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No-Fault Personal Injury Automobile Insurance: The Québec and New York Experiences and a Proposal for California

By SONJA STENER*

Member of the Class of 1991

I. INTRODUCTION

One of the primary purposes of the automobile liability insurance system is to provide compensation to people injured in automobile accidents. Many experts agree that the liability insurance system has been inadequate and inefficient in providing compensation to auto accident victims.¹

Recovery of damages for injuries suffered under the traditional tort system is contingent upon the plaintiff’s ability to establish that the defendant was at least partially at fault.² Due to this fault requirement, many claims must be litigated,³ delaying compensation of the victim by months or years.⁴ Numerous victims remain uncompensated or undercompensated, while others receive compensation far in excess of their actual losses.⁵ Compensation under the liability insurance system is slow in coming and uncertain at best.

The automobile liability insurance system is also failing in another important respect—affordability. Auto liability insurance is becoming increasingly expensive. The increase in insurance premiums has been at least partly responsible for a concurrent increase in the number of unin-

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¹ See, e.g., W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 83 (5th ed. 1984) [hereinafter PROSSER & KEETON].

² Id. §§ 30, 38.

³ Id. § 83, at 598.


⁵ PROSSER & KEETON, supra note 1, § 83, at 598; O'Connell, supra note 4, at 899.
sured motorists. During the last decade, the number of serious automobile accidents caused by uninsured motorists increased by forty percent nationwide. Uninsured drivers cause premiums to rise because insured drivers must purchase coverage against injury caused by uninsured drivers.

No-fault personal injury automobile insurance (no-fault) has been suggested by a number of scholars as a solution to both of these problems. Studies show that under a no-fault system, more drivers who suffer personal injury are compensated and they are compensated more quickly than drivers insured under traditional policies. Further, recent data suggests that no-fault premiums do not increase as rapidly as traditional policy premiums.

While many states experience the problems of uninsured drivers and undercompensated victims, California has been particularly hard hit by the liability insurance crisis. The California court system is severely clogged, causing extreme delays for traffic accident victims who are forced to pursue their claims in court. California also has one of the highest estimated percentages of uninsured drivers in the nation. California insurance officials estimate that twenty-five percent of California's sixteen million cars are uninsured.

Reform of the automobile liability insurance system is needed desperately in California. Recently, California legislators and voters have been searching for alter-
natives to the current automobile liability system.\textsuperscript{15} Whatever alternative California eventually adopts, other states are likely to follow soon with similar reforms.

Québec and New York State have adopted no-fault auto insurance acts\textsuperscript{16} to alleviate the problems associated with traditional tort systems. Experts consider these no-fault systems to be among the most innovative and successful no-fault plans in existence. This Note will outline the Québec and New York no-fault systems, analyzing the differences in the two and the practical effects of those differences. This Note proposes that California adopt a no-fault personal injury plan, incorporating some of the aspects of both the Québec and New York systems, to replace the traditional liability insurance system in compensating auto accident victims.

\section*{II. NO-FAULT PERSONAL INJURY AUTO INSURANCE}

\subsection*{A. Failure of the Traditional Tort System}

Traditional insurance is third-party insurance; the insurance company compensates any third party who has been injured by the policyholder’s negligence.\textsuperscript{17} The bodily injury portion of the policy protects the policyholders by providing them with a legal defense and paying damages to any accident victim injured through the policyholder’s negligence.\textsuperscript{18} By failing to purchase adequate bodily injury liability insurance, uninsured or underinsured motorists create what is termed the "compensation gap."\textsuperscript{19}

Certain traditional insurance provisions help bridge the compensation gap and provide for payment to a number of auto accident victims who are unable to recover all or part of their losses from the negligent party’s insurer. First, uninsured or underinsured motorist insurance pays the policyholder’s injury losses when the policyholder is injured by

\begin{itemize}
  \item \textsuperscript{15} In November 1988, there were four auto insurance initiatives on the California ballot, Propositions 100, 103, 104, and 106. Four auto insurance bills were introduced during the 1989-90 legislative session; none of them progressed to the second house. George, \textit{Whither No-Fault in California: Is There Salvation After Proposition 103?}, 26 SAN DIEGO L. REV. 1065, 1073-76 (1989).
  \item \textsuperscript{17} U.S. DEP’T OF TRANSP., supra note 10, at 2.
  \item \textsuperscript{18} Id. at 2, 9.
  \item \textsuperscript{19} Id. at 12.
\end{itemize}
a hit and run, uninsured, or underinsured motorist.\textsuperscript{20} However, the policyholder must still show that the other party was at fault.\textsuperscript{21} Second, insurance covering medical payments pays medical expenses up to the policy's limits to all occupants of the policyholder's car, including the insured, without regard to fault.\textsuperscript{22}

Critics charge that the traditional tort system has failed to provide adequate compensation to automobile accident victims.\textsuperscript{23} To recover under the traditional system, the injured party must demonstrate that the defendant was at least partially at fault for the injury.\textsuperscript{24} If the defendant denies fault, the plaintiff must litigate the claim,\textsuperscript{25} which is costly and time consuming. Months or years may elapse between the time the injuries were sustained and the time the victim receives compensation.\textsuperscript{26} Further, numerous victims are either undercompensated or overcompensated.\textsuperscript{27} The present tort system is thus often characterized as a lottery in which the parties and their lawyers do not know whether the plaintiff will recover, even at the time of trial.\textsuperscript{28}

Academics proposed no-fault accident compensation plans as an alternative to the inadequate traditional tort system.\textsuperscript{29} In the late 1960s and 1970s, states began to adopt no-fault plans.\textsuperscript{30} Today, twenty-three states and the District of Columbia have implemented some form of no-fault personal injury auto insurance.\textsuperscript{31}

B. No-Fault Defined

Under no-fault accident compensation plans, the injured party is compensated without regard to fault.\textsuperscript{32} No-fault insurance is first-party insurance; the insurance company pays benefits to the policyholder, re-
gardless of fault, whenever the event insured against occurs. Thus, under no-fault insurance plans, people injured in automobile accidents make a claim to their own insurance company for indemnification, regardless of who caused the accident. In addition, any pedestrian, bicyclist, or occupant of the policyholder's car injured in an accident involving the insured receives compensation for medical expenses under the insured's policy.

