

Crisis in Car Insurance. EDITED BY ROBERT E. KEETON, JEFFREY O'CONNELL, AND JOHN H. MCCORD. University of Illinois Press, Urbana, 1968. Pp. vii, 274. \$5.95.

Dollars, Delay and the Automobile Victim. Studies in Reparation for Highway Injuries and Related Court Problems. SUPPORTED BY THE WALTER E. MEYER RESEARCH INSTITUTE OF LAW. Bobbs-Merrill Co., Indianapolis, 1968. Pp. xvii, 486. \$9.50.

Abraham W. Brussell†

Crisis in Car Insurance is an outgrowth of the conference entitled "Changes for Automobile Claims" held October 2-3, 1967 by the University of Illinois College of Law at Urbana, Illinois. The conference was assisted by grants from the Walter E. Meyer Research Institute of Law—Program of Research on Auto Reparation. The volume is a streamlined, edited version of the soft-cover report of the conference found in the 1967 University of Illinois Law Forum.¹ The volume contains eight basic papers with "remarks" by fourteen other participants at the conference. Among the participants were persons from the insurance industry, plaintiff's and defense lawyers, and representatives from federal and state governments, from universities, and from consumer groups.

The volume begins with a paper by Daniel P. Moynihan which, though bearing a question mark after its title "Changes for Automobile Claims?", is nevertheless a categorical assertion that change is—and must be—coming. The second paper by Spencer L. Kimball, entitled "Automobile Accident Compensation Systems—Objectives and Perspectives," is a philosophical presentation of what, according to the author, should be the general social goals of a properly oriented system, *i.e.*, what an automobile accident compensation system should seek to achieve.

The third paper by Robert E. Keeton and Jeffrey O'Connell is entitled "Basic Protection Automobile Insurance"—the title and subject that have illuminated the horizon ever since the studies of these two authors reached the legal profession and the insurance industry in 1965 with the publication of the original Bible—*Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile In-*

† Judge, Circuit Court, Cook County, Illinois.

¹ 1967 ILL. L.F. 361-634.

urance. This paper is really the heart and fulcrum of the conference; it either directly or indirectly affects every other paper and remark found in the volume.

The fifth paper by Frank Harwayne, entitled "Insurance Costs of Basic Protection Plan in Michigan," is a presentation by actual study and other empirical data methods of the dollars and cents economic claims of the Keeton-O'Connell Plan. The author indicates that automobile insurance minimum costs paid by Michigan motorists would be reduced by approximately 25 per cent if the state adopted the Keeton-O'Connell Plan, and that fifty per cent more people would receive payments under the Plan than under the present system of "fault" liability and liability insurance plans. The statistics are plausible but are not accepted by any opponent of the plan. To no one's great surprise, notwithstanding the imposing presentation of data, figures, and other empirical material, the conclusion of Mr. Harwayne does not make quick converts among insurance men or state officials regulating insurance.

In the two papers of lawyers—"Lawyers View Proposed Changes"—Attorney Jacob D. Fuchsberg for the plaintiff's bar and Edward C. German for the defendant's bar both sharply criticize the Keeton-O'Connell Plan. The grounds of criticism include such diverse "critiques" as a challenge to the reliability of the statistical material, protection of the adversary system, and quotations from the New Testament supporting the argument that court congestion is not simply a recent American development caused by the gas buggy. To this reviewer these criticisms by the bar bear a strong aroma of "self-interest." This kind of criticism weakens some of the positive suggestions for improving the fault system suggested by at least the plaintiff's attorneys' representative.

Of two papers by legislators, the first, entitled "Legislators Look at Proposed Changes," by Michael S. Dukakis, gives a bread-and-butter discussion of the Keeton-O'Connell statute as it passed the Massachusetts House of Representatives (it was defeated in the Senate at the 1967 legislative session). The most significant fact of this paper is that the lawyers, not the insurance companies, were responsible for the Senate defeat. These lawyers utilized a public-relations approach and conducted an organized, well-financed campaign to defeat the bill in the Massachusetts Senate. This fact, coupled with the recognition that almost every state legislature has a large number of lawyers in its membership, points up clearly the problem faced by any proponent of change in the present tort and insurance systems. Legislator Anthony Scariano of Illinois gives a history of the failure of a Keeton-O'Connell

proposal to move out of committee. His basic point is that "something"—not necessarily the adoption of the Keeton-O'Connell Plan—must be done to change the present system.

