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BASIC PROTECTION—RELIEF FOR THE ILLS OF AUTOMOBILE INSURANCE CASES*

Jeffrey O'Connell**

For a long time automobile accident cases have been clogging our courts, delaying and therefore often denying justice to all litigants. According to a recent study, the flood of automobile accident trials (typically two-thirds of the court's civil jury docket) has produced an average of over 31 months delay for trials in large metropolitan communities. The longest average delay, 69.5 months, was in the Circuit Court of Cook County which serves Chicago. The next longest outside of Chicago, 51.5 months, was in the Supreme Court of Westchester County in New York. This was followed by the Court of Common Pleas in Philadelphia with 50.8 months, the Supreme Court in Kings County, New York, 50.5 months, and the Supreme Court in Suffolk County, New York, 48.2 months.¹

In discussing court congestion, it is important to note that all this automobile litigation is only the top of an iceberg. As the visible top is chipped away, more of the invisible mass below the surface rises. Cases filed represent only a small fraction of the total number of claims, and in turn, cases tried represent only a small fraction of cases filed. As an example, a recent survey in New York City showed that of the 193,000 annual claims of victims seeking to recover damages caused by someone else's fault, only 7,000 reach trial, and of these only 2,500 reach verdict. Claimants simply cannot fight through the thicket to a court verdict.² If the backlog were not so great, more patient claimants would pursue their claims into and through the courts. This means that proposed solutions, such as the abolition of jury trial for automobile cases and the appointment of more judges,

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*These remarks were prepared for but not delivered to the Section on Judicial Administration, American Trial Lawyers Association's Annual mid-winter meeting in New Orleans, Louisiana, February 10, 1967.
Portions of the manuscript are adapted from a book written by the author and Professor Robert E. Keeton of the Harvard Law School, KEETON & O'Connell, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1966) [hereinafter cited as BASIC PROTECTION].

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1. INSTITUTE OF JUDICIAL ADMINISTRATION, STATE TRIAL COURTS OF GENERAL JURISDICTION—PERSONAL INJURY JURY CASES v (Calendar Status Study, 1966).
are likely to be frustrated by the backlogs they are designed to alleviate. If only partial improvements in the whole system are achieved, the more the backlog of traffic cases is reduced, the more additional cases will be entered for trial, thus wiping out any saving achieved.\(^3\)

The problem, then, goes deeper than procedural questions such as whether cases are to be heard by judge or jury. The problem, in essence, is *what* is being heard, not who is hearing it. And the problem is not only the cost and delay in compensation but the unfair way in which compensation is paid or not paid, quite apart from high cost and delay.

The solution, in turn, lies not so much in procedural devices, like switching from juries to judges or appointing more judges, but in attacking the automobile cases more directly—in making fundamental changes in the criterion for paying claims of traffic victims. Under present automobile insurance, you can be paid after a traffic accident only by making a claim against the other driver's insurance company on the basis that such other driver was at fault in causing the accident and that you were blameless. The result is that all traffic claims today are dominated by attitudes of distrust and even outright hostility accompanying any negligence lawsuit. Professor Robert E. Keeton and I propose a plan which we call the "Basic Protection Plan," under which the bulk of automobile insurance claims would be paid as fire insurance claims are paid—by one's own insurance company and without regard to anyone's fault. Just as your fire insurance company pays for the loss you suffer when your house burns, regardless of whether you were careless with a lighted cigarette, so, under the Basic Protection Plan, your automobile insurance company would pay you for your out-of-pocket loss, regardless of negligence. (But just as fire insurance does not cover intentionally burning your house, so one who intentionally injures himself in a traffic accident would not be paid by Basic Protection insurance.)\(^4\)

Basic Protection insurance is in essence an expanded version

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4. The details of the Basic Protection Plan, including a draft statute, together with documentation of the pressing need for its adoption, are presented in Basic Protection. See also *Keeton & O'Connell*, *After Cars Crash—The Need for Legal and Insurance Reform* (1967), a version written for the general or non-technical reader.
of supplementary coverage most people already carry in their automobile policies—the so-called medical pay coverage, under which your own insurance company reimburses your actual medical expenses up to a stated limit (say, $500 or perhaps even $2,600), regardless of who was at fault in the accident. Basic Protection would do the same for all kinds of out-of-pocket losses (wage losses, for example, in addition to medical expenses) up to a limit of $10,000 per person and would do so at a lower cost. Amidst the din of outraged cries at ever-increasing automobile insurance premiums under the present system, a respected independent actuary has calculated that the premiums for this Basic Protection Plan, if it were put into effect in New York State, would be substantially lower than rates for the present system.  