In the auto insurance context, no-fault usually refers to insurance against personal injuries; it does not include insurance against property damage. Thus, no-fault insurance policyholders will be indemnified by their own insurance company only for costs associated with personal physical injuries when the policyholders are involved in auto accidents. Any claim for property damage will be handled under the traditional system.

The purpose of no-fault automobile insurance plans is to make compensation more readily available when personal injury or death is caused by an automobile accident. Instead of having to litigate claims for medical expenses, the injured policyholder simply makes a claim to the insurer and receives compensation for the injuries. This process compensates victims much more quickly than a traditional tort suit. However, the amount of compensation available to an injured party under a no-fault scheme will be less than that recoverable at common law.

C. Different Types of No-Fault

The primary distinguishing characteristic of no-fault insurance systems is that the insured's right to bring a lawsuit in tort for personal injury is limited to some degree. The benefits received under a no-fault

33. Id.
34. Id.
35. Id. at 15.
36. Id. at 18. Michigan is the only state in the United States with no-fault property damage automobile insurance.
37. Id. at 14.
38. C. BROWN, NO-FAULT AUTOMOBILE INSURANCE IN CANADA 1 (1988).
39. ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, INSURER STUDY OF PIP SERIOUS INJURY CLAIMS: SECOND FOLLOW-UP (1982). Data collected in this study indicates that no-fault claimants received 33% of the total benefits they would ever receive within 30 days of the date on which they notified their insurance company of their injury, while claimants under a traditional insurance plan received only 8.3% of the benefits they would ever receive within that 30 day period. One year after notification of their insurers, no-fault claimants had received 95.5% of the benefits they would ever receive, while the traditional insurance claimants had received only 51.7% of the compensation they would ever receive.
system serve as a complete or partial substitute for recovery in tort.\textsuperscript{41} Generally, each no-fault system defines a threshold over which an injured party must cross before bringing a lawsuit in tort. The purpose of the threshold is to prevent tort lawsuits for damages for pain and suffering in the absence of serious injury.\textsuperscript{42}

Different jurisdictions establish the threshold in different ways. Dollar thresholds set an amount of medical expenses which are regarded as demonstrating that the victim suffered serious injury.\textsuperscript{43} Verbal or narrative thresholds define serious injury by reference to the physical effects of the injury, such as death, disfigurement, or serious impairment of a bodily function.\textsuperscript{44} If the accident victim's injuries or damages do not meet the threshold as defined in the jurisdiction, the victim is wholly precluded from bringing a lawsuit.\textsuperscript{45} In such a case, the victim is compensated for medical expenses and other injury-related losses by the victim's own insurer under a no-fault policy.

No-fault insurance plans differ by the extent to which they limit the insured's right to bring an action in tort. Add-on no-fault plans provide no-fault personal injury benefits without prohibiting lawsuits as a condition or prerequisite for receiving the no-fault benefits.\textsuperscript{46} Add-on no-fault policies never prohibit the insured from filing a lawsuit.\textsuperscript{47} They merely give the insured the option to refrain from filing suit and to file a claim with the insured's own insurance company for the amount of actual losses. This type of no-fault existed in Pennsylvania,\textsuperscript{48} and currently exists in Oregon,\textsuperscript{49} Saskatchewan,\textsuperscript{50} and Ontario,\textsuperscript{51} as well as in other U.S. states and Canadian provinces.\textsuperscript{52}

Modified no-fault plans abolish the right to sue in tort except in cases of very serious injury.\textsuperscript{53} These plans usually eliminate the right to sue for nonpecuniary losses, such as pain and suffering and loss of enjoy-
ment of life.\textsuperscript{54} Because modified no-fault plan jurisdictions maintain the victim's right to sue in tort when the victim suffers serious injury,\textsuperscript{55} the crucial issue in these jurisdictions becomes how the threshold of "serious injury" is defined. The definition determines under what circumstances injured parties retain the right to bring a tort suit.

Most modified no-fault plans also eliminate the right to sue for economic losses which are covered by the insurance plan.\textsuperscript{56} Thus, under a modified no-fault plan, the insured usually must seek compensation for wage loss and medical expenses incurred as the result of an accident from the insured's own insurer. New York,\textsuperscript{57} Michigan,\textsuperscript{58} and several other states have modified no-fault plans.\textsuperscript{59}

Pure no-fault plans completely eliminate an injured party's right to sue in tort.\textsuperscript{60} No matter how serious the victim's injuries are, the victim and the victim's family are prohibited from bringing a lawsuit and must seek compensation solely from the insurer. Québec is a jurisdiction with this type of no-fault plan.\textsuperscript{61}

\section*{D. The Debate Over No-Fault}

No-fault personal injury auto insurance has long been the subject of heated debate. Those persons opposed to no-fault argue that the amount of compensation awarded under such plans is too low. Indeed, under no-fault schemes, the potential for enormous awards for pain and suffering does not exist for most accident victims. Proponents of no-fault plans contend that while the amount paid out on a single claim may be less than the victim could have received under the tort system, overall, far more accident victims receive compensation for their injuries under no-fault schemes.\textsuperscript{62} Further, victims receive compensation more quickly under a no-fault system than under the tort system.\textsuperscript{63}