The final paper, entitled "Views and Overviews," by Guido Calabresi is a discussion of methods available to society to regulate and prevent automobile accidents, considered from the point of view of costs. One method is described as the collective approach—"a specific deterrence of accidents by prohibitions as to actual driving or non-driving." The other is the market approach—"the general deterrence of accidents." With respect to the two approaches and the relationship of each to the "fault" system he concludes that it is "conservative" in the best and proper sense of the word to abandon fault and replace it with any of several systems which would give better and more efficient "market deterrence."

The conference and the volume conclude with a summary of and report on the workshop sessions. It must be noted that over ninety per cent of the participants at the conference were from the automobile insurance industry. For these workshop sessions, members of the University of Illinois Law Forum were the informal recorders. It is evident from all these summaries that there was no absolute consensus on any of the subjects covered. The titles are striking and illustrative of the many problems: "What Is the Public Thinking?," "Cost of Coverage," "Legal Services—The Contingent Fee," "Availability of Insurance: Classification According to Area and Occupation," "The Collateral Source Doctrine," "Cancellations," "Court Congestion," "Government Regulation," "Compensation of the Victim," "The Industry's Public Image," "Cutthroat Competition: The Antitrust Implications."

The part of the summary devoted to "Suggested Solutions" centers around the main theme of the conference: Is the basic protection plan of Keeton-O'Connell the proper solution or should some modification of it be adopted? No conclusion was reached on this basic problem.

The discussion and the debate will long continue.

Dollars, Delay and the Automobile Victim selects twelve papers or reports prepared by scholars working under grants from the Meyer Research Institute. The first three reports present research in the field of determining how injuries caused by automobiles are compensated; the next five reports discuss how the resulting burdens upon the courts might be lightened; and the final four reports outline "Theories and Proposals for Improved Reparation Systems."

As indicated in the foreword by Professor Maurice Rosenberg,² these papers should be regarded "as a collection of rudimentary attempts at empirical research." The theoretical interpretations of these empirical facts concerning the present system of "auto reparations" are socially valuable in the achievement of justice in proposals for improved reparation systems.

There is a provocative "Tangential Introduction" by Dean Willard H. Pedrick³ which dramatically shows the contrast between the reparations system provided for fire losses and the tort-fault reparations system provided for accidents caused by automobiles.

The volume of selected studies is divided into three subjects. Under the heading "The Dimensions of the Economic and the Delay Problems," there are three papers. The first, a study of 1956 auto accidents in the five-county metropolitan area of southeastern Pennsylvania plus one "non-metropolitan county," is based upon interviews with five hundred victims of approximately 1100 serious accidents reported in the Philadelphia area metropolitan newspapers.⁴

The second paper, "Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation," by Franklin, Chanin and Mark, was based upon an analysis of a random sample of three thousand statements out of 44,000 "closing statements" filed by lawyers in the Manhattan or Bronx sections of New York City having contingent fee contracts with litigants with personal injury claims arising from operation of automobiles. This was compared with a 1959 spot check of similar "closing statements" and with confidential material gathered from the records of several cooperating insurance company projects.⁵ The authors' summary and conclusions are concise and self-explanatory.⁶

The third paper—"Delay and the Dynamics of Personal Injury Litigation" by Maurice Rosenberg and Michael I. Swern—was based upon an analysis of closing statements similar to the previous paper plus a study of court-tried personal injury cases plus a broader study of sources outside the closing statement files. The authors' summary and conclusions emphasize the problems of delay and suggestions of possible "reforms."⁷ Several interesting appendices give pungent factual data as to the economics of the legal profession in the handling of personal injury cases.

² P. iv.

³ P. vii.

⁴ P. 3.

⁵ Pp. 76-7.

⁶ Pp. 66-73.

⁷ Pp. 123-9.

Under the heading "Proposed Remedies for Congested Courts" there are five papers, with four of them bearing—at least in part—the firm and guiding hand of Professor Maurice Rosenberg.

The first paper is the broadest, "Court Congestion: Status, Causes and Proposed Remedies" by Maurice Rosenberg. The author briefly touches upon the antiquity and universality of delay in the courts, the reasons, the procedural devices to cure, and so forth. The author concludes that progress will "have to come from marshaling relief measures in groups, not from a one-injection miracle cure. There is no such panacea." And "the tools we need are persistence, resolution, and a willingness to apply scientific methods of research."⁸

The second paper, "Comparative Negligence in Arkansas: A 'Before and After' Survey," by Maurice Rosenberg, is a study based upon a survey of trial judges and lawyers in Arkansas as to the effects on personal injury actions of a 1955 statute adopting a comparative negligence system for Arkansas. The emphasis is upon the method of the systematic investigation of facts as a basis for possible court reform.