But before turning to an examination of the new system that would right the wrongs of the present one, perhaps these wrongs should be more explicitly identified. In the first place, the difficulties caused by the role of “fault” under the present system are greatly exacerbated by the difficulty of applying the concept of fault to traffic accidents. Who knows what really happened—or who was at fault—in the typical traffic accident? As a high-ranking GM official has stated, the nub of the highway safety problem stems from the fact that “both the masses and speed of cars exceed those of any of the other machines with which we work.” The only remotely comparable instrument is the power mower, which is proving a hazardous instrument itself, though not on a scale to be seriously compared with the automobile.) Perhaps the constant exposure to the danger of an auto crash dulls the sense of peril and the significance of the details of the cause of the crash. In any event, no other common occurrence in our daily lives hinges upon details that no one involved can clearly recall, as is the case with an auto accident. A former law professor who is now an active trial lawyer—an expert in both the practice and theory of negligence cases—has commented that after a traffic accident in which he was involved he was astounded to discover how little of the accident he could intelligently recall. Right after the accident, he says:

“I... tried to think of the things I should observe and remem-

ber to include in my accident report to my insurance company. It was easy to see just where the two cars came to rest [or] ... at least, where they were stopped, and the condition of the cars could be observed. However, I could not say just where I was when I first saw the other car or just where it was, or how fast it was going. Within half an hour after the accident, and with my trained experience of knowing the important factors, I wrote what was probably the most unsatisfactory report my insurer had received for a long time.”

In how many other legal situations would lawyers be so helpless to recall and analyze pertinent factors for the purpose of establishing legal responsibility? Because of this inability of people really to remember what happened in traffic accidents, many lawyers will agree that traffic accident cases are unique in the extent to which parties and witnesses, as well as lawyers in conferring with them, are subject to inducements to exaggerate, to resort to half-truth, and to flirt with the boundaries of outright perjury.

The difficulty in auto cases of applying the “fault” criterion is compounded by other difficulties. For example, the delay of years between accident and trial means that those witnesses who are still available cannot possibly remember accurately the minutiae of the speed and placement of cars in complex incidents that occurred in a few split seconds years ago—even if you assume they could do so right after the accident. Added to this almost necessarily inaccurate testimony is the bias of any party toward his own cause, which is aggravated in automobile cases by the inordinate pride that almost every motorist takes in his own driving and his concomitant inability to concede his own driving error—especially when an accident has followed. The result of all this is that automobile litigation is more fraught with both innocent misrepresentation and outright perjury than any other area of contested litigation.

Assume, however, that a traffic victim is fortuitously able to negotiate all the shoals of a negligence suit and succeeds in establishing the defendant’s liability. Other difficulties still remain.

The measurement of damages in these personal injury cases is often wildly intuitive.

At a recent legal medical seminar, a prominent personal injury lawyer spoke unabashedly of his craft to his peers:

"I put in my book, at least, the appearance of the plaintiff as number one in attempting to evaluate [personal injury] law suit because I think that a good healthy-appearing type, one who would be likeable and one that the jury is going to want to do something for, can make your case worth double at least what it would be otherwise, and a bad-appearing plaintiff could make the case worth perhaps less than half of what it might be otherwise."[8]

How is it that the system allows compensation for injury to turn on such relatively frivolous factors? Of course, it is true that toting up a victim's out-of-pocket losses—medical expenses, lost wages, damage to his motor vehicle, etc.—is rather automatic. But projecting losses into the future—predicting potential medical expenses and reduction in earning power and calculating their present worth—is much trickier. It is true that relatively simple actuarial techniques can be used, and this can be a fairly rational process. The fact remains, however, that the estimate for the future is almost certain to be wrong one way or the other, for at best it is an educated guess. And the degree of uncertainty is multiplied manifold by still other problems in establishing personal injury damages. How is one to measure, for example, the value of the loss of a leg—especially the pain and suffering, both past and future—in dollars and cents? The answer, of course, as many courts have had to admit, is that one cannot. And yet, this measuring the unmeasurable is precisely what the jury is asked to do. The result is that the matter of damages is turned over to the jury's discretion with only the most permissive limits on its exercise. The result, in turn, is license to squander or stint through whim or bias. The result, too, is added delay while the parties argue over the unanswerable.

