



YES, VIRGINIA,  
THERE IS NO-FAULT  
INSURANCE

—Charles Poston

Today's growing popular demand for improvement in the automobile insurance industry has found responsive expression in many forms. Some schemes favor keeping the present tort liability system with modifications designed to meet the

most serious complaints consumers have voiced; other plans—and certainly those most publicized—have proposed abolishing the tort liability system altogether and replacing it with a “no-fault” insurance system.

The essence of no-fault liability insurance is the absence of the requirement of finding tort liability (or fault) in the insured before an obligation to pay arises.<sup>1</sup> Most plans provide that the insured's own company will pay costs for medical treatment up to a set amount or threshold level.<sup>2</sup>

Virginia, like her sister states, has felt the rising discontent with the present insurance system. Quick cancellation of policies by some companies--frequently publicized by Lieutenant Governor Henry Howell--prompted the General Assembly to place restrictions on the companies' right to cancel automobile liability insurance policies.<sup>3</sup> By the 1972 session of the General Assembly the automobile insurance reform movement had clearly grown to be a force of some strength. Several bills purporting to be no-fault measures were introduced, but some of these were no-fault proposals in name only. Others represented serious attempts to effect useful change in Virginia's automobile insurance system.

Most states have at least considered no-fault proposals, and approximately ten have adopted some form of no-fault automobile liability insurance.<sup>4</sup> Most of these supposed no-fault laws have simply modified the traditional system based in tort liability.

Massachusetts and Florida have perhaps the truest of the no-fault laws, both of which are based on the Keeton-O'Connell recommendations,<sup>5</sup> which are found in their work *Basic Protection for the Automobile Accident Victim*.<sup>6</sup> This work was the first comprehensive study of the automobile tort liability system undertaken with a view toward reforming it. The study, of course, sparked a great deal of debate among the academic community, legal societies, consumer groups, and insurance organizations. Supporters rapidly gathered under the no-fault label, believing it to be the panacea for all automobile insurance ills; and opposition to the proposal formed just as quickly. Some of the opposition was based upon serious, thoughtful reasoning; some represented an emotional response to what was seen as a challenge to financial interests. Certainly, neither side had a monopoly on reason and logical thinking, but it seems that every serious study of the automobile insurance problem resulted in recommendations for reform, whether or not under the tort liability system.<sup>7</sup>

#### THE MASSACHUSETTS PLAN

About two years ago Massachusetts enacted the first no-fault statute in the country.<sup>8</sup> The Massachusetts Plan, in brief, provides that every car

owner must purchase at least \$2000 in medical and wage continuation benefits protection for his passengers and injured pedestrians. Unless a bone is fractured, permanent impairment results, or medical bills exceed \$500, claims for general damages, in addition to the insurance benefits provided by the law, are not permitted. In other words, immunity from tort liability is granted up to a \$500 threshold level. The tort liability system is retained for general damages in excess of \$500 as well as for disfigurement, fractures, and in some cases, part payment for lost wages. Subrogation of claims is permitted when tort liability is found. If the injured driver is intoxicated, doped, or if he intentionally injures himself, no-fault coverage does not apply.<sup>9</sup>

When the Massachusetts Plan went into effect in January, 1971, a fifteen percent reduction in premiums was ordered for personal injury insurance. Before the year had ended, however, the state insurance commissioner, seeing that the savings actually realized under no-fault insurance exceeded the initial estimates, ordered a further 27.6% reduction for 1972. Prior to 1971, Massachusetts had one of the highest premium rates in the nation; but during the first nine months under no-fault, there was a 60.6% reduction in average claims. Although the figures for 1970 were computed differently from those for 1971, there was clearly a substantial saving to the policy holders in premium rates under the no-fault law. In 1972 the no-fault coverage was extended to property damage as well as personal injury.<sup>10</sup>

The Plan's immediate success in Massachusetts resulted in widespread publicity of the savings to the policy holders, and this promise of substantially lower rates won new converts to no-fault proposals. Four more states have since adopted compromise plans, others have ordered insurance companies to offer no-fault coverage on an optional basis, and a large majority of the remaining states including Virginia are studying various proposals for automobile insurance reform.