The third paper, "Auditors in Massachusetts as Antidotes for Delayed Civil Courts," by Rosenberg and Robert H. Chanin, portrays the recent experience (1956-60) of the auditor system as used in Suffolk County, Massachusetts. The authors point out that statistics indicating improved efficiency in the disposition of cases are not sufficient to warrant radical changes in court structure or operation—that proper disposition of litigation is the true goal of justice. The need is for better "judicial statistics and for bolder administration of new procedures, with built-in controls that permit reliable evaluation."⁹

The fourth paper, "Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania" by Rosenberg and Myra Schubin, is a study of the impact of the Pennsylvania Compulsory Arbitration System upon the congested trial calendar of a court of lesser jurisdiction—the Municipal Court of Philadelphia. From a statistical analysis of the disposition and appeals of arbitrated cases, the authors conclude that insofar as the problem of the efficacy of the procedure as a means of reducing the judicial work load—and nothing else—the system works well in small claim cases. The authors expressly disclaim any attempt to draw the same conclusion as to courts of general jurisdiction. And they warn that there is a price to pay for compulsory arbitration even in small claim cases.

The fifth and final paper in this Part II is "Split Trials and Time Saving: A Statistical Analysis" by Hans Zeisel and Thomas Callahan.

⁸ Pp. 182, 186.

⁹ P. 256.

This is a statistical analysis for the years 1960-61 of the personal injury cases tried in the United States District Court for the Northern District of Illinois after the adoption of Civil Rule 21, which permitted separate trials for the issue of liability and the issue of damages on motion of a party or direction of the court. A comparison of the personal injury trials in both the separated and non-separated issues resulted in the conclusion that separation will save about twenty per cent of the time required by traditional trials. The authors point out that other questions besides "efficacy as a delay remedy" should be the subject of empirical data.

Under Part III, entitled "Theories and Proposals for Improved Reparation Systems," there are four papers. The first is excerpts from the now almost familiar "revolutionary" proposal known as the Keeton-O'Connell Plan. These excerpts present what the authors call a "Blueprint for Reforming Automobile Insurance." This proposal, first formally made in 1965, has racked the insurance and legislative world and has aroused "103 million dissatisfied motorists." It has awakened complaints by the motoring public and by law enforcement officials. It has aroused legal scholars into aggressive attack or defense. Some members of the organized personal injury bar—plaintiff and defense alike—have sounded dire warnings as to the pernicious impact of this proposal on the adversary system. Insurance companies have examined—or re-examined—their files and statistics and have begun experiments with new "pay in advance" systems or other modifications. In 1967 the Massachusetts House passed the Keeton-O'Connell Statute but the Senate defeated the measure. Several other 1967 legislatures considered the proposal. More will consider the proposal in the future. Not since the 1932 Columbia Law School proposal for a "Workmen's Compensation" System of Auto Reparations has any proposal attracted as much attention as this carefully prepared complete blueprint for auto reparations reform.

The second paper, entitled "Fault, Accidents and the Wonderful World of Blum and Kalven," by Guido Calabresi is an attempt to condense the pros and cons of a "fault liability" system into a concise, "word simple" philosophy. The author's criticism of the "deterrent effect" justification of Blum and Kalven does not provide a true "Coke upon Littleton" (or is it vice versa) in the field of auto reparation systems and justifications therefor.

Taking the fourth paper slightly out of order, Alfred F. Conard has prepared a striking presentation of dollars and cents statistics entitled "The Economic Treatment of Automobile Injuries." The summary¹⁰

¹⁰ Pp. 467-8.

bears close resemblance to the third paper by Conard and J. Ethan Jacobs entitled "New Hope for Consensus in the Automobile Injury Impasse." In the opinion of this reviewer these last two articles give a sound bird's-eye-view of many, if not all, of the problems troubling our society as a result of the invention of the gas buggy. After reviewing the problems, they present a quick run-down of suggested means of improving the present fault system without following the dramatic but radical surgery and transplants suggested by the Keeton-O'Connell Plan. The book concludes with an adequate index.

As the foregoing illustrates, a brief listing of the contents of these two volumes provides a lengthy check list of problems facing American society as a result of the five to six million new vehicles sold every year.

The injury toll: in 1967, 24 million cars crashed, injuring to some extent 1,900,000 people, and killing 53,000. The most recent statistics indicate a greater carnage for 1968. The ramifications of these statistics suggest that the automobile touches and vitally affects a substantial segment of American society.