Even for the occasional person who strikes it rich, however, the woe is not ended. Not only will he be left with the injuries and suffering that compensation is designed to rectify, but also the process of gaining the compensation will often aggravate his condition. Because any victim will, rightly, fear getting less if he appears before a jury fully healed or rehabilitated (with, for instance, an artificial leg that he can expertly use), very

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8. IOWA ACADEMY OF TRIAL LAWYERS, LEGAL-MEDICAL SEMINAR 119-21 (State University of Iowa College of Law, 1963).
often he will forego treatment or rehabilitation during the long delay between accident and trial in order to appear before a sympathetic jury as pathetically handicapped as possible. If the gamble pays off and a large award results, it may still be too small for the more expensive care required by a late start at rehabilitation. And, of course, there is no guarantee, and indeed probably little chance, that the award will be spent on rehabilitation anyway. Several studies have shown that most automobile accident victims are unaccustomed to the management of a relatively large sum of money and will allow their awards to be dissipated.  

Another barrier to full recompense is the high cost of legal representation for claimants—a corollary of the uncertainty and delay under the present system. Lawyers who try negligence cases come from a very specialized and accomplished group, and their unique capacity to wring large verdicts from juries will often cost the victim a third or more of the resulting verdict. A recent study of traffic injuries in Michigan, for example, found that 68 per cent of those who recovered from the other party incurred “collection expenses” ranging up to 60 per cent of their settlement, with a mean of 32 per cent in all cases in which expenses were incurred. Most of this expense is paid to lawyers in the form of a “contingent fee,” i.e. the lawyer agrees to take a percentage of whatever payment is made (usually around 33% but often higher) but to receive nothing if the case is lost and therefore nothing is paid. Regardless of the merits of contingent fees for personal injury lawyers—and they are the subject of intense controversy—it is significant for our purposes that, according to one commonly held theory, contingent fees survive in the United States as a corrective of the “risk involved in the gamble of a negligence suit.” A lawyer won’t collect from some of his clients so he must charge higher for those he does collect from. Also the claimant is so unsure of whether or how much he will recover that he can’t afford to agree to pay a set substantial fee regardless of the outcome.

All this is not to condemn the lawyer and his contingent fee. On the contrary, given the unreasonable complexity of the pres-

9. Conard 81, 84.
10. Id. at 190-91.
ent system, the lawyer often more than earns his fee in guiding his client up the tortuous path to payment. Rather the quarrel is with the overly complex system that requires such expensive services in almost all cases—large and small.

Obviously, then, the present system of compensating traffic victims, based on legal liability for negligence, is hugely expensive and inefficient—paying even more for the overhead of insurance companies, lawyers, and courts than for the compensation of victims, and inequitably distributing the compensation it does pay. In sum it provides too little, too late, and does it unfairly, wastefully and corruptingly.

What, then, is the answer?

Perhaps it could be the Basic Protection Plan which Professor Robert E. Keeton, of the Harvard Law School, and I drafted after a three-year study conducted at the Harvard Law School and which we think would solve the most pressing problems posed by the present automobile claims system.\(^{12}\)

The Basic Protection proposal entails two principal features.

The first is a new form of compulsory automobile insurance\(^{13}\) (called Basic Protection coverage), which compensates all persons injured in traffic accidents without regard to anyone's fault or lack of it.\(^{14}\) Basic Protection insurance pays for losses up to limits of $10,000 per victim for every victim's out-of-pocket losses—which consists principally of medical expenses and wage losses.\(^{15}\) No payment is made under Basic Protection for pain and suffering.\(^{16}\) Whenever a motorist carrying Basic Protection insurance is in an accident and he, or a guest, or a pedestrian, is injured, the motorist's own Basic Protection insurance company compensates him or his guest or the pedestrian.\(^{17}\)

The second feature of the Basic Protection proposal sharply reduces negligence litigation by a statutory exemption. All those persons who are insured (which will mean virtually all motorists since Basic Protection insurance will be compulsory) are exempt from legal liability for negligent driving if damages for pain and suffering (as now measured in negligence cases)

\(^{12}\) See note 4 supra.
\(^{13}\) Basic Protection 286-288.
\(^{14}\) Id. at 276-77.
\(^{15}\) Id. at 260, 283.
\(^{16}\) Id. at 285-86.
\(^{17}\) Id. at 274.
are not greater than $5,000 and other damages (such as for medical expense and wage loss) are not greater than $10,000. In all other cases, the effect of the exemption is to reduce the liability for negligence by these same amounts. In other words, if a victim injured by a person carrying Basic Protection insurance suffers, say, $500 of medical expenses and $1,000 of wage loss, he is not able to recover anything in a negligence suit for his out-of-pocket loss and very likely nothing for pain and suffering since it is so unlikely that, in such a case, the finding for pain and suffering would exceed $5,000. Rather, he is reimbursed for his medical and wage loss by Basic Protection insurance. But, if the victim suffers, say, $6,000 of medical expenses and $12,000 of wage loss, he recovers $8,000 in a negligence suit, for his out-of-pocket loss is paid to him under Basic Protection insurance. For his pain and suffering, he recovers in a negligence suit whatever the jury awards him in that category, minus $5,000.