Proponents of no-fault plans also argue that no-fault policy premiums are less expensive than traditional liability policy premiums. Recent studies support this assertion. Data analyzed by Professor Jeffrey O'Connell of the University of Virginia suggest that auto liability insur-

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} N.Y. INS. LAW §§ 5101-5108 (McKinney 1985).
\textsuperscript{58} MICH. COMP. LAWS ANN. §§ 500.3101-500.3179 (West 1983).
\textsuperscript{59} U.S. DEP'T OF TRANSP., supra note 10, at 23.
\textsuperscript{60} J. O'CONNELL & R. HENDERSON, supra note 46, at 183.
\textsuperscript{61} See C. BROWN, supra note 38, at 32-33.
\textsuperscript{62} U.S. DEP'T OF TRANSP., supra note 10, at 3.
\textsuperscript{63} Id. at 4.
 ance premiums would be significantly higher in New York had its no-fault law not been enacted. The principal advantage of less expensive insurance premiums is that more drivers can afford insurance. When insurance premiums are high and low-income drivers cannot afford to buy insurance, rather than refraining from driving, they drive without insurance. When an uninsured driver then causes an accident, premiums for insured drivers increase. Proponents of no-fault plans argue that the lower no-fault premiums make auto insurance affordable for many more people. Thus, more drivers are insured and the cost of automobile accidents is spread more evenly among the driving public.

Opponents of no-fault plans argue that the deterrent function of the traditional tort system is not served by the no-fault system. The traditional system theoretically deters dangerous behavior with the threat of liability. Opponents also argue that a no-fault system provides no similar deterrent effect because the potential consequences of negligent behavior are less serious. However, no-fault proponents argue that the traditional tort system, insofar as auto accidents are concerned, has minimal deterrent effect because costs are transferred away from the liable parties to their insurer, giving little incentive to alter future conduct.

The debate over no-fault plans will be further explored in the context of the following analysis of the Québec and New York no-fault systems.

III. NO-FAULT PERSONAL INJURY AUTOMOBILE INSURANCE IN QUÉBEC

The Automobile Insurance Act of Québec (the Act) is widely regarded as the most ambitious no-fault automobile insurance plan in North America. The Québec plan is a pure no-fault plan—it completely eliminates the auto accident victim’s right to sue in tort for any losses resulting from bodily injury.

The Act’s principal objectives appear to be efficiency and the elimination of the delays which are associated with judicial review and litiga-

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64. O'Connell, supra note 11, at 997.
65. Hinds, supra note 6, at 1, col. 1.
66. Sugarman, supra note 30, at 559-60.
67. Id. at 573.
70. Qué. Rev. Stat. ch. A-25, § 4 ("The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of action of anyone by reason of bodily injury and no action in that respect shall be admitted before any court of justice.").
tion. With these objectives in mind, the Québec legislature granted expansive power to the Régie de l’assurance automobile du Québec (the Régie), the administrative agency charged with carrying out the insurance plan implemented by the Act. The Régie is responsible for compensating automobile accident victims for their bodily injuries. This agency of government-appointed officials must compensate auto accident victims “regardless of who is at fault.”

The insurance plan is funded by fees paid annually by registered vehicle owners and licensed drivers. Under the Act, every registered vehicle owner and licensed driver pays the same rate and receives bodily injury insurance. In 1986 car owners paid approximately 145 Canadian dollars for the bodily injury coverage provided under the Act. Coverage for property damage and out-of-province liability is not within the purview of the Act; private insurance companies sell this coverage to Québec motorists.

The Régie has “exclusive jurisdiction to inquire into, hear, and decide any matter relating to the compensation of bodily injury” resulting from an auto accident. The Régie thus has the power to decide whether a particular victim is entitled to compensation and the amount of compensation each deserving claimant will receive.

The Régie has extensive regulatory power. The Act provides that the Régie has the discretion to define terms used in the Act, such as “accident” and “victim.” The Régie also has power to define “loss of physical integrity or disfigurement,” which is the condition that must be satisfied to receive compensation for suffering or loss of enjoyment of life. The Régie further has the power to establish the “rules of proof and procedure applicable to the examination, hearing, and decision of the

74. C. Brown, supra note 38, at 33.
76. O’Connell & Tenser, supra note 69, at 927. In 1986 the Canadian dollar was worth approximately .71 U.S. dollars.
77. C. Brown, supra note 38, at 33.
79. Id.
81. Id.
matters over which the Régie has jurisdiction." Thus, the Régie has broad power to make decisions which significantly impact the scope of the Act and its application.

To receive compensation in Québec, the auto accident victim first files an application with the Régie requesting reimbursement. The Régie reviews the application and issues a written decision to the claimant. The Régie has discretionary power to make a prima facie determination that an application is justified and to begin making payments immediately before rendering a final decision.

If a claimant is denied compensation, the claimant may appeal the Régie's decision in two ways: by applying to the Régie for review or by appealing the Régie's decision to the Commission des affaires sociales. The Commission's decision is final.

Benefits provided under the Act include reasonable costs of medical and paramedical care, ambulance fees, prostheses or orthopedic devices, and the replacement of clothing. The Act provides flexibility in the awarding of medical expenses by giving the Régie discretion to reimburse accident victims for "other expenses of a similar nature." Costs of rehabilitative treatment are also covered by the Act. These costs are paid by the Régie to the extent that they are not covered by any other "social security scheme."

