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Book Review: The Injury Industry and the Remedy of No-Fault Insurance

W. Ted Minick

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BOOK REVIEW

THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE. BY JEFFREY O'CONNELL. New York: Commerce Clearing House, Inc. 1971. Pp. xiii, 253. Appendices. \$8.50 (simultaneous publication by the University of Illinois Press. \$2.95 paper).

The present automobile reparations system, dependent upon fault, is dying. Various forms of no-fault insurance have been adopted in several states¹ and a national no-fault bill is being considered by the United States Senate.² As this reform movement sweeps the country, legislators and the public at large are bombarded by a mass of often conflicting information from a wide variety of self-proclaimed or otherwise denominated experts. In all the hue and cry, there are few men more qualified to speak on the subject, at least from the point of view of the proponents of no-fault insurance, than Jeffrey O'Connell. For over fifteen years, Professor O'Connell has been vigorously pointing out the evils in the present reparations system and advocating a basic protection plan which he and Robert Keeton originally designed. This latest volume, although relatively concise, is a well documented and highly persuasive presentation of the same general scheme.

The first eight chapters of Professor O'Connell's book deal with the evils of the present reparations system. It is perhaps in this area that the author's fervor does the greatest disservice. Professor O'Connell is an accomplished writer, but his condemnation of the present system is often overly generalized and borders on the glib. For example, he states that "the basic difficulty with the present system is that the insured event is too complicated turning as it does on *legal liability*."³ He then supports that proposition by setting out the "tricky terrain" one must traverse in order to recover damages. That "tricky terrain" includes claiming against the other driver's insurance company, claiming freedom from fault, and claiming for a "totally uncertain amount" including pain and suffering "which is obviously almost impossible to translate into dollars and cents."⁴ In analyzing the present system, however, experience will reveal that there is nothing very tricky about claiming against an insurance company. While it is admittedly difficult to fractionalize an automobile accident into minute details, such as seconds, exact speed, and distance involved, it is not generally necessary to do so, and twelve jurors applying common sense can generally cope with the question of fault. Damages are not totally uncertain in the eyes of the jurors, and dollar amounts for pain and suffering are determined every day.

Professor O'Connell seems to take the position that liability insurance is inherently evil. He repeatedly mentions the extension of other no-fault plans of insurance, such as group medical care, workmen's compensation, and fire insurance. But nowhere in his book does he mention liability insurance that is commonly carried with a homeowner's policy, nor the liability insurance normally carried by contractors to protect them from claims against injuries

¹ See, e.g., FLA. STAT. ANN. §§ 627.730-741 (Supp. 1971); MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971).

² S. 4339, 91st Cong., 2d Sess. (1970).

³ J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 3 (1971).

⁴ *Id.*

caused to non-employees on or near the job site. Carried to its logical extreme, Professor O'Connell's thesis seems to be that there may be no place for liability insurance in American society. Indeed, he expressly states that it is incumbent upon our society to "devise an insurance mechanism which will spread the loss not only efficiently and effectively, but with at least a measure of courtesy and compassion."⁵ Such a system exists today; there is available to all persons no-fault insurance, such as hospitalization insurance, which would protect them from the kinds of things that Professor O'Connell decries. But because at least a large percentage of persons do not wish to expend the money for premiums for such insurance, Professor O'Connell desires to radically change the system.

No one would question that there are numerous and grievous abuses in the present reparations system. Undoubtedly, minor claims are paid far too much in relation to the damages sustained, as opposed to those serious injuries for which there is little or no compensation. Few fair minded persons would sanction the refusal of some liability insurers to pay as expenses are accrued in cases of clear or reasonably clear liability. Such a practice would not only be fair and equitable, but would probably be economically desirable to the insurance companies as well. Similarly, few would question the fact that some claims are padded by claimants, doctors, and, most regrettably, by lawyers. Unquestionably, automobile accident cases do consume far too much of our legal talent and judicial resources. And unfortunately, those cases do arise which are outright frauds, inspired or at least perpetuated by members of the bar. These evils, and others, occur with an appalling degree of frequency and must be eliminated, or at least substantially reduced. The question, however, is whether complete abrogation of the present system is the remedy.

Professor O'Connell's approach is posited on the thesis that (1) all of us are going to be involved at some time in a traffic accident, and (2) most of us are going to be injured. The sheer volume of accidents may well be a valid ground for consideration of sweeping changes. But the conditions of which Professor O'Connell most often complains are not necessarily uniform throughout the United States. Texas courts, for example, are not as congested as those in the major metropolitan areas of the East. Furthermore, in Texas at least, it is extremely doubtful that no-fault insurance would constitute a premium saving since approximately two-thirds of the present Texas family automobile insurance policy premium is made up of no-fault items.⁶ Also, it appears to this reviewer that there is a basic philosophical difference in requiring one to have insurance to protect himself, as opposed to requiring him to have insurance to protect others whom he may harm.

Professor O'Connell, however, is not inflexible. His book contains in Appendix II an optional no-fault plan which he and Professor Keeton proposed in 1971. This no-fault plan would give the consumer the option of remaining under the present system, electing an exclusively no-fault plan, or electing both. Most importantly, the choice would be that of the consumer, the man who is paying the premiums, an advantage which Professor O'Connell recognizes. It

⁵ *Id.* at 2.

⁶ Abraham, *Automobile Insurance Rates and No-Fault Insurance*, 35 TEXAS B.J. 117 (1972).

would also have the advantage of allowing the no-fault and third party liability concepts to be in direct competition with each other in the open market place, and, ultimately, the public would decide which is the more desirable.

The Injury Industry is highly recommended to all members of the trial bar, as well as the general public. It is short enough to be read quickly, but sufficiently documented to present a reasonably accurate picture, notwithstanding some apparent generalization. It is written in a clear and lucid style which makes it readily understandable. More importantly, it is a book which will provoke independent analysis by the reader.

*W. Ted Mimick**

* B.A., Eastern Washington State College; J.D., Southern Methodist University. Attorney at Law, Dallas, Texas.