Note, then, that this exemption from legal liability for negligence performs two crucial functions.

(1) It eliminates suits over negligence in a great mass of cases of less severe injury, in which damages under claims for negligence could not exceed $5,000 for pain and suffering or $10,000 for other damages. These are precisely the cases in which the amount spent in trying to determine "who must pay what" tends to be disproportionate to the amount ever actually paid. Thus, the exemption drastically reduces the number of cases in which the expense of litigation and preparation for the prospect of litigation will be incurred, since the percentage of injuries so severe as to escape applicability of the exemption is small. The effect on both court congestion and the administrative overhead of the automobile claims system will be distinctively beneficial. (2) In both types of cases—both large and small—the exemption serves to avoid duplication or overlapping between basic protection payments and amounts received from negligence claims. In other words, when out-of-pocket loss is under $10,000, it will be paid for only under basic protection insurance; losses in excess of that amount will be paid for through automobile negligence insurance.

Although this new coverage is like workmen's compensation in calling for payments on a basis of liability without fault and

18. *Id.* at 274-76.
for periodic payments as losses occur, it is nonetheless very different in other important respects. Unlike workmen's compensation laws generally, the proposed Basic Protection law preserves negligence actions for cases of severe injury—cases in which negligence damages exceed the exemption. Also, the 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 existing 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 negligence suits that are preserved but also the more substantial Basic Protection claims (involving at least $5,000 of out-of-pocket 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 insurance than to workmen's compensation insurance. The closest analogy in present insurance covering legal liability for negligence, however, is medical payment coverage—the very common supplementary coverage under present auto policies under which a motorist's own insurance company agrees to pay him or occupants of his car for medical expenses incurred in treatment of a traffic injury, regardless of anyone's fault.

A few additional points will help to explain the practical operation of the new plan.

Basic Protection benefits will not duplicate benefits from other sources such as sick leave, Blue Cross, or accident and health insurance policies. Thus, to the extent that loss is covered by other benefits, Basic Protection benefits will not be paid. To put it another way, Basic Protection benefits are designed to reimburse net loss only.

Basic Protection benefits are payable month-by-month as losses accrue, and not in a lump sum as are damages from a negligence suit. (Basic Protection benefits may be paid by lump sum payments in special circumstances—for example, when the amounts are too small to justify the expense of periodic payment).

19. Id. at 293-94, 295.
20. Id. at 280.
21. Id. at 278-79.
22. Id. at 277-78.
Damage to property, including motor vehicles, is not covered by Basic Protection; property damage claims will continue to be handled under present law and insurance coverage. A damage to vehicles is already covered in most cases by insurance payable without reference to fault, since most cars in use today are covered by so-called "collision" insurance under which a motorist's own insurance company pays him for damage to his car, regardless of fault. Consequently, it seems wise to limit reform to the major social problem now produced by automobile accidents—compensating victims of personal injury.

Although Basic Protection coverage is limited to out-of-pocket loss and does not reimburse for pain and suffering, a policyholder may, if he wishes, purchase optional "added protection" coverage to reimburse him for his pain and inconvenience arising out of an automobile accident. Similarly, although Basic Protection coverage is limited to a total of only $10,000 of loss, a policyholder, may, if he wishes, purchase optional added protection called "catastrophe protection," providing benefits up to $100,000 in addition to basic protection benefits.

A Basic Protection insurance policy—like the present automobile insurance policy—will be issued to the owner to cover a vehicle described in the policy. The new coverage will be marketed in the same way and through the same sources as present automobile insurance.

At least two other elements of the Basic Protection deserve discussion. First, since, as many studies show, it is the catastrophically injured victim who suffers most, why do we concentrate on the other end of the spectrum by providing compulsory coverage under Basic Protection for the first $10,000 in loss? Second, since, according to our own arguments, the negligence criterion is so difficult to apply in traffic cases, why do we preserve it for the larger ones?

As to the catastrophically injured, it is important to note that the Basic Protection system is of great help. (1) It pays him his first $10,000 of loss and does so promptly, which will obviously be a great aid to him. (2) It will clear the court dockets so that his tort claim for more compensation can be promptly heard. (3) It makes available to him on a voluntary basis added protection to cover catastrophic losses.

