ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILES 8672

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Maloney continued

deposit. That is, from a policy standpoint, once you go to an open rating system, what logical reason is it for the other insurance companies to be forced to contribute to a security fund, if their competing against each other and NCCI sets a rate, which they feel is fair, and you come forth and say, alright, we will allow you to vary, perhaps, below the "pure premium" level?

Fritz

I don't really anticipate any company jumping in immediately and trying to penetrate the floor of the "pure premium". The difficulty they're going to have is developing their expense factor. They will know what "pure premium" they will need by class. The companies are going to be guessing, to some degree, as to what their expense is actually going to be. At the end of the year, if the President of the company doesn't take a good hard look at the result of writing Worker's Compensation, he doesn't belong as President of the company.

Maloney

Have you looked at the possibilities of obtaining a bond or insurance or someone to cover companies entering the market?

Fritz

They are covered under our guarantee fund. Our guarantee fund requires everybody that writes insurance the same as you have here in Alaska. Everybody that writes that particular line, must participate, in the event the company goes belly-up.

Maloney

It just seems to me that, that's illogical, once you allow open rating. Once you allow pure competition, I don't think a company coming in that's undercapitalized should be able

Maloney continued
to ask those companies that are fully capitalized, which might have been charging a little rate, in order to maintain their solvency, to contribute to their competitor, who's underpricing and taking the business away.

Fritz
Let me correct that. Once we invoke the guarantee fund, that company is out of business. All we are doing is paying off the existing claims. That company is gone. It's down the tube.

Maloney
I understand that. I'm just saying that they come into a market, perhaps, being somewhat undercapitalized in an attempt to penetrate the market, as entrepreneurs have been known to do where there is competition in any market place. They underprice their products, somehow convince you to allow them to penetrate the "pure premium" floor and then the competitors, who were holding the line on prices or charging a reasonable price, are forced to finance, in a sense, the entrepreneurial venture the undercapitalized company took.

Fritz
In the first place, I feel that my staff is competent to make a determination of, whether or not, this company can undoubtedly demonstrate, through statistical data, that they can do better than the "pure premium". Secondly, we would be monitoring on a continuous basis; in other words, demanding quarterly reports from the company on this particular line. If we saw the experience was developing sour, we would immediately revoke the authority to utilize the rate below the "pure premium" and force them back into the normal thing.

Maloney

I wouldn't question your competency to do that. What I question is laying the cost on the competitor, where it's the State that's made the mistake. It seems to me, that if you're in a situation, where the State has licensed someone or authorized someone to charge a premium, which is too low, the State should or your organization should, be forced to come up with the funds for its own mistake.

Fritz

I am really not in a position to answer, one way or another, because I haven't even gotten to the open rating, but once we get there, you can rest assured, it's going to be a long period of time before anybody comes in and tries to penetrate the floor of the "pure premium" and get approval of it.

O'Keefe

For the benefit of the other staff members and Commission members here, we do address this with our own Department of Insurance, to make sure that they, logically, have the capability to do this kind of policing, keeping in mind that most times, record keeping is not local. So, perhaps, Kenny Moore would be asked, at some point further on, to comment on the ability and the necessity of the State here to do that policing.

I have a couple more questions. In previous testimony, we did address the issue of self-insurance. In this State, it is my understanding that the policing action of the self-insurance program is not just with the Department but with another agency. I believe, it's the Worker's Compensation Board. It's a standard thing to be under attack now, as to qualifications. Do you have any recommendations on what we might consider for a starting point for self-insurance? If

O'Keefe continued
so, what do you do in Oregon on self-insurance qualifications?

Fritz
The qualifications are prescribed by the Worker's Compensation Department or Board. They are not nearly as astringent as we would like them to be. This particular committee has expressed a great deal of concern over the self-insurers. They talked to me about giving the jurisdiction of the self-insurers to the Insurance Department. However, in order to do that, at least from a financial operation, not, necessarily, the benefit level. That's the Worker's Compensation Board and I want no part of it. We have guidelines which we force the insurers today to comply with, to preserve their solvency. We restrict what they can invest. We monitor the dividends, and all their financial activities are carefully monitored by the department, either through the examination or review, of their financial data.

We cannot apply those same rules to a self-insurer. We cannot go into Georgia Pacific, Weyerhauser or any of the big self-insurers and say, look, you cannot buy this particular stock 'cause it hasn't been dividend paying for five consecutive years. You must set this much aside in your assets, for reserve, for claims, or you must set so much aside for incurred but unreported claims. The rules of examination and financial activity would destroy self-insuring. It takes away the purpose of why people go self-insured. They get the use of their money, without the restrictions, that we place on insurers. So, until the Legislature or this committee can come up with a solution, as to how we can monitor the financial activiites of a self-insurer, I don't want any part of it.

O'Keefe
One more question and I think I'm done. Could I get your

O'Keefe

opinion on your experience and exp rtise in the area of factious grouping? It is my understanding now, at least, in regards to Worker's Compensation, we can have safety groups. The idea being that the safety group itself does something of benefit that would reduce losses and, therefore, justify a reduced premium. What about factious grouping, without any purpose in mind, when you say five neighbors getting together?

Fritz

We don't allow factious grouping, without any common goal or purpose. There are restrictions on grouping. On the safety dividend grouping, we had considerable misgivings. We allowed four companies to use safety dividend operations. In other words, it's an association, that all of the individual employers belong to. The association agrees with the company that we will undertake and do your legal responsibility of safety engineering that the law requires each insured or insurers. They do it through the use of the association. In turn, the dividends generated flow-back to the association, who utilize the funds, to continue their operation and finance the safety operation.

We have placed a restriction on them that they cannot, a company cannot remit back to the assocation, anymore money that is actually spent in the safety work. In other words, we match it 'cause it can be a form of a rebate. Therefore, we have placed a severe restriction on it. However, California did the same thing and it was challenged in the State of California. This past week, the Circuit Court of Appeals, in California, has taken the position that the Insurance Depar-ment can't place those restrictions on it. So, I think, we are going to have to back off and open this thing up. Allow

Fritz continued
the associations a lot more flexibility and freedom in that operation. I have a feeling that the same is going to occur in our court. Now, that's the EBI case.

Rogers
Are there any other questions?

Carlson
Commissioner Fritz, you commented on your committee report. What was the date and how and when did they submit that?

Fritz
The report was submitted to the Governor in November of last year. The Governor charged the committee on January 22, 1979. It was my suggestion that he appoint this committee to study the thing from one end to the other. Like I say, we are number one in the Nation in rates, number six in benefits and it's a dubious position. This report was delivered to the Governor on September 25, 1980. The Governor accepted the report and for the big meeting of all the employers and all the interested people in Portland (550 interested employers and people were there when the Governor accepted the report).

Carlson
I'm a little confused. Then, it didn't take legislative action. You talk like some of this is in effect now. Were you able to do this all by regulation?

Fritz
None of this has been done by regulation. Dwayne, this is all the committee's report to the Governor, which will be packaged in a "one shot" Worker's Compensation Bill. (I'm not too particularly happy about it all being appropriated into one bill.) I'm interested in seeing open rating. The more things

Fritz continued

that you've got in the bill, the more chance it has of getting shot down. My open rating bill, I think, will sail right through. The more things you attach to it, the more oppostion you generate. The Appendix B of the legislative changes that are necessary are all recommendations. Dwayne, none of this has been adopted. It is going to be presented by the Governor in a package bill starting in January of 1981.

Carlson
Thank you. You're still doing business as you have in the past?

Fritz
We are still operating under the same basis.

O'Keefe
This brings up somemore questions on my part. You indicated that your particular concern is on the expense dollar. In this case this morning, we heard it's approximately 30%. From the size of the report you have there, I would think that the other 60 to 70% is being attacked too. Is there any other recommendations in the report that have significant dollar impact that we should be interested in?

Fritz
There are 57 different recommendations. Some of them you do not have. That's why I say, you cannot take this report in total. For instance, for a long time, we were faced with the position that nobody, no carrier, could close a claim until the Worker's Compensation Board told them they could close it. Many times the worker was back to work two weeks before the Worker's Compensation Board got around to telling them they could close the claim.

Fritz continued

In the meantime, the company has made two more payments to them and they have a hard time getting it back. They are not going to sue for the two weeks wages. The total overall estimation of what will result, if all of the recommendations are adopted by the Legislature, roughly, it has been estimated at about 60 million dollars.

There is no one single factor that I advocate being the solution. We have problems. For instance, you can appeal from a Worker's Compensation referee hearing, if he made a determination that you got this much disability and you could appeal that to the circuit court. The experience has been that ninety percent of those cases were upgraded by the circuit court. Now, they are changing the system. It has been changed for the last session. You go from the referee to the Circuit Court of Appeals, which has acted as a deterent.

Medical factor, I think, is probably the biggest single increase in losses (increase cost in medical treatment) and that, of course, has come under the scrutiny of the committee. There's recommendations to that.

We had to have what is know as the "Odd Lock Doctrine", which has been very, very expensive, in the State of Oregon. If you are at age 55, you held a particular job and your injury results from the fact you cannot do that particular job, you are totally disabled and you receive total disability, even though you are perfectly capable of going out and doing some other job of a lesser nature. There's no reduction in your benefits. There's a lot of things which are not applicable to the State of Alaska.

Maloney

I had a question. You mentioned that the referee's decision

Maloney continued
is applied directly to the court. Does the board, then, not make any rulings at all?

Fritz
It goes from the referee to the full board (3 man board) and then to the circuit court.

Maloney
What's your experience on the number of cases and percentages that are appealed from referees' decisions to the board?

Fritz
It varies in Oregon. It's a well know fact, that once the claimants' attorneys handle this thing, they can generally improve their position. I'm not taking issue one way or another with the result. As I say, it is an existing factor.

Maloney
How are the referees selected?

Fritz
Civil servants

Swalling
Approximately, how many firms do you have writing Worker's Compensation Insurance in the State?

Fritz
Major companies, probably, 30 major writers, are all writing 5% or more. There is an awful lot of them, probably, 100 companies writing.

Swalling
In the study, did the task force come up with an approximate

question/answers continued

Swalling continued
number they thought might be necessary to quarantee the open competition work? Did they come up with a minumum number that would be necessary?

Fritz
No.

O'Keefe
From your experience, you previously had experience, in Alaska, in dealing with insurance companies and trying to attract them to Alaska. Now, you have experience in Oregon, with the similar goal - attractiveness of the State, in terms of, bringing in carriers. Obviously, there's a difference between them. Could you give the committee some idea of what it would be to attract more carriers into Alaska, to say, be more competitive, like you're suggesting?

Fritz
Profitability. I don't see a profitability. There is no other motivating factor to motivate the companies to come in, other than, the profit factor, which give motivation. If they can see that they're going to make a buck, they'll come in.

O'Keefe
I have a problem with that. You're saying that under our, which you say is, perhaps, the cartel approach to Alaska, you're saying that profit is the motive but all of a sudden people are not going to have a cartel approach. They are really going to compete. If the profit was there, the opportunity was there. Why aren't there 700 companies up here competing?

Fritz
We don't have 700 companies in Oregon that are competing.

Fritz continued
As I just testified, we probably, only have 20 major writers. I am sure that you have pretty close to that too. I know that Alpac is a writer. I know that Liberty is a writer. Your company and Double One is a writer. Fireman's Fund is a writer. I could go on and I could probably come up with about 20 companies.

O'Keefe
The difference may be just in statistics. I was using your definition of 5% or more as a major writer.

Fritz
I started to calculate that. I said 30 companies at 5% and that doesn't come out. I dropped that down to 20 companies.

O'Keefe
I really appreciated your information from my standpoint. I think, it's been very straightforward and you gave us good comparison of two states and insight in that area.

Fritz
I appreciate the opportunity of having talked to you. I am really sincere when I tell you that. I think your committee, myself, and I'm sure, Ken Moore, are all motivated in the same thing. It has to see to it, that the injured worker gets adequately reimbursed, and at the same time, not penalize the employer anymore that it's absolutely necessary, to generate the dollar. Anytime you squeeze fat out, somewhere, it's gonna be beneficial. That's the only way to accomplish it.

I was interested this morning. We were talking about classification. I talked to, Dwayne, about it a little bit before. We have the same system, you know, appealing to our

Fritz continued

OC and R Committee and yours is the Alaska Compensation and to the Commissioner. I had a case recently. We're getting quite a few of those. They are appealing classification not rate. Two pallate makers, for instance, one does all the sawing, cutting, hammering and everything else and he is rated exactly the same as the fellow who gets the material precut, and all he is doing is assembling. Yet, they are paying the same rate and this guy squawked and I upheld him. He deserves a different rate. He doesn't have the same exposure but you do. You are starting to develop too many classifications. You get top-heavy too.

We have mandated farm rate in Oregon. The Legislature arbitrarily fixed the rate from the agriculture classes at $14.00. It's a screwball program and it's going out of effect. The cattlemen, under the normal "pure premium" development, should be paying $28.00 rates and the truck farmer should be paying a $9.00 rate. Yet, the Legislature mandated a $14.00 rate. It just doesn't make sense.

Carlson

I've got one question. If I understood you correctly, and you really concerned me, you make reference to the number percentages of appeals, from what you called the referee. Brian, you can correct me if I'm wrong. I think, we were just funded for some preliminary hearing officers. This would kind of expedite and avoid so many full hearings before the board. This sounds like we just have a duplication of effort, if we can't point out somewhere along the line where we can avoid some of the pitfalls.

Fritz

Perhaps, I didn't make myself clear, Dwayne. I said that approximately 90% of the cases, that were appealed, resulted

Fritz continued
in a higher award. I didn't say that 90% of all cases were appealed. No, it isn't that high, nowhere near that high.

Carlson
Can I ask a question? Do you feel that's a workable thing, having, as you call them, referees down there? Does that expedite your cases?

Fritz
Very much so. I firmly believe that, that's a better and equitable system for expediting disputed claims.

Rogers
Are there any further questions for Mr. Fritz?

Carlson
I don't have any questions but I personally would appreciate it, somehow or another, if we could sort out Commissioner Fritz's remarks out of our proceedings and get them a little quicker than just the normal details of the two day or one day meeting. As he gave his without paper; so, we don't have copies of it. I would, personally, like to study that in detail.

Rogers
In that case, I would request that staff transcribe Commissioner Fritz's presentation first and get that out to the Commission members as soon as that is completed.

Fritz
May I ask, if you are interested, how many copies of the report? Please bear in mind that you'll have to discard some of the recommendations as not being applicable to the State of Alaska.

Rogers
I think, we would need a copy for each member of the Commission and maybe, one for our files, for a total of 10. If that's a problem, we could easily make copies here in Alaska.

Fritz
We won't have much of a problem of getting a copy of the final report. Appendix B, I don't think would be of much value to you. That relates to Ammendments necessary to Oregon Law. To accomplish the purpose, I think, yours would have to be individually drafted.

Rogers
Absolutely. I really would like to thank you for taking the time to come up here and make the presentation.

Fritz
I have sort of a vested interest up here.

Rogers
If there are no questions, we will now return to the earlier presentation by Mr. Edmiston.

SECTION ANALYSIS - AS23.30.155(n)

This proposed amendment would authorize the Board to award a lump sum for all types of compensation whenever it determines that it is in the best interest of the employee and does not cause substantial hardship to the employer.

Currently, the Board may only award lump sums for unscheduled permanent partial disability under AS23.30.190(20). There is no authority to award lump sums on the other disability types or death benefits, except through a compromise and release agreement. This places the employee or beneficiary at a particular disadvantage in that under the terms of an agreement all future compensation for temporary total, temporary partial, permanent partial or permanent total disabilities are waived, and, in many instances, the lump sum is reduced to present value. This severely restricts the options of the employee or beneficiary who may feel it is in the best interests to settle the claim in a lump sum, but may only do so through a compromise and release.

The Board also questions the appropriateness of having the authority to approve lump sum settlements through an ageement process, while unable to do so through the hearing process.

