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Book Reviews

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BASIC PROTECTION FOR THE TRAFFIC VICTIM: A Blueprint For Reforming Automobile Insurance. By Robert E. Keeton and Jeffrey O'Connell. Little, Brown and Company, Boston and Toronto: 1965. Pp. i-xv and 1–624, including index. $13.50.

There have been many proposals advanced in recent years for reforming this country's system of determining who bears the cost of automobile accidents, but none has the meticulous detail of the Basic Protection Plan devised by law professors Keeton (Harvard) and O'Connell (Illinois). Foretastes of their plan have been presented in published articles[1] and in many formal and informal talks. The complete details are now available in a book which also surveys other reform proposals and analyzes automobile accident compensation systems currently in use here and abroad.

Under the authors' proposal, a person injured in a motor vehicle accident would make a claim for "basic protection benefits" to obtain compensation for his injuries. The claim would be made to, and if litigation were necessary suit would be brought against, an insurance company, in most cases the company from whom the claimant purchased basic protection coverage.[2] The injured person would be entitled to such benefits whether or not his injuries were caused by anyone's negligence or other fault. Basic protection benefits compensate the injured person only for his economic losses (typically medical expenses and lost earnings), and part of those are not covered: there is a deductible equal to $100 of net economic loss of all types, or 10 per cent of loss from inability to work, whichever is greater. Damages for pain and suffering are not provided as basic protection benefits, but additional insurance may be purchased by a motorist to compensate himself and his family for harm of that sort. It will also be possible for an injured person to maintain a tort action in which he would be allowed to recover compensation for pain and suffering to the extent that his damages therefor exceed $5,000. In the tort action the injured person would have to prove that someone else was liable to him under existing principles of tort law. The tort action would proceed just as it does at present, but there would be no recovery therein for amounts payable as basic protection benefits or (as previously noted) for the first $5,000 of damages for pain and suffering. In such a tort action the claimant would also be allowed to recover his economic losses in excess of $10,000, his loss arising from the $100 deductible feature and compensation for property damage. (Property damage is not covered by basic protection benefits.) In contrast to the present automobile tort claims system, under which all benefits are usually paid

1. Keeton and O'Connell, *Basic Protection — A Proposal for Improving Automobile Claims Systems*, 78 HARV. L. REV. 329 (1964); Keeton and O'Connell, *A Basic Protection Insurance Act for Claims of Traffic Victims*, 2 HARV. J. LEGIS. 41 (1965).

2. If the claimant is not the owner of an insured car, the claim would usually be brought against the company from whom the owner purchased basic protection coverage.

in a lump sum, basic protection benefits would be paid each month, as the injured person's losses accrue. Basic protection benefits would be financed by insurance which would have to be obtained on a motor vehicle before it could be registered. Minimum coverage would be $10,000 per person, $100,000 per accident.

In summary, the Keeton-O'Connell plan involves compulsory automobile insurance compensating a traffic victim for his economic losses up to $10,000 whether or not anyone was at fault in the accident. This contrasts with the system presently found in this country where the victim may recover damages for pain and suffering as well as for economic losses, but only if he can prove that someone was at fault (and in most states, only if he himself was free of contributory fault).

This review's summary hardly does justice to the authors' plan, since it leaves out so many of its important details. The interested reader may consult one of the several summaries of the plan contained in the book itself.[3] The presentation of their plan in detail, complete with a draft statute in ready-to-enact form, is unique among the more recent American reform proposals. The plans of other reformers have simply been outlined. Keeton and O'Connell are to be commended for working out the details of their plan, a task which must have taken uncounted hours. Of course the presence of so much detail makes the reader's task difficult. The book is not recommended for a light evening's reading. Moreover, the book's presentation is at times labored.