The Canadian National Health Care and Workmen's Compensation systems are the most important of these other social security schemes. The National Health Care system significantly decreases the no-fault system's expenditures on medical expenses. Under this plan, the Canadian government guarantees all citizens equal access to quality health care at

82. Id.
83. Id.
84. Id. § 52.
85. Id. § 54.
86. Id. § 55.
87. Id. § 56.
88. Id.
90. Id.
91. Id. § 46.
92. Id. § 45.
93. Wash. Post, Dec. 18, 1989, at A1, col. 3. The Canadian plan is essentially an insurance system in which patients choose their own doctors and the government pays the bills. The patient is treated and the doctor bills the provincial government directly. Unlike the socialized medicine system in Britain, Canadian doctors are not employed by the state. However, the Canadian government closely regulates doctors' fees and hospital costs.
no cost to the citizen. This comprehensive, tax-financed health plan is one of the principal reasons why the premium exacted by the Régie for no-fault coverage is so low. The vast majority of medical costs are paid by the national health plan, not by the no-fault auto insurance fund.

The Canadian Workmen's Compensation system also relieves the no-fault system of the burden of compensating some victims. Any person entitled to compensation under the Workmen's Compensation Act and indemnity under the no-fault system must seek benefits under the Workmen's Compensation Act and not from the Régie.

In addition to reimbursing auto accident victims for medical expenses, the Act provides for replacement of lost wages. The Act gives a formula for calculating the estimated income of an auto accident victim who is unable to work because of injuries. Calculation of the victim's income is based on the victim's pre-accident gross income from employment, up to an annual maximum. Net income is then calculated by subtracting income taxes from the gross income amount. The victim is then reimbursed for ninety percent of the victim's income. Payments are made twice monthly to the victim beginning one week after the accident and continuing throughout the time of the victim's disability.

Once the injured person returns to work, if the individual earns as much as or more than before the accident, the Régie stops making payments. If the person earns less in a new job than the person earned before the accident, the payments are reduced by an amount equal to fifty percent of the first 5000 Canadian dollars of earned income plus seventy-five percent of the earned income in excess of 5000 Canadian dollars.

The Act makes special provisions for giving income-type reimbursement to victims who are not eligible for income reimbursement. People covered by these special provisions include the unemployed, persons

94. Id.
95. Id.
98. Id. The Act provides that the gross income maximum be recalculated annually to equal 150% of average, nationwide earnings as established by the national statistics bureau, Statistics Canada. Id. § 50, amended by ch. 59, § 26, 1982 Qué. Stat. 1173, 1181. The annual maximum in 1986 was 34,500 Canadian dollars. O'Connell & Tenser, supra note 69, at 921.
99. Id.
100. Id. § 26.
101. Id. § 35.
103. Id.
at home, and students.  

Accident victims who were unemployed at the time of the accident are entitled to compensation based on income they could have had, based on their "experience and . . . physical and intellectual capacities," as determined by the Régie.  

Any victim who is a person at home who becomes unable to perform ordinary household chores is entitled to indemnity for expenses incurred as a result of injury.  

The Act also provides for payments to students who become unable to pursue their studies as a result of injuries sustained in an auto accident.  

When the insured is killed in an auto accident, the Act provides special benefits. A surviving spouse is entitled to payments for life.  

The amount of these payments is equivalent to a percentage of the income replacement indemnity to which the deceased would have been entitled had the deceased survived the accident. The percentage the surviving spouse will receive is calculated on the basis of the total number of dependents surviving the victim. The amount the surviving spouse is entitled to receive will be reduced by any amount received by the survivors from the Québec Pension Plan.  

If the decedent leaves no surviving spouse, dependents will receive payments until the time when they would no longer have been dependents had the decedent lived. In cases where the decedent leaves no spouse and no dependents, the original version of the Act provided for a lump sum payment to the decedent's parents or, if there were no parents, to the estate. However, a 1982 amendment to the Act provides that if

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107. Id. § 23.  
108. Id.  
109. Id. § 21.  
110. Id.  
111. Id.  
112. Id. § 37, amended by ch. 59, § 18, 1982 Qué. Stat. 1173, 1178.  
113. Id.  
114. Id.  
116. Id. § 37, amended by ch. 59, § 18, 1982 Qué. Stat. 1173, 1178.  
the decedent "ensured the viability of a family enterprise," the owners of that business are entitled to a portion of the indemnity.\textsuperscript{118}

The Act also covers funeral expenses. The person who pays the funeral expenses of the victim may claim up to \textdollar 2000 Canadian dollars from the \textit{Régie}.\textsuperscript{119}

Although the Act eliminates a victim’s right to bring a tort cause of action, accident victims may still receive payment for noneconomic losses such as pain and suffering under certain circumstances. A victim who sustains "a loss of physical integrity or disfigurement" is entitled to a lump sum for suffering or loss of enjoyment of life.\textsuperscript{120} The amount of indemnity decreases as the age of the victim increases; thus, infants receive larger sums than adults.\textsuperscript{121}

An interesting issue arises when an accident involves a Québec motorist and a motorist from a traditional tort system jurisdiction whose right to compensation lies in the right to sue the motorist at fault. Québec residents are not obligated to carry third-party liability insurance for accidents occurring inside Québec.\textsuperscript{122} In such an accident, a non-Québec motorist is compensated by the \textit{Régie} "to the extent that he is not responsible for the accident."\textsuperscript{123}

The \textit{Régie} determines to what extent the nonresident motorist was at fault.\textsuperscript{124} If the victim and the \textit{Régie} dispute the extent of the victim’s responsibility, the issue of fault is litigated before the court.\textsuperscript{125}

Thus, the Act discriminates against all nonresidents by compensating them only to the extent that they are not at fault,\textsuperscript{126} while residents are compensated without regard to fault.\textsuperscript{127}