Past Record

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
ALASCOM, INC.	78	41,493,466	413,161	1.25	177,000	37%
	77	45,498,537	611,034	2.09	134,000	22%
	76	35,087,775	581,400	2.42	127,385	22%
ALASKA AIRLINES	78/79	9,519,000	403,279	4.0	276,819	65.9
	77/78	9,996,000	360,069	3.6	290,844	80.9
	76/77	9,508,000	318,818	3.3	302,575	94.9
AK. INTERNATL INDUSTRIES	75	10,739,933	243,598	2.27	430,236	1 1/2 77%
	74	5,540,387	100,070	1.81	99,064	99%
	73	2,641,479	57,214	1.94	4,654	9%
AK. RURAL ELECTRIC COOP	79	22,013,000	726,060	3.3	218,680	30.1
	78	19,220,000	628,974	3.27	242,693	38.6
	77	17,163,000	489,080	2.85	34,313	7.0
	76	14,471,000	359,542	2.48	76,974	21.4
ALYESKA PIPELINE SERVICE CO.	75	23,738,822	30,475	.46	9,848	32.4
	74	4,399,185	5,891	.36	54,541	925.8
	73	1,374,200	2,866	.21	9,820	3,42
AMFAC CORP.	75/74	16,540,641	n/a		62,858	45
	74/75	21,015,963			76,310	
	73/74	26,131,341			80,112	
	72	61,178			-0-	
	71	57,258			-0-	
	70	53,088			-0-	

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
AMOCO PROD.	71	1,325,846	28,936	.02	4,608	16%
	70	1,315,242	26,551	.02	211	.8%
	69	1,263,183	25,830	.02	438	1.7%
ANCHORAGE, MUN. OF	74	25,650,000	241,758	.94	227,346	94
	73	21,770,000	164,843	.76	134,290	81
	72	17,250,000	219,665	1.14	158,724	72
ANCH SCHOOL DISTRICT	77/78	61,100,000	653,521	3.0	Pd 111,775 Rs 318,294	.83
	76/77	88,522,808	489,889	1.4	Pd 161,269 Rs 90,150	.51
	75/76	58,726,168	390,523	1.2	Pd 151,298 Rs 93,110	.63
BETHLEHEM STEEL	69	14,533	-	-	-76-	-
	68	-	-	-	-0-	-
	67	9,115	-	-	-40-	-
BUMBLE-BEE SEAFOODS	78	758,206	69,647	9.1	7700	11%
	77	685,508	38,773	8.0	8748	23%
	76	604,442	14,840	4.1	3635	25%
	-	-	-	-	-	-

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
	-	-	-	-	-	-
	-	-	-	-	-	-
CONSOLIDATED FREIGHTWAYS	69	396,645	-	-	3193	-
	68	363,472	-	-	892	-
	67	462,183	-	-	741	-
DILLINGHAM CORP.	71	1,977,385	398,346	10.6	38,124	76%
	70	2,417,188	389,188	6.4	150,038	38%
	69	3,398,016	378,551	10.6	387,942	10%
DUTCH HARBOR SEAFOODS	78/79	800,000	84,160	10.52	10,000	11.9
	77/78	600,849	48,805	8.12	4,358	8.9
	76/77	823,306	-	-	144	-0-
FAIRBANKS, CITY OF	75/76	-	310,000	-	69,131	-
	74/75	-	172,999	-	54,801	-
	73/74	-	138,348	-	100,204	-
						Clai
FOSS ALASKA LINES	73	-	-	-	250	1
	72	-	-	-	475	3
	71	-	-	-	-	1
	70	-	-	-	-	0

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
FRED MEYER, INC	77/78	1,687,997	25,892	1.65	6,775	.234
	76/77	1,303,728	13,283	1.64	3,440	.258
	75/76	1,010,421	16,404	1.64	7,816	.476
	71	500,000	-	-	-	-
	70	-	-	-	-	-
	69	-	-	-	-	-
	-	-	-	-	-	-
	-	-	-	-	-	-
HYDRO CONDUIT CORP.	Est 70	182,000	3,999	2.15	2,000	.5
	69	171,388	3,806	3.8	575	.151
	68	-	-	-	-	-
INTERNAT'L HARVESTER CO.	72	108,356	400	-	-	-
	71	116,840	432	-	-	-
	70	101,206	374	-	-	-
JUNEAU, CITY & BOROUGH OF	75	12,456,700	175,000	1.40	88,431	.505
	74	9,600,420	111,992	1.17	55,996	.50
	73	8,160,000	89,940	1.10	33,900	.378

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
KETCHIKAN PULP CO.	63	6,338,000	169,130	2.67	81,955	48%
	62	9,100,000	303,959	3.34	222,180	73%
	61	5,341,000	177,769	3.33	169,260	95%
	-	-	-	-	-	-
LITTON SYSTEMS, INC.	79 est	45,682	-	-	-	-
	78	71,884	-	-	-	-
	77	39,648	-	-	-	-
LOOMIS CORP.	72/73	801,844	18,017	2.25	500	.028
	71/72	822,988	11,947	1.45	2,547	.213
	70/71	1,033,066	11,077	1.07	1,066	.096
LOUISANA-PACIFIC	75	752,010	117,842	15.67	15,620	13%
	74	731,686	64,780	8.85	23,470	36%
	73	347,957	26,095	7.50	1,956	7%
MOBICE OIL	68/69	818,721	22,447	-	2,600	11%
	67/68	719,822	16,379	-	349	2%
	-	-	-	-	-	-

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
NANA REGIONAL	78/79	4,100,000	336,751	8.21	47,925	7%
	77/78	3,174,618	305,242	9.71	58,619	5.3%
	76/77	5,810,000	238,494	4.10	49,345	4.8%
PAN-ALASKA FISHERIES	78	4,834,563	443,872	9.18	234,054	52.7%
	77	4,103,000	264,582	6.45	135,078	51.1%
	76	3,062,282	168,726	5.51	47,104	28%
PAY & SAVE, CORP.	71/72	1,116,232	6,595	.59	484	7.3 ~~5.2~~
	70/71	777,277	4,235	.54	205	4.8%
	69/70	371,704	1,790	.48	98	5.5%
PHILLIPS PETROLEUM	78	2,202,759	9,595	2.29	2,584	27
	77	1,947,092	16,209	1.20	32	-
	76	1,882,680	28,047	.167	824	3
SAFEWAY STORES	75	6,481,486	55,740	.86	35,235	63
	74	5,579,515	81,789	1.46	57,989	70
	73	3,844,994	52,677	1.37	31,510	60
SEA-LAND SERVICE	76	13,893,208	1,129,863	8.14	346,417	31
	75	12,005,119	815,303	6.79	434,417	52
	74	7,941,384	388,590	4.89	291,242	75
	-	-	-	-	-	-

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
	—	—	—	—	—	—
	—	—	—	—	—	—
	—	—	—	—	—	—
UNION OIL	67	1,116,249	10,009	.90	3,557	—
	66	749,232	11,617	1.55	246	—
	65	635,376	4,835	.76	388	16%
	—	—	—	—		—
WESTERN GEOPHYSICAL	73	129,749	67,161	—	34,851	52%
	72	587,066	35,854	—	46,269	129%
	71	450,832	22,617	—	1767	8%

	Yr	Payroll	Prem	Avg Rate	Losses	Loss Ratio
VECO, INC.	79	7,298,025	529,712	7.1	104.420	18.6
	78	7,068,030	517,594	8.2	145,521	35.2
	77	6,803,745	564,841	8.3	63,934	11.3

A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule

By JEFFREY O'CONNELL

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A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule

by JEFFREY O'CONNELL*

Professor O'Connell contends that the contributory negligence and comparative fault doctrines should be abolished due to their ineffectiveness in achieving the goals of the tort system. He further suggests that, by also abolishing the collateral source rule in personal injury cases, compensatory savings would be provided to finance the payments that will be awarded upon abolition of contributory negligence and comparative fault.

IN RECENT YEARS, American tort law has experienced a surprisingly swift trend toward the rule of comparative negligence. While only six states had adopted the rule of comparative negligence

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in 1964,[1] it is now the rule in some 31 jurisdictions.[2] Rejecting the harshness of the traditional rule of contributory negligence, these states have turned to a system of comparative negligence to allow an injured plaintiff to recover damages to the extent he was relatively free from fault in the accident. Unfortunately, although the rule of comparative negligence alleviates some of the hardship resulting to a plaintiff under a traditional tort system, it perpetuates too much of the inefficient administration and inadequate compensation characteristics of that system. For a state interested in alleviating these problems, the better move would have been to a rule making almost *any* faulty conduct[3] on the part of an injured victim irrelevant for purposes of liability or damages. In other words, neither contributory nor comparative fault of the victim (including assumption of risk, misuse of a product,[4] and so forth) should be a factor in determining the liability of a defendant whose conduct or product is faulty. By continuing to focus on the conduct of the plaintiff, states that have adopted the rule of comparative fault have prevented their tort systems from achieving

[1] Ark. Stat. Ann. §§ 27-1763 to 27-1765 (1979); Ga. Code Ann. § 94-703 (1978), § 105-603 (1968); Miss. Code Ann. § 11-7-15 (1972); Neb. Rev. Stat. § 25-1151 (Cum. Supp. 1978); S. D. Compiled Laws Ann. § 20-9-2 (1967); Wis. Stat. Ann. § 895.045 (West Cum. Supp. 1979). See generally W. Prosser, *The Law of Torts* 436 (4th ed. 1971).

[2] Colo. Rev. Stat. Ann. § 13-21-111 (Supp. 1976); Conn. Gen. Stat. Ann. § 52-572h (West Supp. 1978); Hawaii Rev. Stat. § 663-31 (1976); Idaho Code § 6-801 (1979); Kan. Stat. Ann. § 60-258(a) (West Supp. 1978); Me. Rev. Stat. Ann. Tit. 14, § 156 (West Supp. 1978); Mass. Ann. Laws ch. 231, § 85 (Michie/Law, Co-op Cum. Supp. 1978); Minn. Stat. Ann. § 604.01 (West Cum. Supp. 1978); Mont. Rev. Codes Ann. § 58-607.1 (Cum. Supp. 1977); Nev. Rev. Stat. § 41-141 (1976); N. H. Rev. Stat. Ann. § 507:7a (Supp. 1977); N. J. Stat. Ann. §§ 2A:15-5.1 to 2A:15-5.3 (West Supp. 1979); N. Y. Civ. Prac. Law § 1411 (McKinney 1976); N. D. Cent. Code § 9-10-07 (1975); Okla. Stat. Tit. 23, §§ 11.12 (West Supp. 1978); Ore. Rev. Stat. § 18.470 (1975); R. I. Gen. Laws §§ 9-20-4 to 9-20-4.1 (Supp. 1979); Tex. Rev. Civ. Stat. Ann. Art. 2212a (Vernon Supp. 1978); Utah Code Ann. § 78-27-37 (1977); Vt. Stat. Ann. Tit. 12, § 1036 (1973); Wash. Rev. Code § 4.22.010 (Supp. 1978); Wyo. Stat. § 1-7.2 (1977).

In addition, three states have adopted the rule of comparative negligence by judicial decision. *Kaatz v. State*, 540 P2d 1037 (Alas. 1975); *Hoffman v. Jones*, 280 So2d 431 (Fla. 1973); *Li v. Yellow Cab. Co.*, 13 Cal3d 804, 532 P2d 1226, 119 CalRptr 858 (1975). Pennsylvania adopted the rule of comparative negligence in 1977 but repealed the law in 1978. Pa. Stat. Ann. Tit. 17 §§ 2101-2102 (Purdon 1976) (repealed 1978).

See generally V. Schwartz, *Comparative Negligence* 1-3 (1974).

[3] For exceptions, see text accompanying footnotes 25-29 below.

[4] See text accompanying footnotes 27-28 below.

readily attainable effectiveness and efficiency.

The Three Goals of Tort

Tort systems that retain some concept of plaintiff fault to deny full recovery to injured parties fail to achieve the three major goals of a system of accident law.[5] A central goal of a tort system, according to many legal scholars, including Guido Calabresi, should be deterrence, to influence conduct so as to lessen the number and severity of accidents.[6] Second, the system must reduce the societal costs of accidents through various means of loss-spreading. And finally, the system must reduce the costs of administering the treatment of accidents by increasing administrative efficiency. By denying negligent plaintiffs full recovery under tort liability, the rules of both comparative and contributory fault fail to serve these three goals.

According to Professor Calabresi, the primary goal of imposing tort losses (whether by transferring or leaving them) is to reduce the number and severity of accidents by deterrence, by making certain activities more expensive and therefore less attractive to the extent of the accident costs produced.[7] By thus imposing financial loss, the tort system works most effectively when loss is imposed on defendants. Financial considerations loom large for the defendant who, as a practical matter, is always either insured or self-insured. In the case of an institutional defendant, such financial considerations predominate over the fear of personal injury because, by definition, the institution cannot suffer personal injury. The principal harm an institutional defendant can suffer is financial loss, such as that which can be imposed when the defendant's equipment or personnel tortiously inflict injury on others. Although compassionate business or professional people will surely be troubled when such injury occurs, they are nevertheless likely to view personal injury losses in the aggregate, through their financial repercussions. If the number and severity of these injuries can be reduced, the institution will presumably enjoy a commensurate reduction in community ill will, as well as in its tort losses and insurance premiums. Therefore, the issue of who will bear the expense of accidents is very likely to influence the conduct of the institutional injurer (or insurer) in that the threat of financial loss induces the institution to seek a higher degree of care in its (or its insureds') operations to avoid accidents.

By contrast, imposing losses on victims in a system applying contributory or comparative fault can rarely, if ever, have a significant deterrent effect on behavior. For the individual, the desire to avoid injury will almost

[5] G. Calabresi, *The Costs of Accidents: Legal and Economic Analysis* 26-28 (1970). The material in the text accompanying footnotes 5 to 15 is adapted in a different context from J. O'Connell, *Ending Insult to Injury: No-Fault Insurance for Products and Services* 121-24 (1975), also printed in slightly different form in O'Connell, "Elective No-Fault Insurance for Many Kinds of Accidents: A Proposal and an Economic Analysis," 42 *Tennessee Law Review* 145, 153-61 (1974).

[6] According to Professor Calabresi, a prime justification for any system of imposing tort liability must be to reduce accidents in number and severity:

"Why is compensation for illness, even in highly welfaristic countries, much less complete than compensation for accident victims? . . . The answer is, of course, that accidents, unlike most diseases, can easily be reduced in number and severity, and that such . . . cost reduction can—indeed must—be an important aim of whatever system of law governs the field." G. Calabresi, cited above at footnote 5, at 43-44.

[7] *Id.*, at 26.

invariably be much stronger than the desire to avoid financial loss. The degree of care an individual exercises in his behavior will be dictated by his concern over his personal safety, not by his concern over possible financial loss.[8] As a practical matter, then, individuals driving cars or using power tools—or deciding to do such things—will rarely be significantly influenced by fear of the effect of their conduct on insurance payments, even in the unlikely event that they comprehend the laws of contributory negligence and assumption of risk.[9]

Note too that the negligent claimant will still recover from other insurance sources, such as accident and health insurance, sick leave, and fire insurance; his survivors will also still recover from his life insurance. Thus, the deterrent effect of the denial of payment from liability insurance is further lessened, even if potential accident victims do understand the legal effect of contributory negligence. As a result, imposing loss on the victim of an accident because he was at fault will virtually never contribute to reducing accidents and accident costs by making potential victims more careful.[10] Moreover, when we focus on the plaintiff's fault we spread the loss only for those accidents in which there is no contributory negligence, thus "externalizing" the costs[11] of defendants for all those accidents in which the plaintiff is also at fault.

[8] Note that property loss poses a different issue. Most people *will* be influenced in their treatment of property by fears concerning the expense of repairing or replacing it. This financial concern is very diminished when personal safety is a consideration, however, because the desire to avoid bodily pain and physical injury is paramount for the individual. Fears of financial loss predominantly influence risky behavior only when physical well-being is not endangered.

[9] Between 40 per cent and 50 per cent of the public apparently does not understand that contributory negligence inhibits recovery in tort claims. J. O'Connell & W. Wilson, *Car Insurance and Consumer Desires* 12-13 (1969); U. S. Department of Transportation *Public Attitudes Toward Auto Insurance* 71 (1970).

[10] Fleming James and Fowler Harper of the Yale Law School have expressed it this way:

"[T]here are very practical considerations which mean that [deterrent] pressures . . . are more effectively brought to bear against defendants as a class than plaintiffs as a class. In the first place plaintiff himself . . . is a jeopardized participant in every accident that injures him . . . so that he is always subject to the strongest motive to escape personal injury . . . quite apart from any thought about civil liability. If the prospect of losing life or limb does not make a plaintiff careful, little further inducement to care will be added by speculations as to the outcome of a lawsuit. . . . [T]oday those who bear the burden of accident liability are increasingly absentee defendants—corporate and other employers or insurance companies, whose lives and limbs are not at stake in the accident. And [even] if their property sometimes is at stake, in many situations there is not even much danger to that: grade crossing accidents, motor vehicle-pedestrian collisions, and cases involving dangerous condition of premises afford examples of a pretty one-sided kind of risk. Defendants, then, will often lack a powerful incentive to carefulness—self-preservation—that is virtually always present with plaintiffs. It follows that the secondary incentive furnished by concern about legal liability is more important for defendants as a class." 2 F. Harper & F. James, *The Law of Torts* § 22.2, at 1204-05 (1956).

For more on the relative unimportance of tort law as a deterrent to contributory negligence, plus an attempt to refute the contrary theories of Professor Richard Posner, see J. O'Connell, cited above at footnote 5, at 195-203 and 161-169, respectively. G. Calabresi, cited above at footnote 5, at 26, 27.

[11] Calabresi, "Views and Overviews," in *Crisis in Car Insurance* 240, 250 (R. Keeton, J. O'Connell & J. McCord eds. 1968), originally printed in 1967 *University of Illinois Law Forum* 600, 610. Costs of accidents that are properly reflected in an enterprise's costs are, in the economist's argot, "internalized"; such costs that are not thus reflected are "externalized." See text accompanying footnote 15 below.

The result is that when the plaintiff is contributorily negligent, he bears his own losses and the faulty defendant escapes without tort liability.

Imposing tort loss on injured victims is equally ineffective as a means of achieving the other major goals of the ideal tort loss system. One of these goals is to reduce the societal costs resulting from accidents, primarily through various means of loss-spreading so that, for example, an injured breadwinner and his family will not be left without resources.[12] The other goal is to reduce the costs of administering our treatment of accidents through greater administrative efficiency, with fewer payments to lawyers, adjusters, and other third parties in the system.[13] Not only does focusing on a victim's negligent conduct have little if any effect on the primary goal of deterrence; in addition, it frustrates both of these secondary goals. Neither compensation nor efficiency is served by a rule denying negligent plaintiffs recovery under tort liability. To the extent we focus on the fault of the plaintiff, we defeat the goal of spreading his loss. As a result, the injured victim may receive no rehabilitation, subsistence, or maintenance, which will, in turn, create further societal costs. Finally, the goal of an efficient system of claims administration is also frustrated by dissecting the plaintiff's conduct to find out whether he has been at fault. Focusing on the plaintiff's conduct to determine his right to recover is a very expensive and inefficient aspect of current accident law which, unlike focusing on the defendant's conduct, serves little social purpose.