An example of this may be found in the discussion of reform plans advanced by other scholars. Keeton and O'Connell frequently point out that someone else's plan has not given a precisely formulated solution to a particular problem, with a resulting ambiguity. They then perform a detailed analysis which (1) proves that the ambiguity exists; (2) presents the range of its possible meanings; and (3) laboriously decides which meaning the original author probably intended. The problem and its solution are handled solely by analysis of "internal" evidence, *i.e.*, by considering the language used by its author. "Maybe he meant *A*, maybe he meant *B*. He probably meant *A* because. . . ." This excessive concentration on textual analysis is occasionally relieved by the simple expedient of an inquiry directed by Keeton-O'Connell to the author of the work under analysis. But other ambiguities in the same work are all too frequently resolved only by Keeton and O'Connell's analysis of the other author's published writing, rather than by asking the other author to resolve them.

The excessive focus on resolving conflicts in abstract ideas, which Keeton and O'Connell reveal in their analysis of other reform proposals, may perhaps be related to a far greater failing. This involves their handling of one of the main arguments in support of their proposal. The argument is that the basic protection plan will provide a better distribution of the insurance dollar than the existing system. A large portion of the automobile premium dollar now goes to pay the

3. For a brief summary, see KEETON AND O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 6–10 (1965). For an expanded version of the foregoing summary, see pp. 273–95. A detailed discussion, keyed to the sections of their proposed statute, is found at pp. 386–482.

costs of administering the compensation system, rather than to compensate the traffic victim for losses directly attributable to the accident. The basic protection plan, it is said, will reduce administrative costs by eliminating much of the expense of adjusting and adjudicating controversies over fault. Such expenses include fees of claims adjusters, defense attorneys, and plaintiffs' attorneys. The services of these persons would not be entirely eliminated by the enactment of the basic protection plan, but their role (and consequently the share of the insurance premium dollar ultimately received by them) would be significantly decreased. In addition, the costs to society resulting from subsidization of the court system would be lessened by reduction in the number of lawsuits as a result of a decrease in the number of controversies over fault.

Although the contention that administrative costs will be reduced as outlined in the preceding paragraph seems reasonable, the book does not present detailed cost projections and comparisons. After the first 295 pages, where the theme of lower administrative costs constantly recurred, only three pages (295-98) are set aside for special discussion of the costs of the Basic Protection Plan. The most notable feature of these pages is the absence of a facts-and-figures discussion. The authors have therefore failed to resolve the essential question, which is how much costs will be reduced. That question will have to be answered before the plan can be put into effect, because actuaries will have to take account of such costs when rates are set for the insurance policies which are the foundation upon which the authors' entire plan rests.

The authors' inclusion of certain features of their plan may operate to make the reduction in administrative costs not quite so extensive as might otherwise have been the case. One such provision is related to the deductible feature of the basic protection plan. Even though the first $100 of economic loss is deducted from his basic protection claim, the victim retains his right to recover this $100 by bringing a tort action. The authors deal with the effect of this on administrative costs as follows:

> It seems unlikely that victims will press claims for this $100 in any substantial number of cases, or that the cases that do arise will be tried so as to consume much court time. Unless the loss has occurred under peculiarly aggravating circumstances, ordinarily a victim will choose to forget such a claim. In that event he will bear the first $100 of loss himself.[4]

The authors' contention that victims will tend not to press their $100 tort claims is not self evident. Study of claims experience under existing practices could no doubt produce data which would permit reasonable projections of the frequency of claims of that size. In projecting the total administrative cost of the basic protection system it will be necessary to take account of the cost of processing any $100 insurance claim. Since a tort claim will ordinarily be pressed against

4. *Id.* at 276.

an insurance carrier other than the basic protection carrier, two personal injury claims files will have to be opened in most cases where a basic protective claim and a tort claim are made by an injured person — one file by the basic protection insurer, the other by the tort insurer. Moreover the tort insurer will have to prepare its claim file in a way which will permit it to make a determination of fault. The fault question has therefore not been eliminated even in the personal injury aspects of the proposed basic protection system. Fault questions will also be preserved in property damage cases, since the authors leave the present system of handling property damage untouched by their basic protection proposal.