The insurance statistics: in 1967 over \$10.6 billion were spent for auto insurance premiums—more than twice the amount of auto insurance premiums in 1957.

The court statistics: recent years have seen the clogging of court dockets and court rooms—both state and federal court systems in the multiple judge courts of the large metropolitan areas. Delays ranging up to five years are common, with some courts having cases "buried," forgotten by statisticians and litigants alike.

Suggested solutions for the myriad problems arising and plaguing all society are not lacking. In the relatively separate problem of reform in the field of reparations for auto injuries, one author has provided a check list of approximately 34 suggested plans for reform.¹¹ A quick glance at the Index to Legal Periodicals since Keeton-O'Connell dramatically burst across the horizon in 1965 shows the tremendous interest of legal scholars.

But the rumblings and stirrings of dissatisfaction with the present are not limited to the unorganized victims or claimants or to the dissatisfied premium payers or legal scholars. In 1967 several legislatures actually considered the verbatim adoption of Keeton-O'Connell. Two federal studies or investigations are under way, one by the Department of Transportation, the other by a Congressional Committee. The State

¹¹ Damman, *New Auto Plans Keep Appearing: None Takes Hold*, 72 THE NATIONAL UNDERWRITER FOR FIRE AND CASUALTY INSURANCE, pt. 2, at 1, 16-21 (May 3, 1968).

of New York last year undertook a comprehensive study, but the report, originally targeted for April 1968, has not yet been made as of this date. Very recently, the American Insurance Association issued a report making recommendations substantially in line with the Keeton-O'Connell plan. This position by a prominent industry trade association dramatically demonstrates sharp division within the industry itself. Even prior to the AIA's report, some insurance companies were in the process of experimenting with "pay in advance" plans—one in a five county project around Chicago, Illinois, the other in a project in Connecticut. Results of these experiments are not as yet available. The insurance industry is sharply divided.

Projects are being undertaken at a few law schools—namely, those aided by grants from the Meyer Research Foundation. The legal profession is sharply divided—at least on Keeton-O'Connell. The personal injury bar, comprising probably an overwhelming majority of the litigation bar, has generally opposed Keeton-O'Connell without denying the need for improvement or change of some kind.

Understandably, local bar associations find that debates in committees without adequate empirical data, without complete coverage by any one committee of the many facets of the problem, without proper staffing or financing, merely scratch away at the surface of the many problems.

Significantly, the most comprehensive grouping of some of the multi-fold problems facing our society in this area is the outline of study suggested by the Special Committee and Commission of the American Bar Association on Automobile Accident Reparations. This relatively new special committee was created in February 1968. It has had some meetings and conferences.

Yet the study of reparations cannot—or at least should not—be separated from the problems of improving safety or reducing the number of accidents.

This reviewer has long been convinced of the crying need to "do something" about automobile claims. And if judges and lawyers will not courageously, intelligently, and without regard to self-interest, analyze the problems and make suggestions for improvement, then indeed justice will be an empty banner covering an inadequate, unjust, and socially unjustifiable system of handling automobile problems in modern American society.

The first and greatest need is to find the true facts. The empirical methods begun under the grants by the Meyer Research Institute must be expanded. In the opinion of this reviewer there are three areas where careful study of basic facts is strongly needed. First, all ramifica-

tions of the economic interests of the personal injury bar must be analyzed. Who handles personal injury cases? What is the effect of the contingent fee system for plaintiff's attorneys or the per diem retainer system for defense counsel upon claims, suits, settlements, trials, and appeals? Who will be affected by any proposed changes? How much income will be lost or gained by the lawyers? How many specialists are handling personal injury cases?

Second, there should be a comprehensive analysis by state or federal authorities—or both—of the files of insurance companies. How much is spent on investigations or other administrative costs? What are “nuisance value” settlements really doing to a system supposedly based upon rights and duties? What are the “costs” to various insurance companies? Why shouldn't insurance companies be required to account for the handling of each file to the regulating insurance department in a complete report analogous to the “closing statement” required of contingent fee plaintiff's lawyers in New York?

Third, the experience of trial judges—especially in the multiple judge courts of the large metropolitan areas—should be examined. Isn't it significant that neither of the volumes reviewed contains any material—empirical or otherwise—of trial judges, with the exception of the questionnaire sent out in the study of the Arkansas comparative negligence system? Judges through their control of the courts cannot by themselves solve the problem of court congestion—to say nothing of enacting reforms in the substantive law. But their experience in the disposition of cases filed in court should afford a source of valuable know-how in order to grapple with the basic problem of increasing settlements either before or after litigation is commenced.