23. Id. at 280-281.
24. Id. at 284-85.
25. Id. at 295.
As to why we have not made catastrophe protection compulsory—instead of or in addition to Basic Protection—the catastrophically injured traffic victim does not present a unique social problem different from that of the catastrophically afflicted in general—whether afflicted from a fall or cancer. But the relatively minor traffic injury does pose a unique problem—a problem which is soluble separately. The relatively minor traffic injury—with its extant and separate insurance coverage, with its wasteful system of compensation, and its devastating effect on our court system—does indeed present a problem that can rationally be carved out and dealt with separately.

As to why we preserve negligence litigation in the larger traffic cases, no system of insurance payable without reference to fault—such as basic protection—ever seems to supply full compensation to the catastrophically injured. In the words of one eminent authority, Professor Alfred Conard of the University of Michigan, making up the huge losses of the catastrophically injured above a basic level remains all over the world "the virtual monopoly" of negligence claims. Thus, according to the same authority, the ideal claim system would keep "alive the plurality of existing programs—from social security to damages [for negligence]."

Secondly, proposals to eliminate completely the common law action for negligence arising out of automobile accidents are perhaps doomed to founder as unable to muster the necessary widespread political support. The concept of liability based on fault is deeply rooted in our society and will not be lightly cast aside. Moreover, apart from pragmatic considerations and purely on grounds of principle, to make a case for basic protection for the traffic victim regardless of fault is not to make a case for the total irrelevance of fault. Especially in the egregious case in which injuries and damages reach catastrophic proportions and fault is clear, there is much to be said for visiting all that negligence damages entail on the person at fault, and thereby including in the award compensation for the pain and suffering accompanying a prolonged and bitter convalescence or permanent disability.

Let me return to the question of court congestion since that is a question of such central concern. In their book, *Public Law*

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26. Conard et al. 86.
Perspectives on a Private Law Problem,28 Professors Walter Blum and Harry Kalven of the University of Chicago Law School admit that traffic cases play a key role in causing court congestion in many parts of the United States.29 They insist, however, that court congestion and resulting delay constitute a separate problem that should be dealt with separately, apart from any plan for liability without fault in traffic cases.30 One may doubt that the two problems can be separated. If simplification of the standard of liability would remove the principal cause for the large number of traffic cases that cannot be settled because fault is so difficult to resolve, is it not rather arbitrary to insist that the congestion-and-delay problem be regarded as an independent question? As previously pointed out, separate solutions for court congestion may be self-defeating in that the more the backlog of traffic cases is reduced, the more additional cases will be entered for trial, thus wiping out any saving achieved. It may not be valid, then, to say, as Blum and Kalven do, that a fault system inevitably involves delay while fault is investigated and that traffic accidents should not be treated differently from any other group of cases.31 Perhaps a special situation calling for special solution is presented when we are faced with a huge class of cases intractable to the fault criterion. Indeed, even if we should concede that the fault issue is a manageable one in traffic cases viewed one by one, their inordinate number (which will continue to mushroom, just given the variables of more cars, more young people, and less space)32 might justify simplifying the issues for traffic cases alone in order to relieve the log jam. There comes a point at which we simply cannot afford the luxury of dissecting each traffic accident to see who is at fault for the purpose of deciding what compensation shall be paid. We end up spending more on the process than we do on compensation, and as Professor Conard and his colleagues in their Michigan study have shown—far from satisfying people's sense of justice—end up outraging them by the delay and anxiety involved in the process.33 (Perhaps the analogy to our federal tax laws is instructive. There the law says that for incomes under $10,000, we need not bother to dissect each return to see

29. Id. at 75, 31 U. CHI. L. REV. at 713.
30. Id. at 76, 31 U. CHI. L. REV. at 714.
31. Id. at 71, 31 U. CHI. L. REV. at 709.
32. See BASIC PROTECTION 11-12.
33. CONARD et al. 8-9, 280-81.
what deductions should be made but rather use a standard deductible.)

Of course I am aware, as I suggested earlier, that other solutions to the court delays caused by auto accident cases have long been advanced. In addition to appointing more judges and abolishing jury trials in such cases, we hear, for example, of (1) the split trial procedure, (2) the pre-trial conference, (3) compulsory arbitration of small claims, and (4) hearings before auditors, all advanced as panaceas. But in a scholarly and expert review of all these devices, Professor Maurice Rosenberg, formerly Director of the Project for Effective Justice at the Columbia Law School, rejects each of them as a promising solution to court congestion. Says Rosenberg, "Today it can be fairly said that there is no acceptable evidence that any remedy so far devised has been efficacious to any substantial extent." He does admit, however, to one exception: "It is clear that if the intake of [personal injury cases] . . . were shut off, the work load of many jammed courts would shrivel to insignificance. With sharply cut loads, the courts presumably would soon get and remain current in dispatching their dockets."