Once the law has found the means to reduce the costs of accidents through payment by a source, whether that source is a negligent defendant under the fault system, a manufacturer of a defective product under strict liability, or an employer under workers' compensation, the only reason to deny recovery to an injured individual must be that *not* paying will also reduce the costs of accidents. Under the rule of contributory fault, however, denial of recovery seems to increase those

[12] Winston Churchill, as the young Home Secretary aiding Lloyd George and others in initiating the major social insurance programs of the Liberal Government in the early 1900's made a similar point: "Insurance brought the miracle of averages to the rescue of . . . [the mass of mankind]." 2 R. Churchill, *Winston S. Churchill: Young Statesman 1901-1914*, at 294 (1967). On the matter of punishing individuals for carelessness by denying them insurance payments, Churchill observed, "I do not like mixing up moralities and mathematics." A good reason for not doing so, he asserted, is that "there is no proportion between personal failings and the penalties exacted." In addition, he found no "reason to suppose that a mitigation of the extreme severities [visited upon the accident victim] will tend in any way to a diminution of personal responsibility, but . . . on the contrary more will be gained by an increase of ability [of the victim] to fight than will be lost through an abatement of the extreme consequences of defeat." Gilbert, "Winston Churchill v. the Webbs: The Origins of British Unemployment Insurance," 71 *American Historical Review* 856 (1966), quoting "Notes on Malingering, A Document from Churchill to Llewellyn Smith" (June 6, 1909) (William H. Beveridge Papers, London School of Economics). Although I have adapted Churchill's quotations to apply to accidents rather than to unemployment, it seems not to distort his message.

For a defense under economic theory of spreading loss through insurance, as well as social insurance, based on the "law of diminishing marginal utility," see P. Samuelson, *Economics*, 422-26 (9th ed., 1973). But see R. Posner, *Economic Analysis of Law* 344-46 (2d ed. 1977).

[13] G. Calabresi, cited above at footnote 5, at 28.

costs.[14] Barring the injured victim from recovery because of his fault not only fails to reduce the number and severity of accidents through deterrence by adding little, if anything, to his motive to avoid injury, but, as we have seen, it actually increases accidents by not requiring defendants to reflect the costs of these accidents in the price of their products and services.[15] Such "externalizing" results in an increase in dangerous activities. At the same time, denying recovery to the injured victim who is at fault also subverts the other goals of compensation for accident victims and efficient claims administration.

Abolition of Contributory Negligence

Due to its ineffectiveness in achieving the goals of the tort system, the rule barring the faulty victim of personal injury from recovery should be abolished under present tort liability. Quite apart from the desirability of any other reform in tort law, such as, for example, a system of no-fault insurance,[16] the rule of contributory negligence should be abandoned forthwith in cases of personal injury. Nor should the cumbersome aspects of contributory fault be perpetuated through adoption of a system of comparative negligence, because it too undermines all the goals of a tort system, although perhaps to a lesser extent. Under comparative negligence, the victim must still bear many of his own losses with arguably an even more cumbersome criterion of liability, requiring calibration of each party's comparative negligence. Like contributory negligence, comparative negligence adds no significant deterrence to the potential victim's instinct for self-preservation, and yet "externalizes" accidents caused by defendant fault. Therefore, the negative aspects of any rule focusing on plaintiffs' fault heavily outweigh the benefit of somewhat increased compensation to faulty plaintiffs under the rule of comparative negligence. Abandoning any rule of plaintiff fault is *especially* valid for serious injuries because there the discrepancy between the lapse and its consequence is so disproportionate that any achievement of "justice" by the application of such a rule is illusory. In short, where both plaintiff and defendant are negligent, rather than adhere to the traditional common law system placing the entire burden on the plaintiff, the better rule would be to place all the burden on the defendant.

This rule would *seem* to produce an unfair result in the case of an

[14] It may well be, though, that to the extent reparation is paid for pain and suffering and to duplicate collateral sources, a rule of contributory fault may serve to reduce accident costs by cutting down on nuisance claims. As to a change in the collateral source rule, see text accompanying footnotes 30-45 below. See also especially footnote 31 below.

[15] "Fault uses the market in an expensive and unstable way to reduce fault-caused accidents, while from the standpoint of market deterrence [which operates by placing the costs of accidents on the activities which cause them], we want to use the market in an efficient and stable way to reduce accident costs, whether they are fault-caused or not." Calabresi, "Views and Overviews," in *Crisis in Car Insurance* 240, 250 (R. Keeton, J. O'Connell & J. McCord eds. 1968), originally printed in 1967 *University of Illinois Law Forum* 600, 610.

[16] Some of Calabresi's goal is met by the proposal in this article in that at least all accidents caused by defendant fault are internalized. See footnote 15 above. As to the difficulties of meeting the rest of his goal, namely, compensating regardless of defendant fault, see J. O'Connell, *Ending Insult to Injury*, cited above at footnote 5, at 70-95.

auto accident between two negligent individuals, *A* and *B*, where only *B* is injured, because *B*'s negligence will be discounted while *A's* negligence will impose full liability on *A* for *B's* injuries. In reality, though, there will be no unfairness because, as a practical matter, *B* will claim against *A* only when *A* is insured. Tort claims simply are not pursued against parties who are not either insured or self-insured institutions.[17] Thus, any tort claim for personal injury is in reality normally a claim against a better risk bearer by a poorer one—a claim against an insured institution by a relatively impecunious, and, by definition, injured individual.[18]

Note that under this proposal when *A* and *B* are both negligent and each suffers personal injury, each party's insurer would be liable for all the other's damages with no diminution for the negligence of the other's policyholder. This denial of any set-off is consistent with the insurance function of spreading loss. No individual whose injury is caused, in whole or in part, by a negligent party should be forced to bear his own losses.[19] Under the present tort systems using the rules of contributory or comparative fault, the negligent defendant is able to spread his liability losses through his liability insurance, while the negligent plaintiff himself must bear his own losses. Under a pure comparative negligence scheme where offset is imposed, each claimant must even bear some or all of his liability losses as an offset against his own personal injury losses, instead of being able to spread these liability losses. A system that forces insurers to spread tort losses is far preferable to one in which individual accident victims with valid claims against negligent tortfeasors are forced to bear their own losses.

A precedent for ignoring a claimant's faulty conduct in his personal injury claim can be traced to the employers' liability acts passed as a precursor to workers' compensation acts. Under the terms of these statutes, the common law defenses of contributory negligence, assumption of risk, and fellow servant doctrine were abrogated, while the requirement of proof of negligence against an employer was retained.[20] Although those statutes were largely superseded by no-fault workers' compensation acts, the extension of no-fault

[17] See James & Law, "Compensation for Auto Accident Victims: A Story of Too Little and Too Late," 26 *Connecticut Bar Journal* 70, 78-79 (1952). In addition, to provide that only claimants against insured defendants would benefit by the abolition of contributory fault would entail (1) the difficult job of defining "insured" so as to include "self-insured"—by no means an easy task in this context, and (2) incentives for potential defendants to be uninsured.

[18] The only exception is when *B's* losses are already covered by collateral sources, such as sick leave or health insurance. To that extent, since loss insurance is more efficient than liability insurance, *B* is arguably a better risk bearer than *A*. This point suggests the means to finance the additional benefits payable under tort law with the abolition of contributory and comparative negligence: as a corollary to the abolition of the contributory fault defenses, the collateral source rule should be abolished. See text accompanying footnotes 30-45 below.

[19] See *Stuyvesant Insurance Co. v. Bourmazian*, 342 So2d 471 (Fla. 1977), in which the Florida Supreme Court applied Florida's pure comparative negligence rule to permit each individual party to set-off the damage owed to it from damages it owed while denying that right to each party's insurance carrier. Walkowiak, "Innocent Injury and Loss Distribution: The Florida Pure Comparative Negligence System," 5 *Florida State University Law Review* 66, 78-93 (1977).

[20] W. Prosser, cited above at footnote 1, § 80, at 534-37 (1971).

laws to all other types of accidental personal injuries does not seem feasible in the United States at present nor in the foreseeable future.[21] Thus, the improvement embodied in those provisions of the employers' liability acts which eliminated defenses based on the actions of the injured party should be expanded and made applicable to all injuries under today's law. In short, contributory fault should not constitute a valid defense in personal injury actions.

Two Draft Bills

Because I have found that the inclusion of a draft bill greatly clarifies a proposal for legal reform, I include one here. Indeed, a "requirement" that legal scholars proposing legislative reform include a draft bill would hone many such proposals and probably, as a further blessing, abort even more. In addition, based on my experience with no-fault auto insurance reform, inclusion of this draft bill will enhance the probability that a legislature will consider the proposed reform.[22] The framing of my proposal in the context of a proposed statute is not intended, however, to preclude the possibility that the reform could be effectuated by judicial decision.[23]

AN ACT TO ABOLISH CONTRIBUTORY FAULT

Section 1. Except as otherwise provided in this Act, any person, or one whose conduct, except for this statute, would be attributed to such person, having a cause of action for personal injury arising out of any breach of duty,[24] shall not have that cause of action, nor damages therefrom, defeated nor diminished by reason of contributory negligence, comparative negligence, assumption of risk, failure to observe or follow warnings or directions, use of goods or services in a manner unforeseen by a provider of such goods or services, or by other such reasons of fault of such person or one whose conduct, except for this statute, would be attributed to such person.

Section 2. This act does not apply to the injury of any person intentionally causing or attempting to cause injury to himself or to another person for injury arising from his acts. A person intentionally causes or attempts to cause injury if he acts or fails to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow. A person does not intentionally cause or attempt to cause injury (1) merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of causing injury or (2) if the act or omission causing the injury is for the purpose of averting bodily harm to himself or another person.[25]

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[21] J. O'Connell, *Ending Insult to Injury*, cited above at footnote 5, at 70-80 (1975). But note this is precisely what *has* been done in New Zealand. *Id.*, at 73.

[22] On the desirability—indeed perhaps necessity—of reformers providing a legislature with draft legislation, see J. Davies, *Legislative Law and Process* 90-93 (1975).

[23] For a brief discussion of this possibility, see text accompanying footnotes 47-49 below.

[24] [Footnotes 24-29 are not part of the draft bill.] Note that this phraseology includes actions for breach of warranty leading to personal injury, as well as "tort" actions.

[25] This section is adapted from O'Connell, "An Elective No-Fault Liability Statute," 628 INSURANCE LAW JOURNAL 621 (May 1975), at 283, which in turn was adapted from the Uniform Motor Vehicle Accident Reparations Act [hereinafter cited as UMVARA] § 22, at 51-52 (including commentary).

Section 3. This act does not apply to any damages accruing to any person who unreasonably refuses, either himself or through one legally empowered to act on his behalf, to accept medical care, rehabilitation, rehabilitative occupational training, or other medical treatment and care if the procedure, treatment or training is reasonable and appropriate for the particular case and its cost is reasonable in relation to its probable beneficial effects. In determining whether an injured person has reasonable grounds for refusing to undertake the procedure, treatment, or training, the court shall consider all relevant factors, including the risk to the injured person, the extent of the probable benefit, the place where the procedure, treatment, or training is offered, the extent to which the procedure, treatment, or training is recognized as standard and customary, and whether the imposition of sanctions because of the person's refusal would abridge his right to the free exercise of his religion.[26]

Section 4. In any action for personal injury based upon strict liability or breach of warranty, evidence of the failure of the claimant, or one on whose behalf he is claiming, to (a) follow warnings or directions, or (b) use the product or service in a manner not reasonably foreseeable to the provider of the service or product, may be relevant to the specific issue of whether the product or service was defective[27]

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[26] O'Connell, cited above at footnote 25 at 289; UMVARA, cited above at footnote 25, § 34 at 66-68 (including commentary).

[27] "A problem arises [in products liability terminology] with the word 'misuse,' which has been applied by some courts to the contributory conduct of a plaintiff who uses a product for a purpose other than the one its manufacturer contemplated. This usage is not a happy one, because 'misuse' carries connotations of contributory fault, thus raising the question whether such conduct should be an effective defense in an action based on strict liability. Although some courts hold that contributory negligence is such a defense, others have found it appropriate only in suits based on negligence, which may be a sound application of one narrow rule. Unfortunately, the word 'misuse,' with its flavor of culpability, suggests that its relevance is limited, under conventional doctrine, to cases in which the defendant's culpability is the central issue. Although in many courts the plaintiff's conduct would not support an effective defense of contributory negligence in an action based on strict liability, it should nevertheless defeat recovery, whether or not contributory negligence is an affirmative defense in such a suit, because the failure of a product to perform when put to an uncontemplated use gives no support to the necessary allegations that the product was legally defective. Similarly, in a suit based on negligence in which the plaintiff's uncontemplated use was reasonable under the circumstances, the defendant should nevertheless benefit from the fact that, although the plaintiff is not barred by contributory negligence, he has lost his chance to rely on *res ipsa loquitur* or faulty design, if he cannot otherwise establish that the product was legally defective. 'Misuse,' if used at all, should be confined to cases where an uncontemplated use involves culpability and the plaintiff's culpability is relevant. Otherwise, what fails to constitute contributory fault may be overlooked as a means of combating the plaintiff's allegation of defectiveness. 'Unanticipated use' or 'uncontemplated use' would seem to be less risky." Dickerson, "Products Liability and the Disorderly Conduct of Words," 20 *ATLA Law Reporter* 422, 423 (Nov. 1977).

Note that the statutory formulation in the text concerning products liability does not purport to try to solve the huge difficulties under current law of defining the defendant's duty to the plaintiff. For descriptions of those difficulties, see Keeton, "Product Liability and the Meaning of Defect," 5 *St. Mary's Law Journal* 30 (1973); Fischer, "Products Liability—Functionally Imposed Strict Liability," 32 *Oklahoma Law Review* 93 (1979). But however or whether those difficulties are resolved (and they may not be as long as the requirement of proof of defect is retained; J. O'Connell, cited above at footnote 5, at 12-19, 56-57), the alternative proposed above seems much more readily accomplishable (witness the

(Continued on the following page.)

42 or whether the condition or service breached a warranty.[28]

43 *Section 5.* In any action for personal injuries based upon negli-
44 gence, evidence of the failure of the claimant to exercise reasonable
45 care for his own safety may be relevant to the specific issue of whether
46 the defendant failed to exercise reasonable care.[29]

Admittedly, legislation of this type would increase the costs of a tort system already overly expensive in the eyes of many. To finance the new payments that will be awarded upon abolition of the traditional defenses of contributory fault, a state could realize compensatory savings in its tort system by abolishing the so-called collateral source rule in personal injury cases.[29a] Under the collateral source rule, a tort defendant pays again for loss already recovered by the plaintiff from collateral sources such

(Footnote 27 continued.)
precedent of employers' liability acts discussed at text accompanying footnote 20 above), thus leading relatively quickly to salutary results for all the reasons stated herein.

Thus, while § 1 of the proposed statute would abolish certain defenses to the strict liability cause of action, this section preserves the right of the defendant to introduce evidence of use of the product which was not foreseeable and therefore to contest the plaintiff's allegation that the product was defective. See, for example, *Helene Curtis Industries, Inc. v. Pruitt*, CCH PRODUCTS LIABILITY REPORTS ¶ 5851, 385 F2d 841 (CA-5 1967).

It must be admitted, then, that even after the abolition of contributory fault, problems concerning it will remain. W. Prosser, cited above at footnote 1, §§ 65-66 (4th ed. 1971); Bohlen. "Contributory Negligence," 21 *Harvard Law Review* 233 (1908). See also footnotes 28-29 below and accompanying text. Despite these problems, abolishing the defenses of contributory fault will clearly mean recovery in many cases where recovery is not now allowed. As Prosser put it, "[c]ontributory negligence is not the same thing as [for example] abnormal use; and although the two frequently coincide, one may exist without the other." W. Prosser, cited above at footnote 1, § 102, at 670. Secondly, that the abolition of the defenses of contributory fault can be efficacious is illustrated by the abolition of contributory fault (along with the defense of a fellow servant's negligence) under employer's liability acts. Footnote 20 above. "Such legislation," says Prosser, "has done a great deal to palliate the rigors of the common law . . . ." *Id.*, § 80, at 534.

[28] Section 1 abolishes certain defenses available to the provider of a service or product who has breached a warranty, including the comparison-of-cause defense. See generally comment 5 to Uniform Commercial Code § 2-715(2)(a); *Signal Oil and Gas Co. v. Universal Oil Products*, CCH PRODUCTS LIABILITY REPORTS ¶ 8299, 572 SW2d 320 (Tex. 1978). Evidence of the use to which the product was put would, however, be admissible for the purpose of determining whether the product or service breached the warranty in the use to which it was put. See, for example, *Murphy v. Eaton, Yale & Towne, Inc.*, CCH PRODUCTS LIABILITY REPORTS ¶ 6566, 444 F2d 317, 322-323 (CA-6 1971); *Brickman-Joy Corp. v. National Annealing Box Co.*, 459 F2d 133 (CA-2 1972). See also, the final paragraph of footnote 27 above.

[29] While § 1 eliminates certain defenses available to the defendant who is alleged to have been negligent, the author recognizes that the defendant's standard of care may be measured by what the reasonable defendant would have foreseen, and that the reasonable defendant need not in all cases foresee the negligence of the claimant. See, for example, *Lorenzo v. Wirth*, 170 Mass. 596, 49 NE 1010 (1898). See also, the final paragraph of footnote 27 above.

[29a] The abolition of the collateral source rule will have no direct effect on statutes which mandate minimum amounts of liability insurance coverage, for example, automobile insurance. (See the Illinois Safety Responsibility Law, Ill. Rev. Stat. Ch. 95½, § 7-317 (1977), *as amended by* P. A. 81-1202, § 2, requiring $30,000 of such coverage.) The minimum coverage amount will still be required and will be applied to the liability of the policyholder after the amount of the victim's collateral sources has been subtracted.

as sick leave or Blue Cross.[30] Abolishing the collateral source rule makes especially good sense because, to the extent the victim has received compensation for his loss, his injurer is *not* a better risk bearer. On the contrary, given the added expense of re-shifting the loss to a third-party tortfeasor, the insured victim is the better risk bearer to the extent of his own insurance coverage.

By funding the added costs incurred upon abolition of the defense of the victim's contributory fault with the savings realized through the concomitant abolition of the collateral source rule, a state will immediately free funds for more payment to reimburse more tort victims for actual, serious losses.[31] Contrast this with tort law's traditional duplication of payments often made to compensate for smaller losses already covered by collateral sources.