#### ACTION IN VIRGINIA

In December, 1968, the Virginia State Bar appointed a committee to undertake an impartial study of various "Basic Protection Plans" which were then being proposed by various groups and to offer recommendations as to the best method of reform, if such was needed. The report, submitted for the year ending June 30, 1971, urged retention of the basic tort liability system with certain modifications. It suggested giving courts not of record exclusive jurisdiction over claims up to and

including \$3000, abolition of the right of removal to a court of record, and retention of the present right of appeal. The committee sought to reduce court time and, in some cases, court costs by allowing written medical reports as well as bills and estimates for repairs given under oath to be admitted into evidence as exceptions to the hearsay rule. The committee felt that the contingency fee system allowed persons with valid claims who could not otherwise afford to pay attorneys' fees to seek relief in court. The State Bar committee therefore urged that the contingency fee system be retained with supervisory authority lodged in the trial court.

The committee's major recommendations concerned the substantive law of negligence in Virginia. It recommended abrogation of tort immunities covering governmental units, charitable organizations, and the relationships of husband to wife and child to parent. It endorsed repeal of the statutory requirement that a guest may recover only upon a showing of gross negligence by the driver, and recommended adoption of a system of comparative negligence which would, by its nature, abolish the doctrines of last clear chance and contributory negligence, which now prevent recovery in many automobile negligence cases. Except for the comparative negligence recommendation, the changes suggested by the committee were relatively minor, with no support being shown for a change in the basic tort liability system.<sup>12</sup> Many of the recommendations offered by the committee could be attacked on grounds of self interest. For example, abrogation of the immunities might increase the number of recoveries and perhaps open some deeper pockets to plaintiffs, thus giving their attorneys larger fees. As a whole, however, the committee's recommendations represent what seems to be a conscientious attempt to evaluate the present system in light of the alternatives available today. The basic proposals of the State Bar Committee were introduced into the 1972 session of the General Assembly as House Bill Number 594.<sup>13</sup>

Perhaps the most vocal opposition to the no-fault concept comes not from the State Bar as a whole but rather from the Virginia Trial Lawyers Association, an organization composed in large measure of negligence attorneys. During the 1972 session of the legislature, the Virginia Trial Lawyers Association and the Virginia Association of Defense Counsel urged the legislature to require automobile insurance policies to include benefits for medical expenses and loss of wages. No-fault advocates, however, attacked the suggestion as one failing to deal with the basic problems confronting automobile owners. They charged that the additional coverage would result in substantial increases in premium rates.<sup>14</sup>

Early in the 1972 session the Virginia Advisory Legislative Council (VALC), a study group composed, in part, of attorneys and legislators, urged the adoption of no-fault automobile insurance in Virginia. The VALC cited widespread dissatisfaction with the present system, overpayment of some claims and delayed payment of others, and over-protection of the negligent party in comparison to the victim as reasons for endorsing no-fault. Among the advantages it expected from no-fault were more protection for the same cost, prompt payment regardless of fault by one's own insurer, and reduced litigation while maintaining tort liability for the more serious cases. The VALC was closely divided in adopting this position, and several members expressed their opposition to it. One Council member charged that the plan "allows payment of large sums of money to the drunk, willful, wanton, and negligent driver."<sup>15</sup> Others evaluated the proposal as a cautious but well-considered position.<sup>16</sup>

Along with the genuine no-fault bills which fell into the legislative hoppers during the 1972 session, there were many bills proposing amendments to the existing automobile liability insurance laws. Perhaps the public demand coupled with what seemed to be a real threat of a federal law on the subject made the issue an even stronger one. Of the bills considered, the major proposal to survive the session was a bill entitled "The Virginia Automobile Accident Victim Reparations Act", hereinafter referred to as the Williams Bill.<sup>17</sup> Continued to the 1973 session, this bill followed the VALC proposal in many respects and was sent to the Committee on Corporations, Insurance, and Banking.

The Williams Bill provides prompt payment of medical expenses upon valid proof that a loss has been sustained. Duplication of payment for the same injury is prohibited, and the right to sue in tort is restricted to cases in which medical treatment expenses exceed \$1000 or when the victim suffers death, dismemberment, disfigurement, or permanent disability. The bill is not as drastic a reform as other no-fault proposals, however it provides both prompt payment of medical expenses and wage continuation benefits to accident victims. Indeed one of the major criticisms of the tort liability system is that those involved in serious accidents having large claims are often delayed by extended judicial proceedings while minor claims are settled quickly because of the financial impracticality of litigating them. Of course, persons in the former situation are frequently those who can least afford a delayed settlement.<sup>18</sup>