The discriminatory treatment of nonresidents involved in accidents in Québec arguably violates general principles of equal protection by giving comprehensive coverage to residents and less protection to nonresidents.\textsuperscript{128} However, this discrimination can be justified.\textsuperscript{129} The

\begin{itemize}
\item \textsuperscript{121} Id. § 204, sched. A, amended by ch. 59, § 37, 1982 Qué. Stat. 1173, 1184.
\item \textsuperscript{122} Walsh, "A Stranger in the Promised Land?" The Non-Resident Accident Victim and the Québec No-Fault Plan, 37 U.N.B. L.J. 173, 175 (1988).
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. § 7.
\item \textsuperscript{128} No-fault acts in the United States have been challenged in American courts as violative of the Equal Protection Clause of the Federal Constitution. These challenges that no-fault
compensation system managed by the Régie is funded solely by Québec residents. Thus, it does not seem unreasonable to make disbursements from the fund only to the contributors.

The Act has special provisions regarding accidents which occur outside Québec. Québec motorists are obligated under the Act to purchase third-party liability insurance for travel in other provinces of Canada and in the United States. Thus, Québec motorists may be sued by motorists from other jurisdictions when they are involved in accidents which occur outside Québec. However, they may not be sued in the Québec courts. When a Québec motorist is injured in an out-of-province accident, the Québec resident may still claim no-fault benefits under the Act. The Québec resident may also sue the other driver under the law of the jurisdiction where the accident occurred. In this situation, the Régie is subrogated to the extent of its indemnification of the victim. The victim may retain any excess damages awarded.

IV. NO-FAULT PERSONAL INJURY AUTOMOBILE INSURANCE IN NEW YORK

In contrast to Québec’s system in which no-fault compensation is paid to victims by a government agency, no-fault insurance in New York is purchased by individual motorists through private insurance companies. New York’s Comprehensive Motor Vehicle Insurance Reparations Act (the New York law) establishes that no-fault insurance is the type of personal injury auto insurance to be offered in the state. Thus, acts are discriminatory because they exclude nonresidents from protection have not been successful, with courts consistently finding that the classification of accident victims on the basis of state of residency is rationally related to the legitimate government interest of awarding no-fault benefits only to those who have paid into the system. See, e.g., Cyr v. Farias, 327 N.E.2d 890 (Mass. 1975); Gersten v. Blackwell, 314 N.W.2d 645 (Mich. Ct. App. 1982); Perkins v. Merchants Mut. Ins. Co., 50 A.D.2d 1070, 377 N.Y.S.2d 319 (1975), aff’d, 41 N.Y.2d 394, 393 N.Y.S.2d 347, 361 N.E.2d 997 (1977).

129. Walsh, supra note 122, at 176.
131. Walsh, supra note 122, at 176.
133. See id.
135. Id.
136. Id. The term “subrogation” means the payment or assumption of “an obligation for which another is primarily liable.” H. McClintock, Equity § 123 (2d ed. 1948). Thus, if a Québec motorist recovers damages through a tort suit in another jurisdiction, the Régie is entitled to recoup the amount of benefits it has paid the insured.
the New York State government does not actually provide insurance coverage as the Québec government does. However, the State of New York closely regulates many aspects of the no-fault plan, including rates, rate increases, and medical fees charged for treating accident victims.\textsuperscript{139}

New York's no-fault system is a modified no-fault plan which eliminates the injured party's right to sue in tort, except in cases of "serious injury."\textsuperscript{140} The statute provides that ". . . there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."\textsuperscript{141} Basic economic loss is statutorily defined as expenses such as medical payments and lost wages totaling 50,000 dollars or less.\textsuperscript{142} Basic economic loss does not include any loss incurred on account of death;\textsuperscript{143} thus, there is no abridgement of the survivors' right to bring a wrongful death suit when a person is killed in an auto accident.

Pursuant to the New York law, claimants may bring a tort suit if they suffer serious injury. Serious injuries include death, dismemberment, significant disfigurement, a fracture, loss of fetus, and permanent loss of the use of a body organ.\textsuperscript{144} The term "serious injury" also includes injuries which result in significantly limited use of a body function or system.\textsuperscript{145} A serious injury also includes a medically determined injury or nonpermanent impairment which "prevents the injured person from performing substantially all of the material acts" which constitute the person's usual daily activities for at least ninety days of the one hundred eighty days immediately following the date of the injury.\textsuperscript{146} Thus, a victim may only bring a tort suit for noneconomic loss—i.e., for pain and suffering and other nonmonetary detriment—\textsuperscript{147} in cases involving serious injury or death.

Benefits provided pursuant to the New York law are aggregated—the insured may receive a maximum of 50,000 dollars in no-fault benefits.\textsuperscript{148} Thus, the total amount paid to a policyholder for losses from a single accident will never exceed 50,000 dollars.