The new rule advocating the deduction of collateral sources should apply to *all* insurance-like sources, public and private,[32] and, in death cases,

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[30] A limited approach to the collateral source rule was attempted by the Florida Insurance and Tort Reform Act, creating Fla. Stat. § 627.7372 (1977), which permits the admission into evidence of all collateral sources and the amounts which the claimant paid for those sources. See Walkowiak, "Implied Indemnity: A Policy Analysis of the Total Loss Shifting Remedy in a Partial Loss Shifting Jurisdiction," 30 *University of Florida Law Review* 501, 538 n.138 (1978).

A bill to abolish the collateral source rule, entitled the Tort Reform Act of 1979 [1980], is currently before the California Assembly (Assembly Bill 550).

[31] Perhaps, as suggested at footnote 14 above, because compensation is still paid for pain and suffering, abolishing only the rule of contributory fault may result in more nuisance claims. See J. O'Connell, *The Injury Industry* 29-35, 117 (1971). Although that is only speculative, a solution might be to include a tort exemption from pain and suffering below, say, $1000. For a draft language of a tort exemption, albeit in a greater amount and under a no-fault statute, see R. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim* § 4.2 (a)(2) (1965). An alternative or additional solution might be to abolish all payment for pain and suffering in return for a requirement that tort liability insurers pay tort victims for the latters' attorneys' fees in addition to whatever is paid in damages. *Id.*, at 321-22, 437-39. Such a trade-off reform makes sense, given the degree to which attorneys' fees in personal injury cases are now taken out of payment for pain and suffering. J. O'Connell & R. Simon, *Payment for Pain and Suffering* 51 (1972); *reprinted* in 1972 *University of Illinois Law Forum* 1, 51; H. L. Ross, *Settled Out of Court* 108 (1970); Jaffe, *"Damages for Personal Injury: The Impact of Insurance,"* 18 *Law & Contemporary Problems*, 219, 234-35; Morris, "Liability for Pain and Suffering," 59 *Columbia Law Review* 476, 477 (1959). This trade-off proposal, like the main one in this article, might be effectuated by either statute or common law decision. See text accompanying footnotes 47-49 below. I plan to spell out this proposal—coupled with draft statutory provisions—in a subsequent article.

[32] See text accompanying footnotes 38-40 below.

Perhaps an exception should be made for insurers who have provided first-party elective no-fault insurance to their insureds, whereby insureds are guaranteed out-of-pocket losses from accidents in return for assignment of their entire third-party liability claims to the first-party no-fault insurer. For such a proposal, see J. O'Connell, *The Lawsuit Lottery* 186-227 (1979); O'Connell, "Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims," 1978 *Washington University Law Quarterly* 693. Note that the abolition of the defenses of contributory and comparative negligence would be an additional incentive for first-party insurers to offer such coverage. Eliminating the collateral source rule would also make the first-party insurer's pursuit of third-party claims neater by eliminating other subrogees. *Id.*, at 700 n. 31. However, the abolition of the contributory fault defenses would not increase the possibility of accident victims being paid from liability insurance to the point where the purchase of first-party no-fault insurance and the assignment of liability claims would be discouraged. The considerable burden of proving fault in the defendant's conduct or product will remain.

arguably even to public and private pensions and term life insurance. So long as life insurance, for instance, exceeds any savings or investment factor, as it does in the case of term insurance, there seems little reason to distinguish it from accident and health or liability insurance.[33] The law, however, has long made this distinction.[34] Similarly, the portion of pension payments exceeding the payee's vested amount would be deducted as a collateral source under this proposal.

Once again, for purposes of clarity and to further the chances of reform, a draft bill is provided.

A BILL TO ABOLISH THE COLLATERAL SOURCE RULE

Calculation of Net Loss. (a) Except as otherwise provided in this Act, all benefits and advantages received or entitled to be received by one or one's dependents[35] as reimbursement of loss because of personal injury (including bodily harm, sickness, disease, or death), payable or required to be provided under (i) the laws of any state or the federal government, including but not limited to social security, workers' compensation or no-fault auto insurance, or (ii) any health or accident insurance, wage or salary continuation plan, or disability income insurance, also including, but not limited to, benefits payable without regard to fault under an automobile insurance policy, are subtracted in calculating loss under liability for any breach of an obligation or duty causing personal injury.[35a] Said subtraction shall annul any right of recoupment through subrogation, trust agreement, lien or otherwise, in any other person, including any legal entity, whether corporate, governmental or otherwise. But to the extent that any such right of recoupment shall survive this statute by court

[33] Conard, "The Economic Treatment of Automobile Injuries," 63 *University of Michigan Law Review* 279, 313-14 (1964); F. Harper & F. James, cited above at footnote 10, § 25.22, at 1350-52. See also text accompanying footnote 37 below.

[34] R. Keeton, *Basic Text on Insurance Law* § 3.10(a), at 149 (1971); Procaccia, "The Effect and Validity of Subrogation Clauses in Insurance Policies," 609 *Insurance Law Journal* 573, 579 (October 1973).

[35] [Footnotes 35-37 are not part of the draft bill.] This provision is written this way in order to guarantee that all compensation received from collateral sources as a result of the accident is included in determining the amount due from the tortfeasor. If *X* was earning $1,500 a month prior to his injury in an accident and receives $400 to replace his wage loss, with his dependents receiving an additional $600 in benefits, the court should subtract $1,000, rather than only $400 from the liability of $1,500, leaving only $500 due then from the tortfeasor.

[35a] This language includes intentional torts. Thus, even the intentional tortfeasor will be able to deduct collateral sources from his liability. This might be thought to go too far. But, as a practical matter, unless one is to get lost in the swamps separating negligence from gross negligence and "willful" conduct from intentional conduct, one will have to define intentional conduct such as to include only the most blatant intent to injure. See footnote 25, above, and accompanying text. Insurance will seldom cover such conduct, so the question of liability is often academic. In those few instances where it is not academic, payment from the intentional tortfeasor which duplicates payment already made by the collateral source to the victim would clearly violate the principle of indemnity by paying the victim more than his loss. Payment by the tortfeasor to the collateral source might be justified, but any sense of assuaging moral outrage against the intentional tortfeasor seems undercut to the extent he is asked to reimburse not his victim, but his victim's insurer. Thus, for the sake of convenience, intentional torts are not treated differently. Obviously, however, one disagreeing with this decision could alter the statute to allow an insurer a right of subrogation where intentional conduct of the type defined at footnote 25, above, and accompanying text, is involved.

decision, no subtraction shall be made.[36] Nor shall any contract or other arrangement to provide benefits or services as defined above declare itself excess to liability for any breach of an obligation or duty causing personal injury. But, unless otherwise agreed to by the claimant, a claim for loss under liability for any breach of an obligation or duty causing personal injury shall be paid without deduction for the benefits which are to be subtracted pursuant to the above provisions on calculation of net loss if these benefits have not been paid to the claimant before the liability for any breach of an obligation or duty causing personal injury is determined by adjudication or settlement. The party liable for any such breach of an obligation or duty is then entitled to reimbursement from the party obligated to make the payments which otherwise would have been subtracted in calculating loss under liability for the breach of an obligation or duty causing personal injury.[36a]

(b) In calculation of such net loss, no subtraction is made for amounts one receives or is entitled to receive by reason of another's death, except that there shall be subtracted from loss in calculating net loss amounts thus received [(i)] from social security or workers' compensation, [(ii) as a death benefit or deferred compensation under any other public or private pension or retirement plan, including a plan for self-employed individuals, to the extent such benefits exceed amounts the decedent would have been entitled to receive under such plan had he terminated employment, or, in the case of a plan for the self-employed, had he terminated the plan at the date of death for reasons other than death, (iii) from other death benefits or life insurance to the extent such amounts exceed any cash value or other investment or savings feature as of the amount immediately preceding death].[37]

Note that only the proceeds of insurance or quasi-insurance plans, whether public or private, are to be deducted from the recovery under a tort claim. As a result, the amount recoverable in tort by an accident victim who receives gratuitous aid from, say, a relative or friend will not be reduced by the amount of his aider's largesse. Because such acts of individual generosity are sufficiently rare and usually for relatively small amounts, the exclusion of these funds from the deductibility requirement will have no appreciable effect on the cost of liability insurance.[38]

[36] Given the relatively unfettered right of the sovereign—including, but not limited to, courts—to alter the terms of insurance contracts. R. Keeton, *Basic Text on Insurance Law* §§ 2.10, 6.8, 7.2 (1971), the right of the legislature to alter such contracts thusly would seem to exist. But see *Allied Structural Steel Co. v. Spanaus*, 438 U. S. 234 (1978).

[36a] The provisions in the last two sentences are adapted from UMVARA, cited above at footnote 25, § 23, at 52-54 (including commentary). See also O'Connell, cited above at footnote 25, 628 INSURANCE LAW JOURNAL 261, 283.

[37] O'Connell, cited above at footnote 25, at 278. Note that subsections (ii) and (iii) are in brackets, which indicates a relatively controversial provision that a legislature may wish to excise.

[38] An earlier provision on collateral sources drafted by Robert Keeton and myself under our original no-fault auto insurance bill was considerably broader than the above draft:

Section 1.10 *Net Loss.*

Net loss is loss less subtractable benefits received from sources other than [no-fault] . . . insurance.

(a) *Subtractable benefits.* Except as otherwise provided in this section, all benefits and advantages one receives or is entitled to

(Continued on the following page.)

In addition to the question of whether the victim can recover from a tortfeasor the amount he already has been paid by someone else, there is also the question of whether that someone else can recoup from the tortfeasor the amount paid to the victim, normally through subrogation. In other words, if either the victim or his nontort payor can recover from

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(Footnote 38 continued.)

3 receive, because of the injury, from sources other than [no-fault] . . .
4 insurance are subtracted from loss in calculating net loss.

1 (b) *Nonsubtractable benefits.* In calculation of net loss, no
2 subtraction is made for amounts one receives or is entitled to
3 receive (i) in discharge of familial obligations of support or
4 (ii) by way of succession at death or (iii) as proceeds of life
5 insurance or (iv) as gratuities. In no event shall any payment
6 made by an employer to his employee be regarded as a gratuity.

R. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim* 306 (1965). *See also* O'Connell, "An Elective No-Fault Liability Statute," 628 INSURANCE LAW JOURNAL 261 (May 1975), at 278, for a similar but slightly changed collateral source provision drafted by me for a no-fault statute applicable to more than just auto accidents.

Note that the above no-fault provision on collateral sources is much broader than the present proposal in subtracting all benefits and advantages, but the provision makes exceptions for aid given dependents and gifts given to non-employees. Under this Keeton-O'Connell No-Fault Provision, family members other than those obligated to render aid, as well as friends and employers, were discouraged from loaning or giving money to an accident victim because to that extent no payment was due from the no-fault insurer. (However, anyone thus rendering aid, including even a no-fault insurer, could expect to be reimbursed out of any successful liability claim.) Under the draft in the text, the receipt of financial assistance from anyone other than an insurance-like entity does not bar the donor or the donee from recouping that aid from the party found liable for the accident. Compared to the no-fault provision, the provision in the text has a narrower definition of benefits to be subtracted and therefore has need for fewer exceptions.

As the text explains, only insurance-like benefits are deductible because of the harshness of providing that any non-insurer aiding an accident victim forfeits the right of that non-insurer and his beneficiary to recoup in tort the amount of the aider's largesse. Indeed if all financial aid to an accident victim were deducted in a tort action, even advances made by a lawyer to his client would be uncollectable from the tortfeasor. Admittedly, such advances raise serious ethical problems, but the practice of giving such advances is nonetheless widespread. J. O'Connell, *The Injury Industry and the Remedy of No-Fault Insurance* 63 (1971). Why, though, did Keeton and I draft the no-fault collateral source provision so that those family members, other than those with an obligation to render support, as well as friends and employers were thus discouraged from rendering financial assistance to an accident victim because once such aid is rendered, neither the donor nor the donee could, to the extent of the aid, recover from the no-fault insurer?

The no-fault auto provision can afford to be more indifferent to discouraging aid to accident victims because under no-fault insurance, the injured party is assured of his benefits; so there is less need to worry about discouraging others from coming to the victim's aid. But where, in the situation covered by the draft in the text, the issue is not between the plaintiff's friend and a no-fault insurer aiding the victim, but between the plaintiffs friend and a tortfeasor, aid to the victim prior to resolution of the tort claim should be encouraged. This is especially true given the uncertainty and long delay accompanying recovery from a tortfeasor.

Even under the no-fault provision, it was thought necessary to make the exceptions that payments discharging family obligations and gratuities (from other than employers) were not subtractable from insurance benefits. (For ease of administration, all payments from an employer were viewed as similar to insurance-like benefits and not genuine gratuities, made "out of the goodness of one's heart.") In other words, even under no-fault, there is no need to reward the no-fault insurer to the extent the donor was discharging a family obligation or making a genuinely charitable gesture to the victim.

(Continued on the following page.)

a large scale to take advantage of the right to recoupment denied to insurer-like institutions under the proposed bill, their activities would be classified as insurance, calling for appropriate filings with an insurance commissioner, which *ipso facto* would end the right of recoupment.[40]

Denial of the right of an insuring institution, or its governmental equivalent, to gain recoupment through subrogation under their payees' liability claims raises the question whether the lack of this right will cost casualty insurers sufficient amounts to counterbalance the gain to them as defendants, out of which latter gain more payment to negligent plaintiffs is to be financed.[41] Given the waste

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for example, use of the "trust receipt," whereby an insured, in consideration for payment of his first-party claim, promises to hold in trust for the first-party insurer whatever he will recover from the tort-feasor, up to the amount of the first-party benefits. Procaccia, cited above, at 577. Gradually the rule has evolved allowing a first-party health insurer covering personal injury to be subrogated against a first-party tortfeasor, but only if the first-party contract expressly so provides. R. Keeton, cited above, at 152. This is called conventional subrogation as opposed to equitable subrogation. Procaccia, cited above, at 574.

As to life insurance contracts, there is some dicta indicating that even if an express clause in the policy purported to allow subrogation, it would not be effective. *See* R. Keeton, cited above, at 149, 151-53; Procaccia, cited above, at 579. Cases so holding, however, are evidently either rare or perhaps even nonexistent. Procaccia, cited above, at 579 n. 40. To the extent that life insurance is viewed as an investment, there are additional grounds for not allowing such subrogation, but to the extent that most life insurance is term insurance with no investment element, any distinction between life insurance and other forms of insurance seems unsound. *See* text accompanying footnotes 32-34, 37 above.

[40] R. Keeton, cited above at footnote 34, at § 8.2 (1971).

[41] *See* text accompanying footnotes 30-31 above.

and expense of subrogation, the answer would seem to be no. According to one study based on actual field investigations by an author who was generally enthusiastic about subrogation, it costs the subrogee, or assignee, $195 to litigate and recover on a $500 claim. Total costs of litigation and payment for the tortfeasor, or his insurer, amount to $600. Accordingly, the subrogee will only collect $305 net; and the overhead to the insurance industry as a whole will be $295 ($100 plus $195) on a $500 claim—or 60 per cent.[42] According to the same study, recoveries for auto personal injury insurance, expressed in terms of a rough ratio between net subrogation receipts in a given year to net losses in that year, were as low as .01 per cent.[43] As Professor John Fleming of the law faculty of the University of California at Berkeley has noted, "the game is rarely worth the candle." [44]

Supporters of subrogation claims might contend that these figures may be dated and that the amounts recovered through subrogation can be crucial to relieve an insurer from the burden of a matured risk and so provide the insurer the slim margin of profit in this intensely competitive industry. In addition, it can be argued that the high cost of subrogation provides a built-in regulator of its frivolous use when that use is not economically justifiable.

This retort, however, takes an excessively narrow view of subrogation because it considers only the economic cost to the subrogee. As Professor Fleming has observed of such a view:

"It fails to do justice to the wastefulness of subrogation to the whole process of insurance, particularly in its effect on insurance premiums. Subrogation promotes multiple insurance, since the same risk must be covered both by loss and liability insurance. The cost of both, moreover, is in many situations spread among the same risk community, as for example, owners and drivers of automobiles. Thus the high cost of subrogation, added to the administrative expenses of multiple insurance, constitutes a burden on enterprise in the community without any compensating economic, even less than social, advantage." [45]

The abolition of comparative or contributory fault (including assumption of risk) and the collateral source rule, in accordance with this article, could be accomplished not only by state statute but by federal statute as well.[46] Given the pervasively interstate nature of casualty insurance, federal intervention would certainly seem appropriate. Alternatively, these changes could be implemented by common law decision because each of these rules was originally ordained by the courts. Even if a state has already adopted

[42] Fleming, "The Collateral Source Rule and Loss Allocation in Tort Law," 54 *California Law Review* 1478, 1536 n. 236 (1966), citing in turn R. Horn, *Subrogation in Insurance Theory and Practice*, ch. 7 (1964)

[43] Fleming, cited above at footnote 42, at n. 237, citing in turn R. Horn, cited above at footnote 42, at ch. 11.

[44] Fleming, cited above at footnote 42, at 1536.

[45] *Id.*, at 1536-37. See also James, "Social Insurance and Tort Liability: The Problem of Alternative Remedies," 27 *New York University Law Review* 537 (1952). For a further discussion in a somewhat different context, arguing that (1) doing away with subrogation and (2) having casualty insurance cover only those amounts not paid by other forms of loss insurance will not have undue adverse economic consequences from the point of view of internalization, etc., see J. O'Connell, *Ending Insult to Injury: No-Fault Insurance for Products and Services* 141-147 (1975).

[46] See *United States v. South-Eastern Underwriters Assn.*, 5 FIRE AND CASUALTY CASES 194, 1944-1945 TRADE CASES ¶ 57,253, 322 US 533 (1944); R. Keeton, cited above at footnote 34, at §§ 8.1, 8.2.

a comparative negligence statute to replace contributory negligence, a court might still be viewed as empowered to abolish comparative negligence in accord with this article.[47] Especially in those jurisdictions which have retained a common law rule of contributory negligence, a court as well as a legislature would be well advised not to abolish contributory negligence by moving to comparative negligence but, rather, to recognize neither.[48] Similarly, in a jurisdiction which had adopted comparative negligence by common law rule, the judicial abolition of that precedent in accord with this article would be salutary.