The basic protection plan, then, by eliminating the great mass of smaller auto accident cases would clearly, under Rosenberg's analysis, go a long way toward solving the problem of court congestion.

This is not to say that the primary aim of the basic protection plan is to eliminate court congestion. Even if court dockets were uncrowded, other features of the present automobile claims system cry out for reform by the basic protection plan. As already suggested, the present system not only clogs our courts but is highly wasteful and expensive. Studies show that $2.20 must be paid in for each dollar that is paid out to an injured accident victim. The present system, in addition, leaves many victims either totally uncompensated or with only a fraction of their loss paid—especially among the seriously injured. On the other hand, the present system provides generous and even profligate compensation to others—especially among the trivially

35. Id. at 55.
36. Id. at 38.
37. Conard et al. 59.
38. Basic Protection 35-37.
injured. The present system is also marred by the temptations to dishonesty, mentioned earlier, that trap a stunning percentage of drivers and victims by requiring that each person "remember" the details of what happened in the agony of a split-second of collision months or even years before and further requires him—if he wants to be paid—to "remember" that he was careful and the other fellow careless.

All this would require reform even if there were no court congestion. But the bitter delays of years' time added to court calendars by auto accident cases unquestionably lend powerful support to an already overwhelming need for reform.

At the outset I mentioned the comparison between basic protection insurance and fire insurance. Basic protection insurance—like fire insurance—would be payable by your own insurance company for your out-of-pocket loss without regard to anyone's fault.

Suppose, however, that instead of proposing to apply a system like fire insurance to automobile insurance, I were to suggest the opposite—namely applying the auto insurance system to fire insurance. Suppose I suggested that after a fire, a victim could be paid for his loss:

1. Only if he could prove that someone else was at fault or that he was free from fault (e.g., if he had failed to reshingle his roof with fire resistant materials, he couldn't recover, with all the attendant problems of proof).

2. Only after he had hired a lawyer to press a claim against someone else's insurance company which felt no loyalty or good-will toward him.

3. Only after months or—more likely—years of delay.

4. Only after squabbling over a totally indeterminate amount (for example, assume after a fire a homeowner would be entitled to claim not only for his out-of-pocket loss, such as the market value of his burned couch, but also for his pain and suffering arising from the fact that his beloved Aunt Minnie gave him the couch, with all the attendant problems of proof here, too).

Suppose I made that suggestion. No one would ever agree to trade the present fire insurance system for the jungle I have just outlined. And yet, in essence, is not that just what those
who propose to retain the present system are suggesting for auto insurance?

It's true that traffic accidents in some respects are different from fires. Serious traffic injuries are probably more likely to be caused by provable and genuinely blameworthy conduct—witness, for example, the high percentage of fatal traffic accidents attributable to alcohol. So it makes sense to undergo the costs of determining fault in traffic cases of quite severe injury. But as to the great bulk of traffic accident claims, isn't it time we paid the traffic accident victim like the victim of a fire—promptly, graciously and fairly, and without chewing up most of the available money through the expenses of lawyers, insurance companies, and the courts, all of whose talents are so wasted in battling over unrealistically complicated criteria for payment?

And on this question of wasting legal—as well as other—talent, we reach an issue of real bite. Not long ago, there was released a film produced by the American Trial Lawyers (ATL), the organization of plaintiffs' personal injury lawyers, in cooperation with the University of Michigan Law School, showing a trial of a typical law suit. The purpose of the film, according to the publication "Trial," the magazine of ATL, is to help "revive the 'vanishing breed' of the trial lawyer." Says "Trial":

"The American Trial Lawyers Association has learned from its many successful continuing legal education seminars . . . that there is an 'underlying respect and admiration among law school students for the field of advocacy and the courtroom expertise of the top trial expert.' . . .

"With this psychological base of admiration and 'respect,' combined with the acknowledged increased remuneration now available in trial practice, the ATL Board of Governors voted funds for special law school [projects] . . . distinct from the regularly scheduled lawyer seminars. . . .

"The result: [ATL] . . . chose as an effective teaching aid and as an inspiring media [sic], the most obvious, but not expensive, of the audio-visual aids—the universal motion picture medium. . . .

"The series develops around a hypothetical representative civil case, William v. Andrews. It is based on an actual trial.

"The films are legally accurate and in excellent taste, while retaining interest and action to give the feeling and expertise of an actual trial."\(^{40}\)

Among the lawyers participating in the film are such eminent trial lawyers as James Dempsy, While Plains, New York, former president of the International Academy of Trial Lawyers; Craig Spangenberg, Cleveland, Ohio, a past national ATL vice-president; and Jacob D. Fuchsberg, New York, New York, a past national ATL president.