Several detailed insurance reform bills were introduced in the 1972 Assembly. At least two were entitled the "Virginia Automobile Accident Victim Reparations Act."<sup>19</sup> The common theme throughout these bills was to insure prompt payment of benefits to automobile accident victims. Many conclusions may be drawn from a comparison of these bills, but it seems indisputable that there is a growing concern in Virginia not only for dependable car insurance but also for prompt settlement of claims when accidents do occur. The number of bills introduced to effect some change in the insurance law reflects not only a legislative concern but also a realization that the voter has a vested interest in the issue. Early in the session, Governor Holton told the General Assembly that no-fault insurance is "an idea whose time has come." Among the advantages he sees in it are rapid payments for accident victims and a more equitable distribution of payments among those injured.<sup>20</sup>

Perhaps the greatest single reason for Virginia's public interest in insurance reform is concern for the premium rate structure. Insurance rates have not remained constant; neither have they decreased.<sup>21</sup> Every car owner has regular personal contact with premium payments. He pays them when they fall due and receives nothing tangible in return until he is unfortunate enough to have an accident, in which case he may well face prolonged negotiation and litigation before settlement. When an alternative offering substantial reduction in his premiums is proposed, the car owner cannot be expected to advocate retention of the tort liability system.

#### QUESTIONS AND CHALLENGES

In the midst of the clamor from various sectors of the public in favor of no-fault, there are numerous objections to be contended with. These objections fall into three categories: constitutional, traditional, and conceptual.

Constitutional challenges began in 1971 with the case of *Pinnick v. Cleary* in which the Massachusetts law survived a charge that it violated the right to trial by jury, separation of powers doctrine, and due process of law under the federal and state constitutions.<sup>22</sup> Under the no-fault statute the plaintiff recovered for medical expenses but not for loss of earning capacity or pain and suffering. On appeal he claimed that the law deprived him of his constitutional right to full recovery in tort under the due process clause. The court held that the statute was valid in that it was rationally related to the legitimate legislative purpose of regulating the insurance industry so as to provide more efficient administration of justice in automobile negligence

**"The greatest single reason for...public interest in insurance reform is...the premium rate structure."**

cases. Furthermore, the court stated that no one "has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."

In 1972, however, a contrary decision was handed down by the Illinois Supreme Court when it struck down the state's no-fault law as being violative of due process under the state and federal constitutions. The facts of the case were similar to those in *Pinnick* but the statute was not identical to the Massachusetts law. Here the court said that the law limiting amounts recoverable by accident victims for pain and suffering was invalid under the Illinois constitution.<sup>23</sup>

These cases illustrate not only the conflicting views of no-fault's constitutional validity but also the fact that no uniform law on the subject should be expected unless a federal law is passed. State constitutions, traditions, and preferences will dictate variations in insurance plans, and this is probably a desirable situation. Certainly state legislatures should be allowed to adopt the plans most suitable for their states. But again there is criticism of this view, noting that a conflict of laws problem of some magnitude would frustrate settlement of claims of out-of-state drivers. It is difficult to see, however, how no-fault systems would lead to any more of a conflicts problem than now existing under the many variations of the tort liability systems in effect throughout the nation.<sup>24</sup>

Another basis of opposition to no-fault is that it does violence to the ancient common law tenet that a wrongdoer must pay for his own misconduct. Does the wrongdoer now pay for his negligent driving or does his insurance company? All drivers pay insurance premiums of some sort. Accident settlement costs are certainly passed on to those insured through premium rates. In short, it is something of a fiction to insist that the negligent driver really pays for the damage he causes. To be sure, his premium rate may increase after an accident, but that burden is not really comparable to

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the situation of his having to satisfy any judgments against him out of his own pocket. The criminal law, on the other hand, does punish the wreckless and negligent driver in many cases. No-fault proposals do not attempt to disturb the criminal sanctions against such drivers. This moral justification for the present tort system as applied to automobile negligence cases, then, tends to lose its force when one delves beneath the surface. Perhaps it is not inaccurate to say that automobile negligence law has to some extent prostituted the basis of the tort liability system by encouraging the development of liability insurance to protect the *negligent* driver from the consequences of his negligent acts.<sup>25</sup>

Finally, there are the assertions that no-fault will not result in lower rates at all; that instead rates will remain unchanged or may even rise.<sup>26</sup> Possibly there was merit to these positions before no-fault insurance was tested in practice, but the success in Massachusetts tends to support the view that no-fault plans, in fact, offer substantial premium reductions. There has been no convincing evidence of no-fault bringing higher rates that has not been discredited by the cost reduction of approximately forty percent in Massachusetts.<sup>27</sup>