It might be argued that because the savings from abolishing the collateral source rule may not precisely match the additional costs of abolishing contributory or comparative fault, legislative change—wherein more precise actuarial evidence may be adduced through legislative hearings, and so forth—would be preferable to common law change. Perhaps so, but common law change still makes sense. Courts in this generation have been very willing to mandate changes in tort doctrine—such as adopting strict product liability and indeed comparative negligence—that clearly add substantially to costs with no compensatory savings. For the first time, really, under the proposals made here, salutary changes with at least some compensatory savings are combined, with one proposal adding to costs and the other subtracting from them. Viewed that way, the cost trade-offs involved seem much less forbidding.[49]

Conclusion

One closing note: in the proposals I have either made or had a hand in making for no-fault insurance,[50] I have met substantial opposition from members of the plaintiffs' bar. With respect to the proposals made herein, however, our interests seem to coincide. Everyone, especially injury victims and, in turn, their lawyers, will benefit from a reform of the personal injury tort liability system to pay more injured victims more money when their own sources of help have been outstripped by their losses. Unless personal injury lawyers advocate such improvements in personal injury law, pressure for more sweeping

[47] Cf. *Li v. Yellow Cab Co.*, cited above at footnote 2 (where the California Supreme Court abolished the rule of contributory negligence in favor of comparative negligence); see *Vincent v. Pabst Brewing Co.*, 47 Wis2d 120, 177 NW2d 513, 522-523 (1970) (Hallows, C. J., dissenting); O'Connell & Beck, "Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance," 1979 *Washington University Law Quarterly* 124-126, 129-130, Calabresi, "The Nonprimacy of Statutes Act: A Comment," 4 *Vermont Law Review* 247 (1979); G. Calabresi, *The Common Law Function in the Age of Statutes* (to be published by Harvard University Press); Bischoff, "The Dynamics of Tort Law: Court or Legislation?" 4 *Vermont Law Review* 35 (1979); Keeton, "Creative Continuity in the Law of Torts," 75 *Harvard Law Review* 463 (1962); Peck, "The Role of the Courts and Legislatures in the Reform of Tort Law," *Minnesota Law Review* 265 (1963).

[48] But see *Maki v. Frelk*, 40 Ill2d 193, 239 NE2d 445 (1968). For some cogent criticism of *Maki*, see "Comments on *Maki v. Frelk*—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?" 21 *Vanderbilt Law Review* 889-949 (1968).

[49] For a discussion of the necessity of *balanced* reform of the tort system, taking into account the needs of both accident victims and premium payers, see O'Connell, "A Balanced Approach to Auto Insurance Reform," 41 *University of Colorado Law Review* 81, 83-94 (1969).

[50] R. Keeton & J. O'Connell, cited above at footnote 31; J. O'Connell, cited above at footnote 45; J. O'Connell, *The Lawsuit Lottery: Only the Lawyers Win* (1979).

changes, changes less palatable to personal injury lawyers, will mount. Although this coincidence of interests between injury victims and their lawyers may not cause the Association of Trial Lawyers of America to lobby for these changes, surely enough individual injury victims will benefit that *some* plaintiffs' lawyers ought—quite literally—to plead for these changes in individual cases, thus opening the door to reform by common law decision.[61]

Nor does the fact that the proposals made herein should appeal to plaintiffs' lawyers mean the proposals are necessarily less attractive to insurers and self-insurers. As explained above, sensibly enough, compensatory savings are made part of an expansion of tort liability. In addition, by eliminating disputes over claimants' conduct, the insured event is simplified, with corresponding actuarial and other advantages for insurers in predicting and litigating personal injury cases.[62]

[The End]

[61] Although an individual plaintiff will not ain by abolition of the collateral source ıle alone, such abolition, if concomitant ith abolition of defenses based on the plaintiff's conduct, will render the latter change more palatable to a court.

[62] See text between footnotes 13-14 above.

RECOMMENDATIONS FROM COMMISSION MEMBERS
MINUTES OF AUGUST 1, 1980 MEETING

ROGERS

1) The Second Injury Fund is in difficulty. I expect that, that will be one of the areas we may want to look into during the work study commission.

2) There are four things we need to develop prior to the next meeting:

   a) We should compile a list of recommendations you people feel ought to be considered by this commission over the course of the quarter. There have been a number of recommendations by the National Commission on Worker's Compensation Laws and recommendations by the Fineberg Report, the Block Report. We want to basically list or group those recommendations, list them out and then decide which ones are worth time and sub-committee time. All reports will be coordinated into one set of recommendations.

   b) The second major thing would be in terms of what statistical informtion we think we need to ask the Chairman, the people we can get for free to develop the data and the people we need to hire to develop the rest. We should make the request of the Insurance Carriers, that they provide us with any data they have which answers any of the questions and also of the Division of Insurance, depending on which one would be the one likely to have the information. If we get entirely different answers from asking the same questions from three, there's probably something wrong but I think by doing the random sample and asking both to answer the question, we'll probably get a pretty good handle on it. Statistically, we can then look and find the corrections.

Rogers cont'd.

What I would request is that by next Friday, a committee member define areas on which he feels data should be developed, prior to the next meeting. Have the members send a letter to the committee staff letting us know. From that, we'll ask the staff and the House Research Division to develop much of that data, if they can.

We'll ask the staff that any concrete results they get between now and the next meeting a synopsis of it be sent to the committee members to try to keep everybody up to date on exactly what data we haven't been able to obtain.

c) Third, would be the bibliography of research material. All information should be read by all committee members prior to the next meeting. One is the 1971 National Committee Report. Second, is the Interagency Task Force Report. The third is the four studies of Florida, Minnesota, Oregon and California. Everyone has the Fineberg and Block reports. These should be made available to everyone.

d) The fourth theory would be to try to get from each member of the committee a list of four people who might be available for developing information for the committee on any issues that might come up in the future. My suggestion would be that we spend at least an hour going over, firstly, what statistical information the members of the commission think is most important to develop and if anyone knows where that information is readily available we'll send for that. That secondly, we go over the bibliography and it's potential development.

cont'd.

Rogers cont'd.

3) Members of the commission can send their many additional recommendations requesting for data or suggestions for developing the bibliography and try to, basically, build our information base between now and the next meeting.

4) One suggestion for the attorney is to note how many cases there appears to be on Worker's Compensation.

Croft

1) I would say there are five concerns in my mind that we need to address:
   a) The board violates the Alaska Statutes
   b) Rehab/re-employment (not amount but rehab)
   c) P.P.D. $60,000, no relation to statute or anything else
   d) Serious physical injury not addressed
   e) The premium cost re-evaluation of cost, technical amount, long overlap for the cost of Worker's Compensation in Alaska

   I know there is little or no coordination between the Division of Insurance or Department of Commerce and the Worker's Compensation Board. Possibly, the Commission could look at the overlap, language and technical amount for the cost of Worker's Compensation.

2) I would like, for maybe the year '79, be able to get statistics from the Worker's Compensation Board as to the total number of cases they handle, the number of cases that were solely medical benefits, the length of time, the average payment of compensation, the number of cases that were permanent disability, the average amount of compensation payments. Maybe, something that would indicate the extremes, as well. The number of times

Croft cont'd.

that minimum benefits were payable at $65.00 a week. I do think we need alot of information in that regard.

3) I would suggest that you try something like this. Have someone, with legislative research, go through the 200 random cases, all with the '78 number on them; so that, we'll know they were filed a couple of years ago. They could go through and just at random, pull out the final report from the carrier end and then have a check list. The person would collect the following information:
   a) How many cases was the only issue payment of medical benefits?
   b) How many cases only involved temporary total disability?
   c) How many cases involved permanent partial disability?
   d) How many cases involved, of this permanent total, are dead?
   e) How many cases are still open?
   f) How many cases have been closed?
   g) Get the date of the increase and the date of the first payment: also, the date of the last payment.
   h) Was hearing requested?
   i) Was there actually a hearing in the case?

I think that if we had compensation statistics like that, we would then have some idea of what we're talking about. If we find that only five percent say of the cases ever go to a hearing and 95% of the cases were involved in a hearing, we would have a pretty good system. If most of the cases are medical expenses, and we find that, that is what we consider additional portions, maybe the problem is medical. I'd be curious to find out how quickly compensation is paid. I would like to see, out of the 200 cases, the total amount of expenditures. If there is a problem with making sure it it was a random statistical

cont'd.

Croft cont'd.

sampling, I would take the number of cases which involve compensation. We could count those. Take '78 or whatever the last number is, then, you'll know the number of medical payments, make a portion of the medical only, the total number of cases.

Swalling

1) The Worker's Compensation Act has got some severe deficiencies in it. It has been amended over a period of time in a piece meal fashion and it has never been really studied thoroughly and objectively. The problem with slow payments are cumbersome. Administrative procedures relating to Worker's Compensation are administrative in nature and high premium costs are of course something else. Benefits to injured workers, cost to employers ultimately are passed on to the consumer, all of those problems have to be addressed.

Maloney

1) I have some additional concerns in the area of what can be drafted in the legislative fashion relating to the apparent mininterpretation of the law what has been made by our coharts.

2) Opening and extending benefits to workers.

3) We also should look at the area of rehabilitation. In particular, we should take a look at the interest of the party to actually be rehabilitated prior to an award being granted. It appears to me that the individual does not want to seek rehabilitation prior to award.

4) There is also a problem with the amount of and method of

studying reserves that I have had some concern with. The method used to set reserves is unrealistic in today's world rather than having a total expected payment over a long period of time, I would think that looking at a person's value approach to the amount that may be due is more realistic.

5) We also have some concern with minimizing the millingering and volume of cases. The report that was issued last year in the case indicates that there's really been little study of that. I think all of us have had occassion to look at cases where there has been millingering and where there is definitely fraud. I'd like the commission to, at least, take a look at some method to help us in tht area.

6) We should list all of the various recommendations (50 to 100) that have been made in the past, addressing the specific area that we should be interested in. They should be broken down by those areas that affect the benefits, titlements, administration and rehabilitation. We should then have additional suggested recommendations, which would come either from the public or from this group. Add those then, methodically, go through all of them; so that, we, in fact, made a comprehensive study rather than something which doesn't address all of the problems.

7) Let's get the problems from the Board members laid out for the morning of the next meeting.

8) Maybe someone could go to Juneau, take a look at the information, see what they have, take a look at what's

cont'd.

Maloney con'td.

developed in the cases prior to getting back together again, add something that one or two of us requested. I would also urge that the raw data be brought back to the committee.

9) Get information on the profitabilities. Find out what the problems are. Find out what the reserves are and how long this is held. If you can't find out what the profit is, find out what the reserves are and how long it's held. I think that the Investment Income question might be an area in which to start developing data.

10) The committee should try to find out what data is available on profitabilities and then by our next meeting, where we know we don't have the expertise or any data, at that point, we'll be contracting out to develop the data. After the next meeting, we should decide how far we want to go into the profitability question, to what extend we want resources. In that regard, it may be helpful to talk to the other states and their commissions to see if they looked at that. In my opinion, probably it will be very difficult to figure out the profitability figures because, the insurance companies help write the tax laws. Most of us have looked at the profit, whether the reserve is current and productive. It's very difficult to accurately figure out what the profit is.

Carlson

1) One of the problems has been almost a total lack of statistical data. When the legislastors have had to make

Carlson cont'd.

decisions based on information given at a time and given good faith, unfortunately, that data hasn't proven to be factual. More information will be available once we get computerized.

2) We need to find where the accidents happen, where there's a particular carpenter trade, construction industry or mechanics causing some of the problems in the air industry, so we can probably set up training programs to stop industrial accidents.

3) I think that all of the employers and all of us are concerned about the high cost. The retention reserves is a legitimate complaint from employers.

4) Also, we'll want to discuss negotiated agreements as opposed to benefits due under the law in exchange for not having the tort action.

5) The other area of concern which was brought up; where the worker ends up with more take home pay while he is on temporary disability and that area is definitely an area to look at.

6) I would like to hear from the board themselves, the members from the board as to the problems they foresee before we go too far into developing any resource data.

7) I think it is time we take a harder look at the State Fund.

8) I think there are some things, I hope, we can take a

Carlson cont'd.

look at, that need to be addressed this session. The Second Injury Fund, in particular. Part of the problem is a lack of expertise by legislators and others in Worker's Compensation. I think the fund is in serious jeopardy and I think it affects the injured worker in getting back to work and it's going to have an impact on the future rates of the employers. I think that needs to be one of the first things we address.

9) The other is a controverted plan. The number of controverted claims in the State is out of proportion and I think we need to take a look to see why this has happened. I hope that we hear from attorneys from both sides, both claimants and the insurance industry and why they feel the large number of claims are controverted.

11) I'd like to see some data submitted regarding the joint trust.

11) I think we have to be very careful at this meeting. While there are those of us who represent organized labor, there is a great segment of the population that is not represented. I think that any legislator should try with all his might to protect the unorganized as well. So, I think, that any laws that are made on Worker's Compensation, we're talking about compensation for a worker that's been injured on the job, should include all.

12) I think the Board should have trained hearing officers. I hate to see the claim labeled before we make any decisions. I think that recommendations should be submitted to the board for their approval or disapproval or adding to it. I think the initiative must come from

cont'd.

Carlson cont'd.

the Department and the board. Should set up the adoption of regulations and procedures. I think it needs to be changed from a board being called to a department that is working with the board. I think also that you are going to have the Department of Law cross involved because, the Department of Labor thinks that we don't have any lawyers to help claimants with court proceedings. Probably, you will have to include both.

O'Keefe

1) I hope to be able to be a coordinator between the National Council which does some of the statistical data gathering for Alaska. The Worker's Compensation Classification Rating Committee along with the wealth of information which should be available for this study from the insurers in this state, so that people making decisions here today and the legislature in the future will know how, from a claims standpoint the mechanisms succeeded and failed. I think that being the insurer, this committee can see to what problems we face in implementing the laws that's now instructed in Alaska.

2) I think it's important to point out that in this state there has been two reports, one of them is the Fineberg report. There is another. Mr. Block has a report pointing out some concerns as well. There's nationwide, all fifty states commending many reports that are brought up concerning Worker's Compensation. Perhaps as many as 200 recommendations. These can all be boiled down.

Cont'd.

O'Keefe cont'd.

3) Information in its aggregate is available through the National Council of Worker's Compensation in the rate making formula in terms of allocations and expenses. Statistically, they can determine how much of this would be, how much loss is attributable to medical, temporary disability, permanent, etc. The formula does calculate this. So, that this information should be available.

4) I have a few copies of the Reinstatement of Worker's Compensation Expense Program. Again, this would address the issue of rate make-up and the expense stand point. We will endeavour to get additional copies, so everybody can read this.

5) I would like to make sure that the Division of Worker's Compensation and the Division of Insurance give as much lead time and cooperate as much as possible. Particularly, with the National Council and with the Alaska Insurers to make sure that the compatibility that you have available is utilized,that you are not asking requests that would require complete system changes in these parts. They are not accomplished in a short bit of time.

6) We, as individual insurance companies, speaking only for ourselves, are concerned about the issue of on-time payments, in particular, first-time payments. The law, in terms of the State of Alaska, is quite similar to some other states regarding the timeliness of the first payment for the injured party and regarding termination of payment and the notification justifiably given to the claimant. However, like any other law that is presented, it does have its difficulty.

cont'd.

O'Keefe cont'd.

We are obviously concerned about on-time payments. We do some record keeping in this area but admittedly, it is not what this committee is looking for. We know that any delay that we make on a first-time payment, any annoyance we cause through a claimant, only hurts us because they have no recourse but getting an attorney and this can be more expensive. It is to our best interest to pay on time. This is difficult because of the inability of the company to get the employer's report from a far off location. If an insurance company can match up the doctor's first report of injury and the employer's report in such a fashion that we can meet the 10 day notice, the issue of notice to the employer, notice to the insurance company and how does the insurance company find out from the employer in a location, Alaska, which perhaps doesn't have a ratio. This can be difficult.

7) I think it's much more. It's a much easier task for this committee to address the issue of stopping payments arbitrarily. This is an issue where, in all due concience with any insurance company, we should look at that. But before we chastise the industry on statistical basis, let's take into consideration that the insurance company has no vested interest in alienating claimants.

Rasley

1) I'm concerned with the cost of a good program through the employer. I think my first intent for being on this committee is that I hope that the intent of this study group will help the legitimately injured worker on a timely basis, at a reasonable cost to the employer.

2) I think that the system itself certainly needs overhauling. It might be beneficial to us to try to get

Rasley cont'd.

some of the data collected by these other states. If that is possible, to see where they went with their system and what kind of results they have had with their programs they've instituted.

3) One of the problems is with claims. Many times its cases that I have talked to our members about, they go into the hearing or either the attorney from one side or the other has filed a statement of readiness; then, they get to the hearing they are not ready. This wastes everybody's time. It runs up the attorneys fees. I believe on both sides and these are all calculated into the costs of the insurance through the carrier or through the employer. I think that's an area that needs looking at.

4) I think another area that needs to be looked into is possibly an independent state investigative unit. I think that's an excellent idea. It would be an unbiased type of organization that would give a much better idea of what legitimate claimants are.

5) One other comment concerning a specific area that I think needs work and probably one of the more important ones is the disagreement of the interpretation of the word "Compensation" and what it means. In the Act itself, ten different people can read the Act and get ten different interpretations of what "Compensation" means. If it means medical compensation or disability compensation, we need to show exactly what we mean by "Compensation" throughout the Act. This particular area needs to be defined, so that they have a clearer understanding when a case appears before them. I think this is an area that really needs to be look at at and it would help clear up any disputes in the Act itself.

Rasley cont'd.

6) Defining Compensation. It would definitely cover a controverted medical claim to where the attorney would be paid according to the statute; so that, I think, is one of the problems now. In some cases, the carriers and the employers are arguing if that is not covered by the statute. That's one of the problems. It needs to be covered and my point was, broadening the scope of compensaton; so that, it does cover the areas of these things to where it would not be open to controversy.