Not surprisingly, the "representative civil case" selected by ATL and the University of Michigan was an intersectional collision between two automobiles.

But the result for anyone looking at the films objectively is not to illustrate the glories of trials and trial work, but unwittingly to confirm what has already been said about the almost incredible waste of talent and money and time and energy of countless experts and ordinary citizens in arguing about matters unworthy of a small fraction of the resources expended.

In her first interview at her lawyer's office, the plaintiff in the film says, in describing the accident, "Since I was going to turn left I had my signal on. Out of the corner of my eye, I suddenly saw the other car. Then there was a terrible shock. I just can't explain it. It was an awful feeling."\(^{41}\) Later in taking the plaintiff to the scene of the accident to reconstruct it, her lawyer says to her, "Like every accident, it probably happened pretty fast. I know your recollection is pretty confused. And that is only natural. It probably happened with startling suddenness and in addition, a great deal of time has elapsed since it happened." To each of these statements the client readily agrees.

At the scene of the accident, the following exchange takes place.

Says the woman, "I came to a full stop. I remember there

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40. A $100,000 Teaching Experimental, Trial, August/September, 1966, pp. 20-21.
41. This and other quotes from the film are not precisely verbatim from the sound track but a close approximation based on careful notes made during multiple runs of the film.
were two—no—three cars to my left and I waited for each of them to clear the intersection and then I pulled out slowly. Then this other car plowed right through the stop sign and hit me."

"You didn't see the truck go through the stop sign, did you?"

"No, but it must have been the way it hit me."

"Did you see the truck when it hit you?"

"No, not exactly. I sort of saw it out of the corner of my eye, the way you see things that way."

"How far away was the truck when you first saw it?"

"Well, how can I tell, I can't say."

"How fast was it going?"

"Well, it was traveling fast, I'll tell you that. It's been such a long time. I wasn't paying that much attention. In addition, I'm just no good at gauging distances and speed."

At that point, plaintiff's lawyer tells her that she will have to remember as best she could. Then as the scene fades out, the narrator comments that the lawyer explains the rules of negligence and contributory negligence to his client making clear that if she is to be paid, she must establish negligence on the part of the other driver and no contributory negligence on her part. The lawyer is then shown saying to the client, "You are going to have to try to remember. Whether you like it or not, you are going to have to recall distances and speed."

Of course this exchange is not surprising to anyone who has ever tried an automobile accident case. This prodding of witnesses and clients to remember the unrememberable—and making very clear the unfortunate consequences to a client of not remembering—is standard procedure in almost every automobile accident case. What emerges, of course, is not likely to be real memory but a mixture heavily larded with wishful thinking.

Thereafter, throughout the preparation during the trial it is made abundantly clear that no one remembers very precisely what happened. Certainly the defendant's memory is diametrically opposed to the plaintiff's. According to him, he stopped but she turned suddenly without using her turn signal. In addition, wholly differing views on whether the defendant or plain-
tiff drove properly are advanced from varying witnesses. (One
witness who purports to be positive on this point is proven to
have been situated where he couldn’t see what he was purporting
to remember.) Indeed after all the prodding of plaintiff by one
of her counsel, another of plaintiff’s lawyers, in speaking of her
recollection to a third person, says, “Keep in mind that my client
may be mistaken. She has told us certain things which I am
sure she means in good faith, but she may be telling us things
she really doesn’t know or that are wrong. Everyone at an acci-
dent sees things differently and remembers things differently.”

Of course this kind of total confusion can be true for other
litigated matters as well, but no one really doubts that the in-
ability of counsel, clients, witnesses, and even courts to recon-
struct accurately the split-second occurrences in traffic accidents
is far more prevalent than in other types of litigation and this
film makes that abundantly clear as just the few quoted ex-
amples illustrate.

In the course of the film, we learn at the pretrial conference
that the plaintiff’s damages from the accident were approxi-
mately as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctor’s bills</td>
<td>$135</td>
</tr>
<tr>
<td>Brace</td>
<td>$25</td>
</tr>
<tr>
<td>X-Ray</td>
<td>$10</td>
</tr>
<tr>
<td>Emergency room</td>
<td>$5</td>
</tr>
<tr>
<td>Property damage to vehicle</td>
<td>$365</td>
</tr>
</tbody>
</table>

The property damage was probably covered by collision insur-
ance and much of the rest by either medical payments coverage
or health and accident insurance. (This is confirmed by the
vigorous attempt by the defendant to introduce evidence of pay-
ment of the plaintiff’s losses by other sources—even to the point
of appealing the trial judge’s ruling excluding such evidence in
an attempt to try to persuade the Supreme Court of the State
to change the collateral source rules which excludes considera-
tion of other payments.) The defendant’s loss was limited to $15
to $20 worth of damage to his car which he hadn’t bothered to
have repaired.