## CONCLUSIONS

Change is in the wind for the automobile insurance industry in Virginia, and political leaders ignore the public concern over the issue at their peril. The real question is related to the form the changes will take in Virginia and the extent of the changes. It is a question that demands an objective study of all alternatives, not an emotional, self-serving or haphazard approach. The no-fault concept poses some serious questions that must be answered, but it appears to have captured the public's support. The comparative negligence approach recommended by the State Bar committee certainly presents what may be an acceptable alternative. Its major obstacle, however, is the tremendous amount of publicity the no-fault proposals have had and the sensational success of the Massachusetts Plan. The consumer will tend to opt for the plan that serves him best for the least cost, and other interest groups will naturally be influenced by their special concerns. The General Assembly, then, must face the problem by considering all alternatives and adopting the plan most suitable for Virginia.<sup>28</sup>

There is nothing sacred in a concept or idea just because it is old, and prudent change of a constructive nature should not be feared. The no-fault proposals do not represent change for its own sake, but, rather, offer a plausible alternative for coping with a need—the need for prompt, efficient in-

surance coverage at a reasonable cost. While it is a proposal that alters a basic area of the law, our legal system is, ideally, geared to accommodate such change when necessary. From the consumer's viewpoint, no-fault insurance makes sense; and because the consumer in this instance is largely the middle-class individual, who is also the typical voter, Virginia can anticipate the General Assembly's adoption of some form of no-fault automobile liability insurance within the near future. \*

## FOOTNOTES

1. Brainard, "A No-Fault Catechism: Ten Basic Questions Raised and Answered," (1972) *Ins. L.J.* 317.
2. Greene, *Risk and Insurance* (2nd Ed. 1968), 453-54.
3. Va. Code Ann. §38.1-381.5 (Cum. Supp. 1972).
4. *The Wall Street Journal*, Aug. 7, 1972, at 1, col. 6.
5. *Id.*
6. 1965.
7. See *Report of the Committee to Study and Evaluate Basic Insurance Protection Plans*, Twenty-third Annual Report of the Virginia State Bar (1971) for a proposal to retain the tort liability system with certain modifications (hereinafter referred to as the State Bar Committee).
8. Puerto Rico adopted a government-sponsored no-fault system in 1968. Aponte and Denenberg, "The Automobile Problem in Puerto Rico," (1968) *Ins.L.J.* 884.
9. "Status Report on No-Fault Auto Insurance," *J.Am.Ins.*, Jan-Feb. 1972, at 10; Docey, "No-Fault—End of a Civilized Tort System?" 6 *New Eng. L. Rev.* 79 (1970).
10. "Will 'No-Fault' Bring Cheaper, Better Auto Insurance?" *Changing Times*, March, 1972, at 16-17.
11. Report of the State Bar Committee, *supra* note 7, at 36 et seq.
12. *Id.*
13. *Report of the Committee on Basic Insurance Protection*, Va. Bar News, May/June, 1972, at 23.
14. *Richmond Times Dispatch*, Jan. 18, 1972, at A6, col. 1.
15. *Id.*
16. *Virginian-Pilot* (Norfolk), Jan. 20, 1972, at A14, col. 1.
17. H.B. 337 (1972 Session).
18. Keeton and O'Connell at 11-13.
19. H.B. 315 and H.B. 337 (1972 Session).
20. Address to General Assembly, Jan. 12, 1972.
21. Keeton and O'Connell at 69-71.
22. *Pinnick v. Cleary*, 271 N.E. 2d 592, Mass. Interestingly, amicus briefs supporting the plaintiff's challenge to the bill were filed by the American Trial Lawyers Association, the Massachusetts Trial Lawyers Association, and the Massachusetts Bar Association. Amicus Briefs supporting the no-fault statute were filed by the American Mutual Insurance Alliance, American Insurance Association, and the Massachusetts Association of Independent Insurance Agents and Brokers, Inc.
23. *Grace v. Howlett*, 283 N.E.2d 474, 51 Ill.2d 478 (1972).
24. Braunstein, "Conflicts of Laws Problems Arising from Different No-Fault Auto Insurance Plans in Various States," 67 *The Brief* 234 (1972).
25. Jones, "The Great Myths About Auto Insurance Today," an address before the Society of Chartered Property and Casualty Underwriters, Jan. 22, 1969, in Philadelphia. Mr. Jones was President of the American Insurance Association which supports no-fault automobile insurance.
26. See Senator Tower's remarks on the federal no-fault bill. 118 CONG. REC. S13084 (daily ed. Aug. 8, 1972).
27. *The Wall Street Journal*, August 4, 1972, at 6, col. 1.
28. In *Pinnick*, *supra* note 22, the court pointed out that the automobile tort liability insurance system seems to have the highest cost/benefit ratio of any major compensation system in operation in the nation. For every dollar of net benefits, this system consumes about a dollar. 271 N.E.2d at 605.