7) I would like to know the percentage of cases that come from unisured employers. I think that, that particular area is an area where it's difficult for the claimant to collect any compensation. I don't mean the self-insured. I mean the guy that is violating the law and doesn't have any compensaton coverage at all.

8) I would like to know how many of those cases used Sec.125 of the Act, Sec. C had to do with Rule 45. I would like to know how many of those cases, Rule 45 was involved with, in relation to how many go before the board (Rule 45 states: "If not in accordance with the law, a compensation order maybe suspended or set aside in full or in part through injunction being in the Superior Court brought by a party and interest insubordinate in all other parties as seen before the board").

9) In reference to Worker's Compensation premiums, that's really one of the only places I've ever seen that the contractor really doesn't know where his money is going. Usually, your contractor knows where every penny is going, what he's spending it for and why he's spending it but in Worker's Compensation, it doesn't seem like he knows that. He has to pay. He goes ahead and pays it but

Rasley cont'd.

he doesn't really know what he's buying. This was in reference to Dick Fineberg's report (page 53 or 54). We might look into this.

10) One of the things that I see that seems to be a problem, is rehabilitation. If an individual goes for rehabilitation training, my understanding, at the present time, is that his benefits are cut just about in half. It would seem to me that, that would certainly take away the incentive for the individual to get training. The amount of his benefits should be continued until such time he can go into some useful employment.

11) There are a great many people out there whom we, of this study commission, are representing and we're not just representing union members. I hope that I'm here to represent all the people of Alaska, all the working people of Alaska, not just my union members because this is something that effects every working person in this state.

Chapados

1) I am also concerned about costs. I think there has to be some position that we can all arrive at to provide a good program for the Alaska workers, as well as to keep in mind the cost of the program. I think the studies that have been introduced, the Fineberg Report and Dick Block's Report really have established something from which we can work. I think prior to the creation of these studies, we have a situtation where many people were not able to refer to any statements of information that would generally be acceptable. I think we can go from there, using these studies to proceed with, perhaps, making alot better

Chapados cont'd.

evaluation than we would otherwise.

2) I agree with Dwayne and Dave on the matter of timing and the time we are going to be able to spend with Worker's Compensation.

3) I'd like to see the Block Report made available to the committee members. It was a good report, probably a few of our view-points differ but you can balance them one against the other.

4) Our group of employers in the transportation industry, for the most part, are in the regulated industry. For that reason, we are more concerned about the cost than the average employer, because we cannot pass on our additional costs with justification and considerable amount of effort, clearer presentation to the AGC, the RACC and the other agencies that regulate our rates. Usually, when our cost becomes effective, it takes about six months before we can get a change in our rates and it's very difficult to get this sort of change or get it amended right at the same time the rates are increased. This is an area that perhaps, we could give some thought to.

5) We should look into an employer being required to take an injured employee back. I can see where it would be certainly a desirable thing to do but I know that if an employer is concerned about an aggravated injury, it would then make his situation even more infallible, as far as cost. The employer is concerned about an far as cost. The employer is concerned about this. He has a lot of concern about the kind of liability he must protect himself with.

6) I think we certainly should consider engaging some firm

cont'd.

Chapados cont'd.

or individual who is qualified to take a look at the statistics that are available now and based on such information that we follow up and have questions on. I think that if we leave it up to the governmental agencies, they have a lot of other things to do and I think we should get someone who really knows what they are doing to dig into this area. I would suggest that we consider this as one of the steps we take during the study.

7) One of the things, perhaps, you may want to discuss is the impact of the average weekly wage. I believe it is a result of that construction project (the Pipeline) with the large wages and that sort of thing, that really did, in fact, raise the cost to all employers, as well as to Alyeska.

SCOMM

33:21

STATE OF ALASKA

THE LEGISLATURE

1980

Source

Legislative Resolve No.

SCS CSHCR 59

33

Relating to workers' compensation.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS there have been several major revisions of the state workers' compensation law since statehood; and

WHEREAS the many changes that have taken place in the state since statehood are sufficient reasons for the legislature to thoroughly review the provisions of the Alaska Workmen's Compensation Act; and

WHEREAS the cost of workers' compensation can be a burden on employers in the state;

BE IT RESOLVED by the Alaska State Legislature that under AS 24.20.090 and Uniform Rule 48(c) the legislative council is directed to establish a Workers' Compensation Study Commission consisting of the following members:

(1) three employers subject to the workers' compensation law appointed jointly by the speaker of the house of representatives and the president of the senate;

(2) three representatives of labor organizations who are covered by the workers' compensation law appointed jointly by the speaker of the house of representatives and the president of the senate;

(3) one representative of an insurer providing workers' compensation coverage in the state appointed by the president of the senate;

(4) a state senator and a state representative appointed by the chairman of the legislative council who shall be co-chairmen of the study commission; and be it

FURTHER RESOLVED that the Legislative Affairs Agency is directed to make available staff, administrative support, and facilities reasonably required to carry out the functions of the Workers' Compensation Study Commission established by this resolution; and be it

FURTHER RESOLVED that the governor is respectfully requested to direct the Department of Labor to contribute to the work of the Workers' Compensation Study Commission established under this resolution; and be it

FURTHER RESOLVED that the Workers' Compensation Study Commission shall meet at least bimonthly and shall by the 30th day of the First Session of the Twelfth Legislature report to the legislature on its preliminary findings and recommendations concerning changes in the workers' compensation law needed to eliminate antiquated and inadequate provisions, to provide fully for the legitimate rights of injured Alaskan workers, to bring the workers' compensation law into harmony with current needs and conditions, and to minimize the cost of workers' compensation to employers in the state.

8/1 W Comp Study Commission

1

Jan Hansen / Rep Jackie McClintock
(Workers Comp Division)

SAT	Sept	20	Fbks
SAT	Nov	15	Anch
SAT	Dec	13	Jnu
	JAN		JNU

CHANCY CROFT: QUID PRO QUO: Quick comp for loss of rights

5 CONCERNS:

① Statute works well — w/o formal participatin when adjuster/claimant fair.
Poorly when decision-making brought into play.
WC Bd violates law (20-day law) w/ exception of Fbx Bd.

→ ② Rehabilitation. In long run — does most for employee.
Best possible chance.

③ Arb. Arary problems —
$60,000 permanent partial — arrived at by ins. industry
No relationship to anything
scheduled injuries out of date

NEW AREA: 1 Serious physical injury, w/o loss of income
Person can have ~~it~~ w/o comp

④ Premium cost Haven't had real evaluation of cost. Little coord/
272 Div Ins/WC Bd to make sure
761 Premiums realistic

⑤ Technical / cleanup
— 2nd injury fund

Dwayne — need administrative suggestions

MIKE SWALLING:

Every study — WC Act deficient.
Piecemeal amendment. "Shotgun" approach. Formidable task.
Slow pmts
Cumbersome
Duplication
High premium costs

DENNIS MALONEY:

In addition:

① misinterpretations by Sup Ct → extending benefits
② Rehabilitation — look @ interest of party in being rehab prior to award
③ Amount/method of setting reserves — unrealistic
"Present value" approach to reserves
④ Malingering/fraud difficult to handle

DWAYNE CARLSON:

(Swalling: 14 yrs — Goal by 4 most fortunate. May be difficult to do legislation: Progressive extension).
Lack of reliable data. Watch data from WC/DOSH/Insurance.
Need to know where accidents happening ⇒ trying to lower occ hazard
: Outside Actuarial firm (Johnson Higgins)
→ Set up cost factors, Reserves — cut costs w/o benefits

BILL O'KEEFE: 17 yrs INSURANCE
Coord w/ National Council. WCCRA (rating)
Info avail from insurers.
2 REPORTS: Richard Block report.
Many reports 200 recommendations
Decision-making / timeliness.

DAVE RADLEY Dp Engr 13 yrs. Members w/ injuries
- one 'starved out' broken families.
Concerned w/ cost, but 1st intent →
→ Help legit injured worker on timely basis.
Needs overhauling —
Independent State investigative unit —
unbiased org w/ better idea of legit
Skeptical that can do w/i time allotted

FRANK CHAPADOS. Small transport employers. Chmn AK Trk Bd
Good wc law + benefits
Concerned about cost.
Studies (F+B) established basis
Timing → A lot of study to acquaint
[participated in Block study]
Transport/Regulated industry — can't
pass on cost w/o justification
Inequities:
AGC employees contract diff/fm Transport
[Sick leave + W Comp]

Maloney: worker w/ more take-home than where working
other state studies w/ recommendations.
List recommendations
Benefits
Entitlements
Administration
Rehabilitation
Methodically go thru all.
Croft: Prefer Sat meets
Mechanism for accurate statistics
Compile stats ≠ examples
(Research div)
1979 stats from WC Bd
cases
solely medical, temp, etc
Avg amt
Easley: Interpretation of "compensation"

DICK BLOCK (Ely Guess + Rudd): Workers Comp Committee of Ak
WCCA: AGC AFTA Retail Merch Air Carrier etc
History of legislation: Labor vs mgmt
WC Law thru 70 not living up — inadequate
Natl Comm: 84 recommendations
19 "essential" 71-75 and many states adopted
75 → bill brought Ak up to speed
Pipeline impacted all employers, comp
76/77 - reducing benefits SSI offset
cumulative impact 76/77 - nominal rate
reduction 28%
Increased net cost
Concerned: length of committee work [Effect of boom]
CROFT: Special exemption for TAPS
Manual rate: Modified by acc rate.

Block Alyeska experience not included → costs born by other industries
Reg unitary policy shouldn't go to other employer
Chepados – Impact of avg weekly wage
Dwayne – A.W.W. driving cost. w/o that ceiling higher.
Dennis – London doesn't provide state w/ ~~stats~~
Jack – Ratemaking (2 levels). Alyeska stat problem discovered in time.

Block: 1. Look @ total spectrum (calculate indiv wage, arbitrary amts, claims adjustment practice, interim appeal)
2. Statistics, computer processing
3. Insurance alternatives – coord w/other benefits
self-insurance, alternative insuring mechanisms
4. Every recommendation has been reviewed
→ 1971 Natl comm Report
→ Inter Agency Task Force
→ Studies by states – FLORIDA wage loss approach
MINNESOTA – WC analysis. [has own rating bureau]
OREGON – perm partial benefit
CALIF – WC Institute (insurers + employers)
→ Ak – Fineberg + Block report
1976 LAA study of state funds, rating mechanism

Take reports + digest. Categorize. Then basis for debate.
Many fundamental public policy (not statistical)
Need more meetings. Need a bill or bills in January.
Req for data – don't ask for too much.

BLOCK: $1.25 - $1.30 paid to deliver $1 in benefits? A: IN Aggregate. STATE FUND
DWAYNE: 2ND INJURY FUND
CONTROVERTED CLAIMS Need Atty's
RASLEY:

JAM: N/c FBX:

Dwayne: Div Ins input on computer?

Don: Yes

Dwayne: OSHA / Div Ins correlation

Don: Yes. Communic improved. Not best one. Have been in contact.

JAN HANSEN: (WC Div). Computer - early design stage.
R+A / DoL + WC → Travelled to 3 states. Basis from pgm. RFP submitted + out. Target date 1/1/82.
SYSTEM: (1) New claims entered onto computer
Terminals in field off / pull out data
on spec ...
Data - nature, wts, ... , ppd
DOSH - when what kind of injury
Reporting capability

Crofts: What info available now?
→ R+A: Injuries by industry. Data spotty
→ Go thru sample of files.
(Actuary, statistician?).

Tom O'K: no ins stats

Croft: Need statistical basis

Frank: Thought we'd find statistics. Suggest engagement of consultant. Go thru info.

Robt McArmour (OVIA)
JAN: (1) 2nd injury fund in critical condition -
Bankrupt in Feb. Primary problem.
(a) Alloc risk among carriers. (b) rehabilitation
(2) Admin problems. (penalties for late payments, etc). Div hasn't enforced - lack of personnel
Act gives Bd auth to make rules. Bd hasn't.
(3) Technical problems w/ Act. Concerned w/ "Rush to judgement"

⇒ Robt MacArmour (OVHA). No validity to Block report. What are profits of insurance companies? Monitor ⇒ Lawyers representing
Problems – pressure. detectives chasing.
People cut off benefits. People better off if treated well from beginning
800 men + women in AK part of org
have helped – ~160 people w/ claims
Funded by CETA. RMacA put up most of funding for last 3 years

Gilg (after lunch) (Johnson)

Claimant's compensation attorney 6 DoL 14 WC Atty caseload
225 cases. Handle 800 cases/yr.
Problems: 1) disappointed in overall approval. When need, can't get ⇒ 2nd class citizens. 2/3 PAY. (misleading → there is a maximum.
LOOK AT RESERVING
ON AVERAGE – atty gets case a year later.
CLAIMANT ATTORNEY'S fees are regulated — paid 25% of 1st $1000, 10% over that
LOOK AT: (Smallwood case — needs regulation).
Was taking 13–14 mos. from hearing ⇒ decision.
⇒ Use professional hearing officers
⇒ Need DoL $ to get an order (takes 3 6 mos to get hearing) 60-90 days for decision. Look @ US DoL ⇒ Medical report → advises compensation should start.
⇒ Speed is biggest problem
VOCATIONAL REHABILITATION. Run thru DVR etc.
Excellent job 3 month wait. Eligibility, 3 wk testing.
[Sec 191 – ½ benefits while training]
BD should write rules + regs
42,000 TIME LOSS INJURIES/YR
probably 25,000 open files

Hearing offs not paid enough.

DWAYNE: Instruct DoL to promulgate regs (w/ Dept Law)

GJ: 2200 cases / +2,000 go to court

? Investigative work → Look @ cases to see what people are going thru. Problem - 6 or 7 conflicting medical report. Intermediate appellate might be good.

Dwayne If controverted - stop paying. Carrier doesn't have to prove why controverted.

Maloney: 225 cases open — all controverted - all stop payment — 90-95% end up as claimant win.

Frank: Employee losing pension? Employer taking person back — could aggravate injury. Look at tough time for employer rehire.

GJ → Add protection for employer who rehires.

Dennis — Union retirement fund. Could union trust have a provision for resting when disabled.

Dwayne: Remember non-union worker.

GJ: Interest on judgements is customary. When claim is controverted, worker should get interest on ~~claims not~~ payments not paid during controversion period.

FINEBERG: January report. Since then, haven't been too close. Specific recommendations

(1) Take a group of cases — look at problems. Should be a starting point for task force. A large # of disabled cases, some of which still there. Find out if there are pipeline people who need help. 50-100 people who fell out of system.

RAF A lot of the problem is the conflicting medical decisions.

(2) Suggest: 2330.250 misdemeanor for fraud. Commission should look @ non-enforcement of this provision.

(3) 23.30.155(c) Carrier must notify Board when stop payment. (in resisted cases). Not being enforced.

(4) Div/Insurance not enforcing 23.30.030(7).

(5) Time lag in hearing process. First payments are often delayed; non-reporting of suspensions.

(6) Need Remedial Actions report (p52) REQUEST THIS REPORT

(7) Examine referee system. Look @ Oregon, Wisconsin, Minnesota

(8) Booklet for claimant. (State should do)

(9) Cost-cutting for employer. Systemic problem. Those who pay will try to cut the cost. Not as efficient a mechanism for claimants.

(10) Look @ reserving, investment income. Where does comp $ go.

(11) Look @ time lag betw/ onset of problem (WC 76/77) and solution (81/82). Lack of interface betw/ WC Div & Div/Ins

3889 cases - pmt w/i 14 days - only 1093 pd on time

3 INSTITUTIONS: (1) The lawyers. don't make assumption lawyers represent claimants interest in comp law.

(2) Dwayne + Unions - way ahead on computers. Unions need to spend more time on worker safety

(3) Insurance

Don Koch — ... comp law Non payment / late claims
should be a clearer penalty
O'Keefe re on time payments
5 AIC 3 FAI 1
Hearing officers in Juneau Aug 18-22

DATA

(1) Legis Research — go thru 200 cases filed in 1998. At random, pull out [illegible] +
A. Only issue [illegible] off medical
Temp total dis
perm part dis
perm total / death
open / closed
date injury, 1st [illegible], last paid
hearing req, actual hearing
Atty involved ?
Cases appealed beyond bd decision
% from uninsured employers
Sec 12(?) Cases set aside

→ ins cos
→ Div ins
Take % of med-only as %
[illegible] studies ([illegible]) Report available.

(2) Profitability
Reserves — how long held [investment income]

Ask Board, Hearing off - define areas
write indiv Bd members.