A wide variety of medical and rehabilitation expenses are included in the New York law's enumeration of covered expenses. Medical, surgi-

\begin{itemize}
  \item 139. See N.Y. INS. LAW §§ 5101-5108 (McKinney 1985).
  \item 140. Id. § 5104(a).
  \item 141. Id.
  \item 142. Id. § 5102(a).
  \item 143. Id. § 5102(a)(4).
  \item 144. Id. § 5102(d).
  \item 145. Id.
  \item 146. Id.
  \item 147. Id. § 5102(c).
  \item 148. Id. § 5102(a).
\end{itemize}
cal, nursing, dental, hospital, x-ray, ambulance and prosthetic services; psychiatric, physical, and occupational therapy; prescription drugs; non-medical religious methods of healing recognized by New York law; and any other professional health services are all covered by the no-fault provisions.\textsuperscript{149}

The amounts charged by providers of health services are regulated by the state. The insurance law mandates the application of the fee schedule prepared by the Workers' Compensation Board to services rendered to auto accident victims.\textsuperscript{150} If the insurer determines that unique circumstances or use of special procedures justify an excess charge, there is an exception to the limit imposed by the industrial accident fee schedule.\textsuperscript{151}

Under the New York law, victims are entitled to receive replacement income for earnings which they would have earned had they not been injured—up to 1000 dollars per month for not more than three years from the date of the accident causing the injury.\textsuperscript{152} If victims are entitled to receive earnings replacement from their employers, and these payments do not result in a reduction of the employees' income or level of future benefits due from the employers, the victims will not receive earnings replacement from their no-fault insurance plans.\textsuperscript{153} Other reasonable and necessary expenses incurred, up to twenty-five dollars a day for up to one year from the date of the accident, are also reimbursed under the no-fault plan.\textsuperscript{154}

Death benefits of 2000 dollars are payable to the estate of a victim of an auto accident in addition to the basic economic loss benefits.\textsuperscript{155} In the event of death, the survivors are not precluded from bringing a traditional tort suit to collect damages.

Noneconomic losses are not covered by the insurers under the New York law. Noneconomic losses such as pain and suffering are recoverable only through a tort suit.\textsuperscript{156} However, to be able to bring a tort suit, the insured must meet the threshold of serious injury as defined in the New York law.

The New York no-fault plan provides coverage for accidents, even if

\begin{itemize}
  \item \textsuperscript{149} Id. § 5102(a)(1).
  \item \textsuperscript{150} Id. § 5108(a).
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id. § 5102(a)(2).
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id. § 5102(a)(3).
  \item \textsuperscript{155} Id. § 5103(a)(4).
  \item \textsuperscript{156} Id. § 5104(a).
\end{itemize}
they occur outside New York State. The insured and the members of the insured's household are entitled to first party benefits for accidents occurring anywhere in the United States or Canada. The New York insurer has a lien on any recovery the insured may receive from a tort suit in the jurisdiction where the accident occurred.

V. COMPARISON OF SOME ASPECTS OF THE QUÉBEC AND NEW YORK PLANS

One of the principal differences between the Québec and New York no-fault plans is the means by which the insurance is provided. Québec-type government administration of a no-fault plan has many advantages. First, government officials administering an insurance plan would be less likely to make bad faith refusals to pay on deserving claims than would a private insurance company. A private insurance company is concerned with showing a profit at the end of the year. A government agency is unaffected by this underlying profit-making motive. Thus, a government agency would have less incentive to deny claims because the government agency is less concerned with how much of each premium dollar constitutes profit.

Second, in terms of overall efficiency, a government administered plan is probably more efficient. In Québec, the Régie administers the plan and regulates itself, defining the terms used in the Act and drafting the rules of proof and procedure which govern the filing of claims. In New York, although the insurance companies have responsibility for compensating the injured, the state still has extensive administrative responsibilities, including the regulation of rates, review of proposed rate increases, and monitoring of medical costs. If New York actually provided the insurance under the no-fault plan, the state legislature would set the rates and the state agency administering the insurance plan would then implement the rates, thus decreasing the need for monitoring of private insurance companies' compliance with the state-set rates.

One disadvantage of the Québec system is the extremely broad discretion granted to the Régie. Québec's insurance act has been criticized

157. Id. § 5103(a)(3).
158. Id. § 5104(b).
159. Bad faith implies a willful refusal to respond to unambiguous contractual obligations. Thus, a bad faith refusal to pay a claim occurs when an insurance company refuses to pay on a claim which clearly falls within the contractual obligation of the insurer. National Labor Relations Bd. v. Knoxville Pub. Co., 124 F.2d 875, 883 (6th cir. 1942) (dictum).
160. N.Y. INS. LAW § 5102(a) (McKinney 1985).
161. Id. § 5108.
for not delineating more express guidelines to be followed by the Régie and for failing to provide judicial review.\(^\text{162}\) The purpose of this grant of extensive power was to speed compensation to accident victims. In light of this driving purpose, the broad discretion granted to the Régie is perhaps justified. The Québec legislature has considered the competing objectives of speedy, efficient compensation and comprehensive judicial review of indemnification decisions, and decided that speedy compensation and efficiency are of higher priority.\(^\text{163}\)

While speedy compensation is undoubtedly a valid objective of any insurance plan, the Québec legislature has put too much emphasis on this aspect and has jeopardized the integrity of the entire no-fault system. Too much power and discretion have been granted to the Régie. A system of judicial review is needed to monitor regulations promulgated by the Régie which affect the scope, interpretation, and implementation of the Act.

Another disadvantage of the Act is that it does not impose a time limit for processing claims. A statutory time limit is needed to prevent the Régie from engaging in bureaucratic foot-dragging in processing accident claims. A government body administering a no-fault program should be monitored more closely than the Régie is monitored in Québec. With no process for review of regulatory decisions made by the Régie, there is too much potential for abuse of discretion.

Another important difference between the Québec and New York plans is that Québec entirely eliminates the right to bring a tort suit, while New York preserves the right in some cases. Experts argue that maintenance of the tort suit acts as a deterrent to recklessness and negligence because the threat of liability causes people to behave more cautiously when their behavior might affect others.

In the context of automobile driving, however, it is not clear that such a deterrent effect exists. As long as the driver has insurance, the threat of liability is not a threat against the driver's personal assets; it is only a threat of an expensive claim to the driver's insurance company. The result to the insured of a claim against the company is a possible rate increase or, in extreme cases, cancellation of the policy.\(^\text{164}\) Further,

\(^{162}\) Baudouin, supra note 71, at 390.