On the basis, then, of a case with this kind of out-of-pocket
expenditure, the following outpouring of effort and expense
occurs:

†Many conferences between lawyers and client on both sides.
Many conferences between lawyers and witnesses, often with a tape recorder — conferences with all kinds of witnesses "reluctant, dogmatic and hostile." Many of these interviews are shown as lasting almost an hour or longer. All result in extensive signed written statements.

Canvassing of neighborhoods to uncover new witnesses by both sides.

Extended conferences among lawyers for both sides preparing elaborate trial briefs.

Extended conferences among lawyers for both sides over trial tactics.

Extended legal research on both sides on the law governing right of way, dominant vs. serviant highways, stop signs, reasonable expectation of unforeseen conduct by other drivers, etc.

Extended visits to the scene by clients and witnesses with, in one instance, police holding up traffic and cars placed in positions to simulate the position of the accident cars before, during, and after the accident with accompanying careful measurements of distances by lawyers and investigators.

Depositions of parties and witnesses lasting more than an hour with a court reporter transcribing each word and supplying multiple copies.

Maps, photographs, surveys, and plats of the scene prepared by professionals with scientific precision to reproduce exactly eye level views, distances, proper scale, etc.

Pretrial motions in court.

Pretrial conferences between counsel and the judge.

A trial of several days length before a judge and jury. (At a pretrial conference the plaintiff indicates that his case will take two days, the defendant, about a day and one half. The judge indicates firmly that two days should be enough. We are not told how long the trial actually takes.)

Post-trial motions in court, with briefs presented on both sides.

A probable appeal.

The whole process permeated with impatience, distrust,
animosity, anxiety, and anguish among parties, witnesses, and even counsel.

The plaintiff wins (as one might expect from the film produced by the organization of plaintiffs' lawyers). We are not told how much the verdict is. But we do know that the defendant moves to have the verdict set aside as excessive, with the observation that a verdict of about $3,000 would have been proper. We also learn through the pre-trial negotiation that plaintiff's lawyer thinks she might get as high as $10,000, that he "expects" $6,500, but he might accept $3,500 in settlement, and turns down $2,500.

In terms of her damages, it is true that in addition to her medical bills, etc., the plaintiff claims a painful and possibly permanent neck injury from the accident, aggravating a previous condition. But watching all the expensive preparation of the case, one wonders how much is left of any judgment to compensate her for her discomfiture. (Note that under Basic Protection insurance if she desires compensation for her pain and inconvenience she could purchase optional coverage providing such payment. Thus Basic Protection does not do away with such coverage: It makes it available to those willing to pay for it.)

It is true that because of the allegedly permanent nature of the plaintiff's neck injury, hers is a case where a negligence action might still be allowed under the Basic Protection system. But this is a marginal case and thus all cases less than this in magnitude would be handled exclusively under Basic Protection. So even if you assume this case could result in a negligence suit under basic protection, the type of waste attendant on would still be eliminated in the myriad cases of less severe injury. The tragedy today is that the type of effort and resources illustrated in the ATL film are expended in varying degrees in almost every one of the countless traffic accidents resulting in personal injury occurring every day in every jurisdiction.

As a result, there probably could be no better advertisement for Basic Protection reform than the showing of this ATL film throughout the country. The waste of commensurate time and money in deciding in so many cases whether millions of traffic victims are to be paid from applicable insurance after traffic

42. Basic Protection 284-85.
43. Id. at 274-76, 447-48.
accidents is so patent that the film ends up as a most eloquent advocate for changing the present system. Once again, one can only ask what would be the reaction if we had to go through all this or at least had to prepare to go through all this concerning the availability of insurance after every fire?

The irony is that all this waste and unnecessary uncertainty will be apparent to all but those few who may be blinded by their participation in this profligate process: Preoccupation with the mechanics of the process apparently caused the ATL to select this type of case for this film, supposedly to put its best foot forward—to “inspire” the young to develop and devote their talents in such affairs! (Of course in a way ATL is trapped. If one is going to talk about a “representative civil case” today, he almost has to talk about an automobile accident case—there are so many more of them than any other kind!)

The glories of the trial bar can be revived but they are demeaned when they are endlessly devoted to endlessly picking away at who went through stop signs months or even years before.

The time has come, as ATL suggests, to revive the glories of the trial bar—but this can only be done by a system which uses their talents in cases worthy of them. This should become more and more apparent to everyone.