Biblio

Restatement of loss ratio

State of Delaware

2ND injury

[illegible] Trial Lawyers — booklet on injured

Copies of Sup Ct opinions

I RECOMMENDATIONS

II DATA NEEDED (investigator)

III CONSULTING

IV BIBLIOGRAPHY

(1) Crisis issues
(2) Comprehensive revision

Ask Board for input

SUBCOMITTEES

A,A,A (1) Stimson, MALONEY, CROFT

F,F,F (2) Rogers, Chapados, Rasley

A,J,A (3) O'Keefe, Carlson, Swalling

See Licia before lunch

AGENDA

LONGSHORE & HARBORWORKERS' ACT SEMINAR
Upper 1 - Anchorage International Airport

June 25, 1980

8:00 - 8:30	Registration
8:30 - 8:40	Welcome & Introductions
8:40 - 9:10	"The Longshore & Harborworkers Act (an overview)" Will Massey, Deputy Commissioner, U.S. Department of Labor
9:10 - 9:40	"The States View of Concurrent Jurisdictions" Paul Troeh, Deputy Director, Alaska Workmen's Compensation Board
9:40 - 10:10	"Industrial Claims Association Analysis of the L&H Act" Barbara Grissom, Vice President, Pacific Marine Insurance Company
10:10 - 10:25	Coffee Break Sponsored by Alaska Airlines
10:25 - 10:55	"U.S.D.L. Rehabilitation Program" Zee Jackson, Vocational Rehabilitation Specialist, U.S.D.L.
10:55 - 11:30	"Differences & Similarities of the State of Alaska and L&H Rehabilitation Programs, Concepts, Procedures, & Philosophies" (Panel Discussion) Zee Jackson, U.S.D.L. Paul House or Kaye Wilkerson, State of Alaska Bernice Barr, R.N., Manager, International Rehabilitation Associates Virginia Collins, R.N., Director, Medical Consulting Services Renee Murray, Manager, Scott Wetzel Services
11:30 - 12:00	Questions/Discussion
12:00 - 1:15	Luncheon
1:15 - 2:45	"The Importance & Problems of Timely First Reports and Payments & The Worker's Compensation System Generally" (Panel Discussion) Will Massey, Deputy Commissioner, U.S.D.L. (federal claims administration) Paul Troeh, Deputy Director, AWCB (state claims administration) Joyce V. Stevenson, Administration Assistant, Sea Alaska Products (employer) Warren Gore, Dist. #6 Representative, Operating Engineers (employee) Renee Murray, Manager, Scott Wetzel Services (insurer)
2:45 - 3:00	Questions/Discussion
3:00 - 3:15	Coffee Break Sponsored by Reeve Aleutian Airlines
3:15 - 3:45	"Recent Litigation Developments, L&H" Michael Barcott, Attorney, Faulkner, Banfield Doogan & Holmes
3:45 - 4:15	"Concurrent Jurisdictions - P&I" John Bradbury, Attorney, Bradbury & Bliss
4:15 - 4:30	Questions/Discussion & Wrap Up

19 NECA Commentaries

The Report of

The National Commission on State Workmen's Compensation Laws

WASHINGTON, D. C.
July 1972

Introduction & Summary

Major Conclusions and Recommendations

INTRODUCTION

Congress, in the Occupational Safety and Health Act of 1970, declared that:

> the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation . . . .

Congress went on to find, however, that:

> in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.

For these reasons, Congress established the National Commission on State Workmen's Compensation Laws to "undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable

system of compensation." The Act required that a final report, containing a "detailed statement of the findings and conclusions of the Commission, together with such recommendations as it deems advisable," be transmitted by the Commission to the President and to the Congress no later than July 31, 1972.

Activities of the Commission

On June 15, 1971, the President appointed 15 Commission members, representing State workmen's compensation agencies, business, labor, insurance carriers, the medical profession, educators, and the general public. In addition, the Act designated three members of the President's cabinet as Commissioners.

The Commission faced a formidable task. We were asked to evaluate 56 diverse jurisdictions and 16 specific topics, many complex. Our effective working period was less than a year. We resolved at our first meeting to meet our deadline despite the advantages that would have flowed from additional time. We made this decision because important and pressing issues dictated prompt action. The Congress had expressed a keen sense of urgency about workmen's compensation in setting the July 31 deadline. The Commission members and staff have responded to this urgent concern with their best effort.

The Commission has had an active and productive year. Since its first meeting, on July 21, 1971, ten additional meetings have been held to develop the plan and review the substance of this Report. In total, these sessions consumed 32 days with, on the average, 17 Commissioners in attendance.

In addition to the meetings, the Commission held nine public hearings for a total of 18 days. These hearings included three in Washington, plus regional hearings in Chicago, Boston, San Francisco, Dallas, Atlanta, and New York. Because the first hearing was scheduled on short notice, only 10 Commissioners were able to attend. For the subsequent eight hearings, never were fewer than 15 Commissioners present. More than 200 witnesses appeared. The edited transcript of the hearings, to be published, is expected to exceed 800 printed pages.

A full-time staff of 30 employees assisted the Commissioners. The professional staff included economists, lawyers, physicians, statisticians, and others specialising in workmen's compensation and rehabilitation. More than 200 documents were provided to the Commission by the staff, including selections from previous publications and original reports based on staff surveys and studies.

The Commission was authorized to enter into contracts with government agencies, private firms, institutions, and individuals for the conduct of research or surveys and the preparation of reports to be published by the Commission. These publications include a *Compendium on Workmen's Compensation*, a comprehensive review of the issues and information concerning workmen's compensation, and a series of *Supplemental Studies* which examine selected issues in detail. As the *Compendium* and *Supplemental Studies* were prepared and edited by independent scholars, the Commission assumes no responsibility for the ideas expressed in these publications. With some of these ideas the Commission disagrees. Nonetheless, the material was valuable to the Commission and is being published in order to encourage further studies and appraisals of workmen's compensation.

We have carefully considered the views presented at our hearings and by our staff and contractors. The issues have been analyzed thoroughly in our formal sessions, correspondence, and conversations. Although we have given serious attention to previous recommendations for workmen's compensation programs, such as the widely approved standards published by the U.S. Department of Labor and the Model Act published by the Council of State Governments, we assumed as our responsibility a complete reexamination of workmen's compensation in light of the historical changes noted by Congress. We have evaluated the effects of these changes on the "fairness and adequacy" of the program launched more than 50 years ago. We have concluded there is a substantial and vital role for workmen's compensation in contemporary America.

The main body of our Report contains three parts which lead to this broad conclusion. The general objectives of a modern workmen's compensation program are discussed in Part One. A detailed evaluation of the present workmen's compensation program and our recommendations follow in Part Two. In Part Three, we discuss the future of workmen's compensation.

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PART I. OBJECTIVES FOR A MO WORKMEN'S COMPENS PROGRAM

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The four basic objectives are

Broad coverage of employees and of work-related injuries and diseases

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Provision of sufficient medical cur and rehabilitation services

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There are five major objectives for a modern workmen's compensation program: four of them basic and an equally important one that supports the others.

The four basic objectives are:

Broad coverage of employees and of work-related injuries and diseases

Protection should be extended to as many workers as feasible, and all work-related injuries and diseases should be covered.

Substantial protection against interruption of income

A high proportion of a disabled worker's lost earnings should be replaced by workmen's compensation benefits.

Provision of sufficient medical care and rehabilitation services

The injured worker's physical condition and earning capacity should be promptly restored.

Encouragement of safety

Economic incentives in the program should reduce the number of work-related injuries and diseases.

The achievement of these four basic objectives is dependent on a fifth objective:

An effective system for delivery of the benefits and services

The basic objectives should be met comprehensively and efficiently.

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[illegible] below [illegible] with reference to the objectives most pertinent and with a citation of the chapter in the Report which deals most extensively with the respective topics.

In addition to the five objectives, another basis for our evaluation is the Congressional directive to determine if State workmen's compensation laws provide an "adequate, prompt, and equitable" system. We use "adequate" to mean sufficient to meet the needs or objectives of the program; thus, we examine whether the resources being devoted to workmen's compensation income benefits are sufficient. We use "equitable" to mean fair or just; thus, we examine whether workers with similar disabilities resulting from work-related injuries or diseases are treated similarly by different States. (See Glossary for full definitions of these and other terms.)

1. A Modern Workmen's Compensation Program Should Provide Coverage of Employees and Work-Related Injuries and Diseases

Coverage of Employees
(Section 27(d)(1)(C))

Although the percentage of employees covered by workmen's compensation is increasing, State and Federal programs now reach only about 85 percent of all employees. This coverage is inadequate. Inequity results from the wide variations among the States in the proportion of their workers protected by workmen's compensation. Thirteen States that cover more than 85 percent of their workers contain more than half of the nation's labor force, but 15 States cover less than 70 percent. Inequity also results because the employees not covered usually are those most in need of protection: the low-wage

workers, such as farm help, domestics, casual workers, and employees of small firms.

The lack of coverage is due primarily to the statutory exclusion of specific occupations or classes of employers. Another important factor is the persistence in some States of a tradition that coverage be elective.

Our recommendations on coverage are in essence that coverage be extended so as to provide protection to most employees now excluded and that coverage be mandatory.

Elective coverage [Section 27(d)(1)(I)]. Despite progress in recent decades, the laws of more than a third of the States retain the elective feature, installed originally in deference to constitutional interpretations that are largely irrelevant now.

We recommend that workmen's compensation be compulsory rather than elective. (See R2.1)

(In this Introduction and Summary, in the interest of brevity, we have abbreviated and reworded some of our recommendations contained in Chapters 2 through 6. Each recommendation in this summary contains a reference to the full text of the recommendations published in these five chapters. R2.1 is the first recommendation in Chapter 2.)

Numerical exemptions [Section 27(d)(1)(C)]. Barely half the States extend coverage to firms with one or more employees, and among these are States which exempt certain classes of employers, such as charitable organizations.

We recommend that employers not be exempted from workmen's compensation because of the number of their employees. (See R2.2)

Exclusions [Section 27(d)(1)(C)]. Exclusions include such categories as farmworkers, casual and domestic workers, and employees of State or local governments.

Farmworkers. Only about a third of the States cover farmworkers on essentially the same basis as other workers. Because of administrative considerations, we recommend a two-stage approach to coverage for agricultural workers.

As of July 1, 1973, coverage should be extended to agricultural employees whose employer's annual payroll exceeds $1,000. By July 1, 1975, coverage should be extended to farmworkers on the same basis as all other employees. (See R2.4)

Casual and domestic workers. Although several States cover some casual household employees, no State covers them on the same basis as all other workers. The transient or casual character of domestic jobs and the large number of households argue against efforts to provide coverage by conventional means.

We recommend that by July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security. (See R2.5)

Government employees. The laws of 44 States require coverage of some or all State employees; 36 States require coverage of employees of local governments; the other laws are elective.

We recommend that workmen's compensation coverage be mandatory for all government employees. (See R2.6)

Conflicts among State laws [Section 27(d)(1)(M)]. Employees who are subject to the laws of two or more jurisdictions are often uncertain as to where to file a claim. The claim may be compensable under one State law and invalid under another, or, in the extreme, compensable under neither.

We recommend that the employee be given the choice of filing a claim for workmen's compensation in any State where he was hired, or where his employment was principally localized, or where he was injured. (See R2.11)

Coverage of Injuries and Diseases
Section 27(d)(1)(D)

Substantial litigation results from efforts to determine which injuries or diseases are work-related and compensable. There are both legal and medical questions in each claim. The medical question is whether there was in fact an impairment or death caused by an injury or disease that was work-related. The legal question is whether the worker has suffered disability, i.e., a loss of actual earnings or earning capacity

attributable at least in part to the work-related impairment.

The traditional test for determining whether an injury or disease is compensable, is that the cause must be an "accident," sudden, unexpected, and determinate as to time and place. This interpretation has served to bar compensation for most diseases and for injuries which were considered routine and usual in the place of employment.

We recommend that the "accident" requirement be dropped as a test for compensability. (See R2.12)

The compensability of diseases has been hampered also by the uncertain etiology of many impairments. Efforts to overcome this uncertainty by listing specific compensable diseases results in lack of coverage for some diseases.

We recommend that all States provide full coverage of work-related diseases. (See R2.13)

2. A Modern Workmen's Compensation Program Should Provide Substantial Protection Against Interruption of Income

In general, workmen's compensation programs provide cash benefits which are inadequate. The majority of disabled beneficiaries receives less than two-thirds of the lost wages. In most States, the most a beneficiary may receive, "the maximum weekly benefit," is less than the poverty level of income for a family of four. Moreover, many States limit the duration or the total amount of cash payments.

Payments are inequitable as well as inadequate. Benefits differ widely from State to State. Within States, high-wage workers, if disabled, receive a smaller proportion of their lost earnings than do low-wage earners because they are limited by the ceiling of the maximum weekly benefits. Also, in some States, it appears that benefits paid for minor injuries are relatively more generous than payments for serious injuries.

Many programs appear to pay uncontested claims with reasonable promptness. When claims are contested, the record is less satisfactory.

Cash benefits are based primarily on the worker's actual loss of wages or loss of wage earning capacity. Also, whether or not they suffer a loss of wages or of earning power, workers in many States may receive cash payments because of work-related impairments.

Benefits usually are computed as a percentage of gross pay, rather than spendable earnings. Tax factors and the number of dependents contribute to inequities in this approach, and the inequities would be compounded if higher benefits were paid. The traditional payments are two-thirds of pre-tax wages. Benefits calculated as 80 percent of spendable earnings would better reflect the worker's pecuniary economic circumstances and cost the system little more. The small increase in cost would in any event recognize the value of the supplements or fringe benefits which have been introduced since the two-thirds formula was established, and which are not included in gross pay.

Temporary total disability benefits [Section 27(d)(1)(A)]. A worker who is temporarily and totally disabled experiences a temporary and complete loss of wages. Benefits do not begin unless the disability persists for a specified waiting period. Usually, if the disability continues beyond a specified qualifying period, the worker receives benefits retroactively for the time lost in the waiting period. A worker's benefit is calculated as a prescribed proportion of his previous wages, subject to minimum and maximum weekly benefits.

Waiting period [Section 27(d)(1)(B)]. Recommendations published by the Department of Labor propose a 3 day waiting period and a 14 day retroactive period. In contrast, the Model Act of the Council of State Governments specifies a 7 day waiting period and a 28 day retroactive period. Most States meet the standard of the Model Act, but do not meet the Department of Labor recommendation. Although the Model Act would provide benefits for 83 percent of lost time, the U.S. Department of Labor standard would compensate for 93 percent. The purpose of the waiting and retroactive provisions are to reduce payments for truly minor incidents and to assure benefits for even moderately serious injuries.

We recommend that the waiting period be no more than 3 days and that the retroactive period be no more than 14 days. (See R3.5)

Maximum weekly benefits. Both the Department of Labor and the Model Act recommend that the maximum weekly benefit should be at least two-thirds of the average weekly wage in the State. The majority of States do not meet this standard; most did in 1940, but since then have not kept pace with the rise in wages. In 32 States as of January 1, 1972, the maximum for a family of four was less than 60 percent of the State's average wage. Such levels of payment are clearly inadequate.

A maximum of two-thirds of the State's average wage, coupled with a provision that purports to provide disabled workers at least two-thirds of their individual wages, produces the anomaly that almost half of all disabled workers those who had earned more than the State's average wage would receive less than two-thirds of their lost pay.

We recommend progressive increases in the maximum weekly wage benefit, according to a time schedule stipulated in Chapter 3, so that by 1981 the maximum in each State would be at least 200 percent of the State's average weekly wage. (See R3.8 and R3.9)

Proportion of lost wages to be replaced. The decision fixing the proportion of lost wages to be replaced must balance incentives to employers to improve safety with incentives to the disabled to take full advantage of rehabilitation services and to return to work.

We recommend that cash benefits for temporary total disability be at least two-thirds of the worker's gross weekly wage. The two-thirds formulation should be used only on a transitional basis until the State adopts a provision making payments at least 80 percent of the worker's spendable weekly earnings. (See R3.6 and R3.7)

Each worker's benefit would be subject to the State's maximum weekly benefit.

Permanent total disability benefits [Section 27(d)(1)(A)]. A worker is eligible for permanent total benefits when he experiences a complete loss of wages for a prolonged period. In a few States, a worker may receive permanent total benefits merely because he is unable to return to his previous job.

We recommend that our permanent total benefit proposals be applicable only in those cases which meet the test of permanent total disability used in most States. (See R3.11)

Our position on maximum weekly benefits and the proportion of wages to be replaced is identical with our recommendations for temporary total disability. The main issues for permanent total disability benefits concern the total sum allowed and the duration of payments.

Although there is wide agreement that payments for permanent total disability should be paid for life, we found that 19 States in 1972 failed to comply with that recommended standard. In 15 States, duration of payments was limited to 10 years and in 11 States the gross sum payable was less than $25,000, which is less than the average full-time worker in the United States earns in four years.

We recommend that permanent total benefits be paid for the duration of the worker's disability without limitations as to dollar amount or time. (See R3.17)

Relationship to other programs [Section 27(d)(1)(O)]. The variability of benefits provided to disabled workers from sources other than workmen's compensation aggravates the inequities of the system.

If our recommendations for increases in the maximum weekly benefit for permanent total disability and the removal of limitations of time and duration are accepted, we believe that these permanent total benefits should be coordinated with other programs.

We recommend that the Social Security benefits for permanent and total disability be reduced in the presence of workmen's compensation benefits. (See R3.18)

Permanent partial disability benefits. The issues arising from benefits for permanent partial disability are so critical to the future of workmen's compensation that the subject warrants the highest priority. Unfortunately, the critical need for corrective action is matched by the elusiveness of the proper remedy, and there is a serious danger that premature or insufficiently detailed recommendations might only worsen

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the present problems. These problems include the wide variation from State to State in the ratio of permanent partial benefits to total benefits, and the apparent tendency in some States for the payment of disproportionately large benefits for minor permanent partial disabilities relative to the benefits for major permanent partial and permanent total disabilities. Also, in some States, evaluations of the extent of permanent partial disability often seem to be without consistent guidelines. Although the recently issued American Medical Association's *Guides to the Evaluation of Permanent Impairment* are a welcome contribution, they are designed only for the evaluation of impairment and do not purport to provide guidance for the evaluation of disability, as opposed to impairment.

These apparent inconsistencies and deficiencies warrant a separate study and report. We do not deny the importance of the permanent partial phase of workmen's compensation; we feel our responsibility at this time is to point to the need for the immediate commencement of a thorough examination of permanent partial benefits.

Death benefits. Death benefits consist of payments to the surviving spouse, minor children, or other dependents of a worker who dies as a result of a work-related injury or disease. Such benefits account for less than one percent of all workmen's compensation cases and less than ten percent of the total payments. The limits on the weekly benefits and on the total duration or amount, as found in many States, result in little overall cost saving for the program and are particularly ill founded.

We recommend that death benefits be at least 66 2/3 percent of the worker's gross weekly wage. The two-thirds formulation should be used only on a transitional basis until the State adopts a provision making payments at least 80 percent of the spendable earnings of the worker. (See R3.20 and R3.21)

We recommend that the minimum weekly benefit for death cases be at least 50 percent of the average weekly wage in the State. (See R3.26)

In death cases, we recommend that the State's maximum weekly benefit be increased until, by 1981, the maximum represents 200 percent of the State's average weekly wage. (See R3.23 and R3.24)

We see no justification for arbitrary limitation of the amount or duration of benefits to survivors of a deceased worker.