\(^{163}\) Id.

\(^{164}\) Sugarman, supra note 30, at 578. Professor Sugarman points out that it is hard to believe that fear of increases in insurance rates causes people to drive more safely where moral qualms, self-preservation interests, and fear of fines or losing a license have not had a similar effect. He notes that fear of higher rates does cause nonreporting and private settlement of small accident claims.
many people do not purchase bodily injury insurance at all in spite of the threat of liability.\textsuperscript{165} Thus, it is not clear that the threat of tort liability has any deterrent effect in the context of automobile accidents.

As a practical matter, it would be extremely difficult to eliminate the right to bring a tort action for personal injuries suffered in an auto accident in any American jurisdiction. The active trial lawyers' lobby is vehemently opposed to a complete elimination of the right to bring a tort suit for personal injuries resulting from an automobile accident.\textsuperscript{166} Thus, it is improbable that a state could entirely eliminate the right to bring tort suits in the auto accident context.

While eliminating the injured party's right to sue in tort, the Qu\textc{e}bec Act does provide for a lump sum payment for pain and suffering in cases of permanent injury. In contrast, none of the states in the United States with a no-fault system provides benefits for pain and suffering. In the United States, compensation for pain and suffering is recoverable solely as a result of a successful tort cause of action.\textsuperscript{167}

There is a great advantage in maintaining the right of a victim to bring a tort suit in some situations. When the auto accident victim is seriously injured, disfigured, or killed, the value of the loss sustained is virtually impossible to assess. In cases of serious injury or death, one purpose of the damages award is to vindicate the injured.\textsuperscript{168} In such circumstances, the plaintiff may feel that the plaintiff's rights have not been vindicated if the value of personal loss is assessed by a government agency. A jury verdict is the only proper means of assessing the amount of the damage. A verdict rendered by a jury composed of members of the public is more likely to make the plaintiff feel as though he or she has been fairly compensated and has been given his or her day in court.

Another important difference between the Qu\textc{e}bec and New York plans is how the premiums are calculated. The R\textc{e}g\text'{e} in Qu\textc{e}bec charges the same premium to all licensed drivers and owners of registered vehicles.\textsuperscript{169} In New York, insurance companies may charge varying rates to drivers of different risks, so long as those risks are calculated with actuarially sound data.\textsuperscript{170} The argument can be made that age-adjusted and sex-adjusted premiums are discriminatory, and that only a flat-rate pre-

\textsuperscript{165} Hinds, \textit{supra} note 6, at 10, col. 4.


\textsuperscript{168} \textit{Prosser & Keeton, supra} note 1, § 4.

\textsuperscript{169} O'Connell & Tenser, \textit{supra} note 69, at 928; \textit{see also} Qu\'{e}. Rev. Stat. ch. A-25, § 151.

mium like Québec's is fair. However, if the insurer can establish through reliable data that certain groups are more likely to be involved in accidents, that insurer should be able to charge members of those groups higher rates.

Professor Marc Gaudry analyzed data from Québec and concluded that Québec's flat-rate premium pricing has been one catalyst in an increase in the number of automobile accidents in Québec. Gaudry found a thirty-one percent increase in accidents and a six percent increase in deaths due to auto accidents since the promulgation of the Act. This increase was partly due to the fact that flat-rate premiums result in a significant reduction in auto insurance costs for high-risk drivers (e.g., young males). The effect of this reduction is to allow many high-risk drivers, who would be unable to afford insurance under the traditional system, to purchase insurance. Thus, there are more high-risk drivers on the road and, consequently, more accidents.

Another critical difference between the Québec and New York plans is who must pay the premiums. Under the Québec plan, all licensed drivers must pay the no-fault bodily injury insurance fee. Under the New York plan, no-fault insurance is purchased only by the owners of registered vehicles. The Québec system thus has the advantage of spreading the cost of bodily injuries caused by auto accidents among all drivers, rather than putting the entire burden on the owners of registered cars.

VI. PROPOSALS FOR A NO-FAULT PLAN FOR CALIFORNIA

No-fault automobile insurance has been a subject of debate in the California legislature for the last twenty years. Since 1970, at least thirty-five no-fault type bills have been introduced in the California legislature. There have also been at least two attempts to enact a no-fault

171. M. GAUDRY, RESPONSIBILITY FOR ACCIDENTS: RELEVANT RESULTS SELECTED FROM THE DRAG MODEL (Publication No. 544, Centre de Recherche sur les Transports, Université de Montréal, 1987); see also Trebilcock, The Future of Tort Law: Mapping the Contours of the Debate, 15 CAN. BUS. L.J. 471, 475-76 (1989). However, the U.S. Department of Transportation compared the data from no-fault and traditional liability insurance states and concluded that there was no significant difference in the highway fatality and injury rates. U.S. DEP’T OF TRANSP., supra note 10, at 4.
172. See M. GAUDRY, supra note 171.
173. Id.
174. Id.
175. Id.
system through initiatives. These efforts to bring no-fault to California have so far been unsuccessful.

In 1988 there were four automobile insurance related initiatives on the ballot. Proposition 103 is the only one which passed. It provides for a reduction in rates for all types of insurance to a price which is at least twenty percent less than the charges for the same insurance in November 1987.

Some critics charge that the only effects of the proposition will be to lower insurance rates in Los Angeles and raise rates in other areas of California.

California voters also defeated a no-fault proposition in the 1988 election. Proposition 104 was the insurance industry's no-fault proposal. The benefits proposed under the plan were meager: $10,000 dollars for medical expenses, $15,000 dollars for wage loss, and $5000 dollars in funeral benefits.