Even if litigation is not required to dispose of tort claims for property damage and for the $100 basic protection deductible, there still remains a potentially large administrative cost factor. Figures on the probable cost of handling such claims could no doubt have been obtained, and a detailed presentation and analysis of them would have been in order. In view of the high percentage of claims which would probably be settled, the costs of administering claims settlement activities may render the added costs of litigation insignificant. However, the possibility of at least some tort litigation, with its attendant costs, should not be discounted. Many attorneys now litigate automobile property damage cases on behalf of insurance carriers seeking to recover on a collision insurance subrogation claim. Such claims are usually small. This shows that it is possible for attorneys to be involved in handling tort claims for small amounts. When the claimant is covered by collision insurance, his claim for the $100 economic loss deductible from his basic protection recovery plus his claim for the amount deductible under his collision coverage for property damage may produce a sufficiently large figure to justify litigation. The likelihood of this would be increased if the attorney handling the insured's tort claim also handled the insurance company's subrogation claim.

Thus, the basic protection system may not substantially reduce the administrative costs of the total automobile accident compensation system, since tort claim files may still have to be maintained, and since litigation of some of them is possible. The authors' failure to handle these problems adequately rests not so much in their failure to mention them as in their failure to study the present claims system in quantitative terms, and to use the data derived from such an examination to project cost figures for their system and to compare such figures with the cost of the present system. Such a study could be conducted on the basis of a small sample of cases and would by no means require an examination of every insurance company's complete claims experience.

The numerous details of the authors' plan which have not been mentioned in this review will significantly influence the judgment many people will levy on the plan. Many of the details will raise controversy, such as the provision for awarding attorneys' fees to claimants who sue to obtain basic protection benefits. The significance of other details may not be readily apparent. For example, at two places where the key features of the plan are summarized the authors state that *"In general*

the basic protection system preserves present tort claims procedures, including jury trial, for settling and litigating claims. . . ."[5] This might be taken to mean that in the average suit by a claimant against an insurance company for basic protection benefits there would be a right to jury trial. Actually, as the text on page 294 reveals, there is a right of jury trial only if the amount in controversy is at least $5,000.[6] One of the authors' fundamental premises is, of course, that cases involving such large amounts of economic loss are on the average quite infrequent. Therefore, by the authors' own premise, the right to jury trial will not have been preserved in most cases where suit is brought to obtain basic protection benefits.

The plan has been formulated not only to solve the problems the authors detect in the present system, but to do so in a way which stands a realistic chance of legislative enactment. Many of the plan's features and of the book's arguments can be explained by the authors' desire to propose a plan which is politically acceptable. Preservation of tort litigation for the more serious cases seems justifiable primarily on this ground. And the authors take pains to note that basic protection insurance will be marketable through existing insurance channels. Thus, insurance companies, insurance brokers, and plaintiffs' and defendants' attorneys are all given a place under the new scheme. It will be interesting to see whether the plan is adopted anywhere. For myself, I am not yet convinced that it should be. There are too many questions as to its effects which have not been given satisfactory answers, especially those relating to costs. It does, however, deserve careful study.

*R. Wayne Walker**

Detention Of The Mentally Disordered. By Barry B. Swadron. Butterworth & Co., Ltd., Canada: 1964. Pp. 450, with appendix, table of cases, table of statutes, and index. $15.00.

Today, more than ever before, there is an increased concern about any encroachment upon civil liberties. Associated with this concern, there is naturally a renewed interest in the forceful detention of the mentally ill,[1] which is reflected in recent court decisions, Maryland's own efforts to revise the criminal code,[2] the reconsideration of our mental health laws in the wake of the *Durham* decision,[3] the writings

5. *Id.* at 10 and 293. (Italics in original.)

6. The authors discuss the constitutional problems concerning the modification of the right to jury trial on pp. 493–504.

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1. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the Mentally Ill, 87th Cong., 1st Sess. (1961).

2. The General Assembly of Maryland has recently granted funds to establish a commission to study and review the criminal law, procedure and administration. LAWS OF MD. ch. 138 (1966).

3. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

of Dr. Thomas Szasz,[4] the Report of the Joint Commission on Mental Illness and Health,[5] the Community Mental Health Centers Act,[6] and recent progress in the treatment of the mentally ill, to mention only a few. All of these factors make this book a most useful and timely volume, not only as a source of guidelines for the drafting of new legislation,[7] but also as an impetus in fostering greater understanding of the entire subject of the detention of the mentally ill.

In this book the author, a member of the Ontario Bar (LL.B. and LL.M.) has covered the entire gamut of laws concerning the hospitalization, detention and release of the mentally ill, the dilemma of the mentally ill criminal and related laws concerning the mentally defective. For their comparative and informational value, he quotes frequently from the applicable parts of the British Mental Health Act, 1959, and the United States Draft Act Governing Hospitalization of the Mentally Ill.[8] The extensive use of illustrative case material, appeals decisions, samples of the actual forms used under the various laws, and newspaper clippings greatly enhances the value of the book by instilling in the reader a greater feel for the issues involved and the reasoning behind many of the laws.

However, it is the laws of Canada and its provinces which serve as the focal point of all the author's discussions. To this reviewer, who is not a lawyer but a psychiatrist, it was revealing to note that, although some diversity exists among the provinces, there seems to be far more unity amongst provincial laws than amongst the state laws of the United States.[9] The contrast between state and provincial law was also enlightening because it indicated that many of our states have not revised their commitment laws in accordance with recent advances in the care of the mentally ill, as has been done in many Canadian provinces.[10]

That Mr. Swadron is a lawyer is obvious both from the legal detail of his work and from the subject matter of his discussions. However, from the viewpoint of a forensic psychiatrist, it is also obvious that he is a friend of the mentally ill and quite aware of not only what modern psychiatry has to offer the law and society, but also its limitations. It is his understanding of both disciplines which makes his commentary so valuable.

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4. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963); SZASZ, MYTH OF MENTAL ILLNESS (1961).

5. JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH — FINAL REPORT (1961).

6. Mental Retardation Facilities Construction Act, 70 Stat. 717 (1963), 42 U.S.C. §§ 292-92i (1964).

7. The Legislative Council of Maryland has hired Donald C. Allen to review the entire Health Code (MD. CODE ANN. art. 43) and the Mental Health Code (MD. CODE ANN. art. 59) and the Council presently has this report under consideration.

8. PUBLIC HEALTH SERVICE PUBLICATION, DRAFT ACT — GOVERNING HOSPITALIZATION OF THE MENTALLY ILL 51 (1952).

9. LINDMAN AND MCINTYRE, THE MENTALLY DISABLED AND THE LAW — THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL (1962).

10. CORNELL LAW SCHOOL, MENTAL ILLNESS AND DUE PROCESS, REPORT AND RECOMMENDATIONS ON ADMISSIONS TO MENTAL HOSPITALS UNDER NEW YORK LAW (1962).

Mr. Swadron begins his treatise with an examination of the various statutes concerning the voluntary patient and then describes the procedures necessary for regular certification, the pre-condition of involuntary commitment. He raises an important point which is stirring more and more interest in our courts and legislatures, whose awareness has been stimulated by the goading of a proliferating number of psychiatrists, when he states that "the legislatures give the power to medical practitioners as a class to the exclusion of none within that class, to certify the mental disorder of any persons."[11] While conceding the practical considerations which have produced this most frequently used procedure for hospitalization, he pointedly emphasizes its pitfalls. After all, it does in fact take only two physicians' signatures to at least bring about an initial confinement. Should the opinion of two be taken as a reliable indication of the consensus of professional judgment? It is noteworthy that most Canadian provinces further require that a patient who has been certified be admitted to a mental institution only after its Superintendent agrees to accept him. In Maryland, such a patient is usually admitted first and then remains committed for several days while his case is evaluated by the staff. In most Canadian provinces the signed certificates are sufficient authority to any person to convey the patient to the institution and for the authorities thereof to detain him. In many American jurisdictions the police require that simple charges be docketed before they will become involved.