We recommend that benefits in death cases be paid to a widow or widower for life or until remarriage, and in the event of remarriage we recommend that two years' benefits be paid in a lump sum to the widow or widower. We also recommend that benefits for a dependent child be continued until the child reaches 18, or beyond such age if actually dependent, or at least until age 25 if enrolled as a full-time student in any accredited educational institution. (See R3.25)

Relationship to other programs (Section 27(d)(1)(O)). Adoption of our recommendations will assure that families of those who die from work-related causes will have greater and more continuous protection than they might receive from Social Security.

We recommend that workmen's compensation benefits be reduced by the amount of any payments received from Social Security by the deceased worker's family. (See R3.27)

3. Workmen's Compensation Should Provide Sufficient Medical Care and Rehabilitation Services

Medical care and rehabilitation services contribute both a monetary and a human value to the workmen's compensation system. Medical benefits have a monetary value of one billion dollars a year, about a third of the charges to the system. Four out of five beneficiaries receive medical services only.

In addition to medical services from the time of injury or detection of the disease, the system provides physical restoration services, including surgery and physical therapy, guidance and instruction in restoring earning capabilities, and placement in productive employment.

The record of delivering such services varies. Performance of medical services is reasonably good but, with only a few exceptions, the performance of physical restoration is less successful. Vocational guidance and instruction services are spotty and placement services for rehabilitated workers are generally inadequate.

These services need increased attention and coordination.

Choice of physician [Section 27(d)(1)(B)]. Among the issues that relate to the quality of medical care is the method of selecting a physician for the injured employee. The recommended standard published by the U.S. Department of Labor would permit the employee to select the physician freely or in accord with rules of the workmen's compensation agency. Half the States use this system. It can be argued that such freedom for the employee is illusory or disadvantageous to one with a work-related disease which may be improperly diagnosed by a physician unfamiliar with a specialized working environment. Conversely it may be argued that any limitation on the freedom of choice is an infringement on access to independent medical services.

We recommend that the worker be permitted the initial selection of his physician, either from among all licensed physicians in the State or from a panel of physicians selected or approved by the State's workmen's compensation agency. (See R4.1)

Amount and duration of medical benefit [Section 27(d)(1)(B)]. Limits on the amount or duration of medical care are more prevalent for work-related diseases than for injuries. The trend has been to remove such limits for injuries: 41 States comply with the U.S. Department of Labor standard of full medical benefits for those injured on the job. The trend has been similar with respect to diseases but only 36 States in 1972 provide full benefits. The limitations apply largely to diseases activated by dust.

Where the statutes specify payment of "all reasonable" charges, this language has been interpreted in some States to impose limitations on the types of services used. The wisdom of limiting services according to the merits of an individual situation is not open to challenge, but we oppose arbitrary rules that limit medical or rehabilitation services without regard to their merit. Such limits can be self-defeating if they deny benefits, such as prosthetic devices, which restore a patient to a productive career. For the same reasons we oppose compromise and release agreements which terminate an employee's right to medical benefits. Even when lump sum payments are offered in exchange for such waiver of rights, we believe the agreements should require approval of the administrative agency.

We recommend there be no statutory limits on the length of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment. (See R4.2)

Supervision of quality care at reasonable cost. There are no short cuts to economical delivery of medical care of satisfactory quality. There is no substitute for conscientious supervision by competent professionals in order to insure that a job is done well. Nevertheless, fewer than half the States provide such supervision within the workmen's compensation agency. Supervision can not be effective if limited to a clerical review of case histories. There must be skilled observation and authority to order provision of necessary services, to curb excessive charges, and to recommend or require workmen to seek appropriate consultation.

Fewer than half of the States have a medical-rehabilitation division and only 26 provide such supervision in a manner consistent with recommended standards.

We recommend that each workmen's compensation agency establish a medical rehabilitation division, with authority to effectively supervise medical care and rehabilitation services. (See R4.5)

Vocational rehabilitation [Section 27(d)(1)(E)]. Medical care would be far more effective if well coordinated with vocational rehabilitation services. Such coordination would require employers to report promptly to the medical-rehabilitation division on the condition of claimants who are seriously disabled. Simultaneously, the claimant should be informed of his rights and opportunities to use restorative, guidance, and instruction services. Employees of the medical-rehabilitation division would be held responsible for following the course of such services and for assisting in their delivery.

Although some vocational services are provided by insurance carriers and employers, vocational aspects of rehabilitation are handled in most States mainly by agencies that rarely

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have more than a tangential relationship with workmen's compensation or physical rehabilitation services.

Many disabled workers fail to receive vocational services partly because they are not aware of their rights, partly because they lack motivation because of a fear they will lose compensation benefits if rehabilitated, and partly because they cannot afford the out-of-pocket costs of maintenance during instruction.

We recommend that the medical-rehabilitation division within each State's workmen's compensation agency be given the specific responsibility of assuring that every worker who could benefit from vocational rehabilitation services be offered those services. (See R4.7)

The cost of such services should be assessed against the employers, if only to assure that rehabilitation receives appropriate attention within the workmen's compensation program. Provision of special maintenance benefits during the period of instruction, with the sum and period to be determined by the medical-rehabilitation division, would help to assure cooperation of the worker in the instruction program. A worker who refuses vocational assistance might also be subject to denial of other benefits.

Placement of the disabled and use of second-injury funds [Section 27(d)(1)(F)]. "Hire the Handicapped" campaigns have a much broader base than workmen's compensation. They aim to employ not only those disabled on the job, a small portion of the total number of disabled, but others, notably veterans.

The employer concerned with operating costs, including premiums for workmen's compensation insurance, tends to be dubious about, if not averse to, hiring anyone with a preexisting impairment. If an employee with only one hand loses the other, or if an employee with sight in only one eye becomes totally blind, it is inequitable to burden the employer with the charges for the total disability. For this reason, all but four States have established a subsequent- or second-injury fund which assumes responsibility for paying for the compounding effects of a second injury. By this means, the worker receives in full the benefits which are his right, but the employer is charged only for the contributing effects of the last injury and not for the total. He is charged for one eye only: the fund pays the balance of the award for total blindness.

Unfortunately, many employers appear to have little knowledge of such funds. Also, in many States, the funds are insufficiently financed. Only 20 States have second-injury funds with broad coverage of preexisting impairments. Coverage that is so broad as to cover virtually every employee would defeat the purpose of the fund. The Model Act specifies 26 permanent impairments eligible for coverage by a second injury fund and, in addition, covers any impairment which is equivalent to 50 percent of total impairment.

We recommend that States establish a second-injury fund with a broad coverage of pre-existing impairments. We recommend that the second-injury fund be financed by charges against all carriers, State funds, and self insuring employers in proportion to the benefits paid by each, or by general revenue, or by both sources. We urge State workmen's compensation agencies to interpret eligibility for second-injury funds liberally in order to encourage employment of the physically handicapped and to publicize the programs to employers and employees. (See R4.10, R4.11, and R4.12)

4. Workmen's Compensation Should Encourage Safety

Consistent with its aims to protect maintenance of income and to deliver services of high quality with the maximum economy, workmen's compensation also offers incentives to improve the safety of working conditions.

Although the supporting evidence is limited, we believe that the experience rating of insurance premiums can offer employers an incentive to develop safe designs, practices, and working arrangements. It has been demonstrated in individual industries that preventive health and safety programs dramatically improve productivity and reduce labor costs. The spur to safety from experience rating is restricted because 80 percent of all employers are too small to be eligible under present regulations.

We recommend that, subject to sound actuarial standards, the experience rating principle be

extended to as many employers as practicable. (See R5.3)

In addition to the built-in stimulus to safety provided by experience rating, workmen's compensation also promotes safety by expending substantial resources on accident prevention services. However, in some States there are so many carriers writing workmen's compensation insurance, it is unlikely that all provide effective safety programs. Likewise, some State-operated insurance funds and some self-insuring employers devote insufficient resources to safety programs.

We recommend that insurance carriers be required to provide loss prevention services and that the workmen's compensation agency carefully audit these services. State-operated workmen's compensation funds should provide similar accident prevention services under independent audit procedures where practicable. Self-insurers should likewise be subject to audit with respect to the adequacy of their safety programs. (See R5.2)

5. There Should Be an Effective Delivery System for Workmen's Compensation

The effectiveness of workmen's compensation is to be judged by the program's ability to deliver the benefits and services which fulfill its basic objectives.

Six obligations of administration [Section 27(d)(1)(J)]. In this connection, the primary obligations of the workmen's compensation agency are: (1) to take initiatives in administering the act, (2) to provide for continuing review and seek periodic revision of both the workmen's compensation statute and supporting regulations and procedures, based on research findings, changing needs, and the evidence of experience, (3) to advise employees of their rights and obligations and to assure workers of their benefits under the law, (4) to apprise employers, carriers, and others involved of their rights, obligations, and privileges, (5) to assist voluntary resolutions of disputes, consistent with the law, (6) and to adjudicate disputes which do not yield to voluntary negotiation. Adjudication should be the least burdensome of these six obligations if the others are well executed.

Legal expenses [Section 27(d)(1)(K)]. Originally it was hoped that the compensation program would be self-administering; that employees would protect their interests without need for legal counsel or other outside intervention. The no-fault concept and prescribed benefits, it was assumed, would reduce the need for litigation. The complexities of the law and doubts about the sources and nature of impairments have dashed these expectations, although, given sufficient assistance by administrative agencies, claimants might have relied less on privately retained counsel and the system as a whole might have been spared the concomitant legal expenses.

We recommend that attorneys' fees for all parties be reported for each case, and that the fees be regulated under the rulemaking authority of the workmen's compensation administrator. (See R6.15)

Administrative organization. Disputes on claims in five States are assigned immediately to the general courts. Adjudicators who handle workmen's compensation cases exclusively have the primary duty to resolve disputes in 45 States. Only if they fail are the decisions appealed to the courts.

We recommend that each State utilize a workmen's compensation agency to fulfill the administrative obligations of a modern workmen's compensation program. (See R6.1)

In line with their traditional role of providing a laboratory for experimentation, with variations suited to their own experience, needs, or creativity, the States have devised a variety of structures to administer their workmen's compensation programs. It is difficult to evaluate these structures outside the entire political and economic context of each State. The State agencies vary remarkably in their assignment and exercise of responsibilities. Some agencies do little but adjudicate, with small regard for the effective delivery of workmen's compensation services or for their other administrative obligations, cited above. For this reason, we advocate a strong administrative leadership with authority commensurate to the responsibility, empowered to supervise all employees except the members of the appeals board. One person should be

responsible for the administration of the State workmen's compensation program. This emphasis on personnel as a crucial factor in the excellence of the system extends to the entire staff of the agency.

We recommend that, insofar as practical, all employees of the agency be full-time with no outside employment, with salaries commensurate with this full-time status. (See R6.5)

Processing of claims. A number of positive recommendations on administrative procedure appear in Chapter 6. In this summary, we will mention only two, which are included in the list of subjects assigned to us for evaluation by Congress.

Time limits on filing claims [Section 27(d)(1)(G)]. The problem for an employee in meeting the time limit for filing his claim is particularly acute when his impairment results from a work-related disease. A substantial lag may occur between exposure to the disease-producing substance and the manifestation or diagnosis of the disease. The recommendation published by the Department of Labor favors a flexible time limit, so that workers with long developing disabilities can still receive benefits, and about one-half of the States meet this recommended standard.

We recommend that the time limit for initiating a claim be three years after the date the claimant knows, or by exercise of reasonable diligence should have known, of the existence of the impairment and its possible relationship to his employment, or within three years after the employee first experiences a loss of wages which the employee knows or, by exercise of reasonable diligence, should have known was because of the work-related impairment. If benefits have previously been provided, the claim period should begin on the date benefits were last furnished. (See R6.13)

A uniform system of reporting [Section 27(d)(1)(L)]. An active State agency, such as we have recommended, requires the receipt and analysis of substantial data. Most of these data may be useful only within the particular State, but there are advantages which would result from nationally uniform data on several aspects of workmen's compensation, such as promptness of payments, the number of workers receiving the maximum benefits, and the amount of legal fees. At the present time, most States cannot provide this information on any basis, and almost none of the data can be compared across States.

A salutary consequence of preparation and dissemination of comparable data would be the enhancement of one virtue of the Federal system, namely that States can be laboratories of experiment and learn from one another.

Insurance systems [Section 27(d)(1)(N)]. Most workmen's compensation laws provide that qualified employers may self-insure their obligations. Other employers are required to buy insurance from a private carrier or a State fund. Although private carriers are excluded from some States, they provide 63 percent of all workmen's compensation benefits; State funds, 23 percent; and self-insured employers, 14 percent.

The studies available to us indicate that no type of insurance has a general advantage over another in delivering services.

We recommend that States be free to continue their present insurance arrangements or, if the States wish, to permit private insurance, self-insurance, and State funds where any of these types of insurance now are absent. (See R6.20)

Protection against insolvency. Special means are needed to protect employees in the event the employer fails to comply with the insurance requirements of the workmen's compensation law or if a carrier or employer becomes insolvent. Insolvency is a risk of the free enterprise system, but the penalties should not be assessed upon disabled employees.

We recommend that procedures be established in each State to provide benefits to employees whose benefits are endangered because of an insolvent carrier or employer, or because an employer fails to comply with the law mandating the purchase of workmen's compensation insurance. (See R6.21)

PART III. THE FUTURE OF WORKMEN'S COMPENSATION

Our intensive evaluation of the evidence

compels us to conclude that State workmen's compensation laws are in general neither adequate nor equitable. While several States have good programs, and while medical care and some other aspects of workmen's compensation are commendable, strong points too often are matched by weak.

In recent years, State laws have improved. In 1971, more than 300 bills were enacted, about 100 more than customary in odd-year legislative sessions. This encouraging burst of activity nevertheless failed to satisfy many basic needs. Of 16 recommendations for workmen's compensation published by the Department of Labor, the average State meets only eight. The wide variation among the States also are disturbing. While 9 States meet at least 13 of the recommendations, 10 States meet 4 or fewer.

An appropriate response to the serious deficiencies of workmen's compensation has been the major concern of our Commission. Are we to conclude that workmen's compensation is permanently and totally disabled, or is there a rational basis for continuing the program?

That fundamental question has obliged us to consider the possible alternatives to workmen's compensation. We have discussed the implications of abolishing workmen's compensation and reverting to the negligence suits, a remedy abandoned some 50 years ago. This option is still inferior to workmen's compensation: its deficiencies include uncertainties for both employer and worker and the substantial costs arising from litigation over the degree and source of impairment. Such litigation also has serious adverse effects on efforts at rehabilitation.

An even more radical option is the proposal to disassemble the program and distribute the components elsewhere. We are convinced that the problems associated with partition are insoluble, and that the injured workingman would be adversely affected. Each of the programs to which the components would be assigned has at least one serious deficiency compared to workmen's compensation. For example, the eligibility requirements of the Disability Insurance program under Social Security preclude benefits until the worker has several quarters of covered employment. In workmen's compensation, in contrast, the worker is eligible from the first day he is employed. Also, we do not believe there is likely to be in the near future a source of medical care as satisfactory as workmen's compensation. Under most proposals for national health insurance, there are deductibles and other limitations on benefits not found in most workmen's compensation statutes. The ultimate weakness of partition, however, is that there are no well established locations for the two most important components of workmen's compensation: cash benefits for short-term total disabilities and cash benefits for long-term partial disabilities.

Perhaps in another decade or two, an attractive alternative to workmen's compensation will emerge.

For the foreseeable future we are convinced that, if our recommendations for a modern workmen's compensation program are adopted, the program should be retained.

The issue then becomes the final subject assigned to us by Congress: what are the "methods of implementing the recommendations of the Commission?" As we have reviewed the efforts for improvement by the various States, it has become apparent that the answer to this question is the most elusive of all that have been raised. Our recommendations are not fundamentally different from those of earlier investigations; yet previous recommendations have won no strong support.

Several reasons for the indifferent response to previous reform proposals are evident. The lack of interest in or understanding of workmen's compensation by State legislators and the general public is attributable in part to the complexity of the program. Various interest groups, including employers, unions, attorneys, and insurance carriers, have often allowed their specialized concerns to stand in the way of general reform. And State legislators and officials, even when they have been genuinely interested in reform, have too often been dissuaded by the irrational fear that the resulting increase in costs would induce employers to transfer business to States with less generous benefits and lower costs.

In view of these experiences, we have contemplated various strategies for improving workmen's compensation. Among those suggested at our hearings were a complete Federal takeover; retention of present State programs with only voluntary responses to Federal guidance or recommendations; and various methods of combining the basic State-

tection would be required. The normal enforcement method would be the imposition of fines on non-complying employers. Most claims would be handled by existing State workmen's compensation agencies using their regular procedures, except that the scope of protection afforded by the State must include the essential recommendations.

The Commission was unanimous in concluding that congressional intervention may be necessary to bring about the reforms essential to survival of the State workmen's compensation system. We believe that the threat of or, if necessary, the enactment of Federal mandates will remove from each State the main barrier to effective workmen's compensation reform: the fear that compensation costs may drive employers to move away to markets where protection for disabled workers is inadequate but less expensive. There was disagreement concerning the appropriate time for Congressional action, with a majority concluding that States should be given until 1975 to act before Federal mandates are enacted if States have not adopted our essential recommendations. One reason for the delay is the feeling that an immediate push for congressional legislation would precipitate a confrontation which would delay positive action at the State level pending the outcome. Another reason is that many necessary reforms in the State workmen's compensation programs are not susceptible to Federal mandates. If our mandates immediately were adopted by Congress and made applicable to the States, some States might fail to undertake the thorough review of our recommendations that are not appropriate as Federal mandates.

If the Federal government guarantees the adoption of our essential recommendations, if a new Commission is established to encourage and assist the States, and, most important, if those who control the fate of workmen's compensation at the State level accept responsibility for the program's reform, we believe that soon the protection provided by workmen's compensation to "the vast majority of American workers, and their families . . . in the event such workers suffer disabling injury or death in the course of their employment. . . [will be] adequate, prompt, and equitable."

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