The California Trial Lawyers' Association (CTLA) argues that the defeat of Proposition 104 is an indication that Californians do not want no-fault in their state. The CTLA also argues that no-fault is not a viable alternative for California. They argue that there are high built-in costs in California, such as the large number of registered automobiles, the large number of licensed drivers, the large number of miles driven by

177. George, supra note 15, at 1068.
178. See California Ballot Pamphlet (Nov. 8, 1988) (general election).
179. CAL. INS. CODE § 1861.01(a) (West Supp. 1990).
180. See e.g., George, supra note 15, at 1074.
181. California Ballot Pamphlet, supra note 178, at 146.
182. George, supra note 15, at 1067.
183. See Dresslar, supra note 166, at 5, col. 1.
residents and the high health care costs. The CTLA argues that these high built-in costs will result in high administrative costs and prevent Californians from realizing substantial rate reductions under a no-fault plan.

It does appear that with the limitations of our present health care system, consumers may not enjoy an immediate, substantial rate reduction under no-fault insurance. Data collected by the Department of Transportation show that in general, insurance rates do not go down after no-fault insurance is implemented. However, recent data suggest that no-fault premiums do not rise as rapidly over time as traditional insurance premiums; thus, it is likely that there would be future savings to California consumers.

There are other very attractive benefits of no-fault which would be realized by California consumers. First, a greater number of accident victims receive compensation under no-fault schemes than under traditional insurance schemes. Further, the compensation is paid to victims more quickly under no-fault schemes than under traditional schemes. The reduction in the number of tort suits which follows the implementation of no-fault would result in taxpayer savings in the form of lower overall court costs. Thus, the advantages of a no-fault system are sufficient to merit the adoption of no-fault in California.

A no-fault insurance law for California should have the following characteristics: the right to bring a tort suit should be maintained, but strictly limited; the insurance should be provided through a government agency; premiums should be collected from all licensed drivers; the benefits provided under the plan should be extremely generous; and the plan should provide a statutory amount of death benefits which are immediately available to the victim's survivors.

The victim's right to bring a tort suit should be maintained in a no-

184. Id. at 5, col. 3.
185. Id.
186. See U.S. Dep't of Transp., supra note 10, at 4.
188. U.S. Dep't of Transp., supra note 10, at 3. In its 1985 report on no-fault auto insurance plans in the United States, the Department of Transportation found that the number of claims paid per 100 insured cars in no-fault states averaged 1.8, while the paid claim frequency in states with traditional bodily injury liability insurance was only 0.9.
189. Id. at 4. One study showed that no-fault claimants received 33% of the benefits they would ever receive within thirty days of notification of the insurance company of their injury, while claimants under traditional systems received only 8.3% of the compensation they would ever receive within thirty days of notification of the insurance company. Id.
190. Id. at 5. In 1984 Chief Justice Warren Burger found that each jury trial tort case cost taxpayers 8300 dollars in court and other public costs.
fault plan for California because the compensation available under a no-fault scheme is insufficient for those who suffer severe injuries or death as the result of an auto accident. However, the threshold for bringing suit must be high enough to prevent a large percentage of all auto accident claims from proceeding through the tort system. The threshold for bringing suit should be identical to the serious injury threshold defined in the New York Insurance Law. The New York threshold is high enough to screen out most lawsuits, but low enough to allow those who are seriously injured to seek compensation through a tort suit.

The no-fault plan should be implemented through a government agency with regulatory powers similar to those exercised by the Régie in Québec. However, a system of judicial review of the regulatory decisions made by the government agency should be implemented to ensure that the agency does not abuse its discretion in defining the scope of coverage and in creating its own procedures.

The agency administering the no-fault plan should collect premiums from all licensed drivers, as the Régie does in Québec. However, the premium should be adjusted according to factors which affect the amount of risk involved with each individual driver, such as age and sex.

The wage loss benefits provided under the plan should be more generous than those available under the New York plan. The New York maximum of 1000 dollars per month is too low to fully compensate many accident victims. The California law should provide for much larger wage loss benefits, paid to the insured in monthly payments for up to three years following the date of the injury.191

The California no-fault law should also provide for unlimited medical expenses.192 The agency which administers the no-fault plan must adopt a medical fee schedule, similar to the one used by New York insurers, to regulate the amount charged by health care providers.

The no-fault plan should also provide for a statutory amount of death benefits for the decedent's survivors. These benefits should be provided immediately to help defray funeral and other expenses the survivors may incur immediately after the victim's death.

191. The no-fault law in Michigan provides for very generous wage loss benefits. See Mich. Comp. Laws Ann. § 500.3107(b) (West 1985). In September 1990 the maximum wage loss benefits available under the Michigan law were 2808 dollars per month for three years for a total of 101,088 dollars. Michigan administrative regulations provide that the Commissioner of Insurance modify the monthly figure each year to reflect changes in the national consumer price index. Mich. Admin. Code r. 500.811 (1979).

As liability insurance rates increase and the deficiencies in the traditional tort system become more apparent, the need to consider alternative compensation schemes becomes more urgent. No-fault personal injury automobile insurance is a practical, more effective alternative to the traditional tort system for compensating auto accident victims. While each victim compensated under no-fault schemes receives less money than each victim compensated under the traditional system,193 more victims are compensated under no-fault overall, and a greater percentage of each premium dollar is paid to injured claimants in no-fault jurisdictions than in common law jurisdictions.194

While the system adopted in Québec is admirable, implementing a pure no-fault system in California would require sweeping reform that legislators, consumers, and the insurance industry are not currently prepared to face. However, a modified no-fault system similar to New York's should be implemented in California.

194. Id. at 4.