The question here, however, is not the reasonableness of the state's exercise of its police power but the quite different question put explicitly by the Minnesota Constitution that every person is entitled to a remedy for a wrong. It would seem a proposal along the lines of the Davies bill raises a question of considerable moment under Article I, Section 8, of the state Constitution.

V. THE MINNESOTA PLAN FOR RESPONSIBLE REFORM

There is an alternative to "no-fault." For some years the Motor Vehicle Insurance Committee of the Minnesota State Bar Association has been fashioning what has come to be called the Minnesota Plan.⁴⁷ Calling it a plan for "responsible reform" is not intended to add to the already overheated rhetoric of the no-fault debate but to connote a plan which is responsive to the needs of the traveling public and which recognizes personal responsibility as a factor in auto injury reparations. It may be of interest to note that, as part of this reform plan, Minnesota already has a measure of no-fault insurance.

The Minnesota Plan builds on what we already have, namely the tort system which recognizes personal responsibility and yet is a non-exclusive remedy; that is, under the tort system, the injured motorist, whether at fault or not, has sources of recovery other than tort. About nine out of ten seriously injured persons presently receive some form of compensation for economic loss,⁴⁸ from various existing voluntary and involuntary compensation plans such as workmen's compensation, sick leave, welfare, social security, Blue Cross and Blue Shield and other health and accident policies. When one looks at the total picture it appears that "[t]here is not much sense in destroying systems that are working in order to set up a new system which will be less efficient, at its very best, than some of the systems it sets aside."⁴⁹ The need, then, is to improve the "total picture."

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⁴⁷. BENCH AND BAR OF MINN. 47-56 (May-June, 1970).
In any auto injury reparations system it would appear advisable to retain the admitted advantages of the tort system, which include the stress on personal responsibility, the recognition to some degree that one's cost of motoring bears a relationship to how safely one drives, an awareness that personal injury is just that—an injury to a person, not a statistical economic unit, which cannot be arbitrarily reduced to some out-of-pocket loss—and the ability to fashion just and complete compensation for "indeterminate" obligations and the serious injury. Professor Conard has put it well:

Nothing that has been disclosed by recent factual research or the experience of foreign countries has indicated that the tort system of reparation for automobile injuries should be abolished. To be sure, it has been shown to be inadequate; that is a reason for supplementing it, not for abolishing it. It has been shown to be expensive; that is a good reason for shifting to other regimes the things that they can do better. But there remain many tasks that the tort system alone can perform. These include, in appropriate cases, the restoration of earnings above the minimal level that a universal insurance system will support, the reparation of property loss and psychic loss, the vindication of the innocent, and the punishment or admonition of the guilty. The tort system should be preserved and considerably amended to achieve these purposes.50

The tort system does not purport to compensate everyone. The Minnesota driver who is more to blame for his accident than the party with whom he collides, or who may be involved in a one car accident, does not recover in tort.51 In such cases the motorist understands that he must provide for or absorb his own loss and cannot expect someone else who is not at fault or is less at fault to pay it for him. The motorist should, therefore, have the opportunity to acquire first party coverage for these situations, especially hospital, medical and temporary disability or wage loss insurance. Some persons already have this kind of coverage by reason of employment fringe benefits, and others should be able to obtain it at a relatively modest cost. Then, too, within


51. According to the DOT probability sample survey about 47 percent of persons injured receive some tort reparations. 1 U.S. DEP’T OF TRANSP., supra note 48, at 38. Presumably in Minnesota, which has comparative negligence, the percentage of persons recovering in tort would be appreciably higher.
the tort system itself there are several deficiencies, namely, the insurance gap (where the defendant is uninsured and financially irresponsible), the insolvent gap (the defendant's insurer is insolvent) and the limits gap (the limits of defendant's policy are insufficient to pay the judgment). Here again, by relatively simple measures such as uninsured motorist coverage and basic limits coverage under the financial responsibility law, these gaps can be closed.

The Minnesota Plan adopts the broad-gauged approach above outlined, and the 1969 state legislature, as part of this program, enacted:


2. Mandatory availability of supplemental insurance coverage to the named insured of $10,000 accidental death benefits and up to $3120 in wage continuation benefits, plus medical expense coverage up to $2000 to any insured. MINN. STAT. § 72A.1494 (1969).

Chapter 713 is "no-fault" first party insurance. It supplements the tort system by affording compensation to the motorist to cover, to a moderate extent and in certain instances, his own losses.

3. Abolition of contributory negligence and adoption of comparative negligence in all, not just auto, negligence actions. MINN. STAT. § 604.01 (1969).


5. Better regulation of auto insurance cancellations.

This is a substantial and heartening beginning to creative and responsible reform, and additional improvements are contemplated. The legislative program is being supplemented by the auto insurers' program of advance payments, a plan of advancing money for expenses to claimants prior to final settlement, credit being given on final settlement for the advances. In addition, the Minnesota Plan has a program of highway safety, encompassing such critical areas as automobile design, driving and liquor and traffic law enforcement.

52. These three gaps are recognized and discussed in Special Committee on Automobile Accident Reparations Report, supra note 22, at 634–37.

53. No-fault advocates contend auto claims are delayed because auto accident cases congest court calendars. This is not true in Minne-
Along with better coverage and benefits and a strong traffic safety program, there should be an emphasis on controlling costs. Consideration of collateral source benefits and tort reparations might well yield some savings in costs by avoiding double recovery of certain expenses. Perhaps little can be done with inflationary medical and hospital costs and auto repair bills, except that in the latter case, as we have seen, better auto design can reduce premium costs for property damage coverage. But another cost item which has received attention is legal fees in the handling of tort claims. The claimant's need for a lawyer's help, whether under a fault or a no-fault system, is not seriously questioned. As Davies points out, "disputes under no-fault will be primarily on issues of causation, amount of medical impairment and amount of survivor's loss," and "[s]ome disputes and legal actions will still occur."54 (And since no-fault benefits are usually at minimum levels, a no-fault claimant may be less able than the tort claimant to cover the expense of legal help out of his recovery.)

As the Department of Transportation studies point out, the filing of a tort suit is a "relatively rare event."55 Most claims are settled before suit with or without a lawyer, the relatively few jury verdicts serving as a measurement for settlement. About 65 percent of tort claimants retain counsel, and 74 percent of this number actually file a lawsuit, with about eight percent of the lawsuits reaching a verdict.56 There does not appear to be any definite data on retention of counsel for tort claims in Minnesota. With the advent of comparative negligence, however, it may be that counsel will be retained by claimants less often since there will be less outright denial of claims by insurers on the basis of contributory negligence.

The question of legal costs raises the question of contingent

sota. "Delay attributable to court congestion is not a factor. A civil jury trial may be had in any county within twelve months of filing the note of issue." Report of the Senate Counsel to Senate Judiciary Committee, citing Office of Senate Counsel, The Judicial System in Minnesota 130-33 (1969), and Office of the Administrative Assistant to the Minnesota Supreme Court, Sixth Annual Report 6 (1969).


55. 2 U.S. Dep't of Transp., Economic Consequences of Automobile Accident Injuries 3 (1970).

56. 1 U.S. Dep't of Transp., supra note 48, at 49. Attorney representation in paid tort cases averaged 46.5 percent in the DOT sample survey of 19 states, with five states having ratios in excess of the average and six states having a ratio of less than 30 percent. 1 U.S. Dep't of Transp., Automobile Personal Injury Claims 78 (1970).
fees. The Department's study puts legal costs at an average of 25 percent of total recovery under the tort system.\(^5\) The contingent fee enables the injured person who could not otherwise afford legal counsel to have representation, and undoubtedly under any no-fault plan the contingent fee would still be present. While it appears that sufficient data is not yet available,\(^6\) there is some indication that the contingent fee received in small cases is commensurate with an hourly fee charge while, as the size of the recovery increases, the increase in the fee may become excessive for the amount of additional work performed.\(^7\) There is also some evidence, however, that in a lawyer's case load, taken as a whole, the generous fee is offset by undercharges (or no charges) in other cases.\(^8\) While it would appear that the contingent fee, in some form, is here to stay because it provides a method for every claimant to obtain competent legal services when needed, an effort should be made to assure that, in the case of a large recovery, considerations other than the percentage figure alone are taken into account, so that the fee does not exceed what is reasonable for the time, effort and professional skill involved.

VI. CONCLUSION

There are numerous inherent weaknesses in the Davies "no-fault" scheme. It rests on unsupportable assumptions as to the impossibility of determining fault, a concept well within the common sense experience of jurors. It provides inadequate benefits for injuries and economic loss and fails to compensate at all for many of the damages suffered by an accident victim. While Senator Davies contends that the cost of his first party insurance would be lower than the cost of present liability insurance, the studies of the point are inconclusive at best, several suggesting that costs would increase rather than decrease under a "no-fault" system; in fact, experience in the only state which has tried a no-fault plan has indicated that costs have increased.

\(^{57}\) 1 U.S. DEP'T OF TRANSP., supra note 48, at 48. Persons retaining counsel tend to recover a higher proportion of their losses. Id. at 52.  
\(^{59}\) F. MacKINNON, CONTINGENT FEES FOR LEGAL SERVICES 172 (1964), cited in Special Committee on Automobile Accident Reparations Report, supra note 22, at 632, which points out that more cost data on hours worked in various kinds of cases is needed before more than tentative conclusions can be made.  
\(^{60}\) F. MacKINNON, supra note 59, at 182.
Where coupled with the inadequate coverage of the Basic Reparation Policy and the availability of full coverage at greater cost, it seems altogether likely that the average driver will incur greater expense under the "cost-cutting" Davies plan than he does at present. Finally, there are substantial questions whether the proposal provides the "certain remedy in the laws" guaranteed by the Minnesota Constitution.

It cannot be denied that reform is required of our present method of auto injury reparations. But to describe the problem as an "either-or" issue, as being fault or no-fault, liability insurance or first party insurance or, more lucidly, revolution or the status quo is a misleading distortion and a disservice both to legislators who must make the laws and to the motoring public which must abide by them. The solution is not to dismantle the present system but to improve it. This has been the goal of the "Minnesota Plan" described above.61 While more needs to be done, the solution is to make needed reforms within the present system, not to adopt new, untried proposals, such as the Davies bill, which would radically change the basis of reparations for injuries and introduce many new weaknesses.

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61. Pennsylvania appears to be taking an approach similar to the Minnesota Plan. A report of the state's Action Committee for Highway Safety, chaired by Professor Herbert Denenberg of the Wharton School of Finance and Commerce of the University of Pennsylvania, has recommended greater use of collision coverage deductibles, expanded medical pay coverage and first-person auto accident death insurance. The committee says a $10,000 death policy would cost $5 per year, while 200 weeks of $50 disability protection could also be bought for $5 per person per year. Medical pay coverage could be increased from $500 to $5000 for an additional $5 per year. New York Times, Jan. 3, 1971, § 3, at 3, col. 1.