Several provinces require legal procedures, which are in the nature of judicial review, in addition to certification by two physicians' certificates. In Alberta, the certificates must first be submitted to a justice of the peace. In British Columbia and Quebec, the patient must be personally examined by a judge who also reads the certificates. Such procedures have evoked a strong desire in medical circles to avoid the involvement of courts, judges, and juries in the commitment procedure. After all, is not this a medical situation? Does the appearance of a mentally-ill person before a judge or magistrate offer any real protection of his civil rights?

In discussing the test for certification, Mr. Swadron finds:

> In the end result, I can find no direct authority which requires the doctor to be satisfied to an extent which is beyond a reasonable doubt that the individual is certifiably mentally disordered. But I must admit that I would feel uneasy if a doctor certified a person on the basis that it would be the best thing to do, notwithstanding he could probably satisfactorily remain in the community.[12]

The specific qualifications of the two certifying physicians vary greatly among the provinces. In some provinces one of the physicians may be on the hospital staff (not allowed in Maryland). One province requires at least one of the physicians to have some special knowledge

11. SWADRON, DETENTION OF THE MENTALLY DISORDERED 22 (1964).

12. *Id.* at 51.

of mental illness (not necessarily a phychiatrist). Many more specific limitations apply where a commitment is to a private institution.

After his thorough consideration of the certification process, Mr. Swadron shifts to an examination of the post-commitment requirements. For example, following the period immediately after commitment, a superintendent's authorization is usually required for extended detention. The approval of an independent jury or review board may also be required to detain a patient beyond a short period of time. The question of the duration of the patient's stay and the frequency of statutorily-determined re-examinations is considered in some detail. While many of our states have these same requirements, they often degenerate into meaningless routines.

In concluding his survey of commitment laws, the author reminds us of the function which they serve and the standard by which they should be measured:

> It is the aim of every jurisdiction that all persons who should be confined in mental hospitals are so confined. All the provinces of Canada have legislation authorizing the detention of persons under medical certification or judicial order based upon such certification, the procedures of which were discussed in the previous chapters. Medical certification pre-supposes an examination by a medical practitioner. Legislation should provide authority for the bringing together of the medical practitioner and the person alleged to be mentally disordered. It should also provide for the relaxation of standard procedures to facilitate admission to mental hospitals in cases of emergency. The laws in this area may only be considered adequate if any factual situation which may arise can be dealt with in an expedient fashion and with a minimum of difficulty.[13]

The dire consequences of inadequate legislation are emphasized through the use of case histories.

In dealing with mental illness and the criminal law, new problems arise. In Canada, for example, the criminal law is national and uniform throughout the country. However, there are no federal mental hospitals or penal mental hospitals. The courts and prisons are then required to use provincial hospitals and the proper care of some of these patients may depend more on the degree of cooperation of various officials than upon the patient's needs.

Of course the fundamental legal problem in this area is the establishment of an adequate test for criminal insanity. The Canadian test represents a more modern and liberal approach than the time-honored *M'Naghten* Rule. Swadron describes the Canadian approach:

> Under the Canadian statute law a disease of the mind that renders the accused person incapable of an appreciation of the nature and quality of the act must necessarily involve more than mere knowledge that the act is being committed; there must be an

13. *Id.* at 210.

> appreciation of the factors involved in the act and a mental capacity to measure and foresee the consequences of the violent conduct. . . .[14]

The shortcomings of the *M'Naghten* Rule have repeatedly asserted. As Sir David Henderson has noted:

> In melancholia, schizophrenia, paranoid states, general paralysis, senile dementia, epilepsy with insanity, and many others . . . , the individual's mind is sufficiently clear to know what he is doing, but at the same time the true significance of his conduct is not appreciated either in relation to himself or others. . . .[15]

Under the Canadian rule, the restrictive interpretations of the "wrong", which typify the *M'Naghten* Rule, are avoided.

In Canada a person is sane until insanity is proven.[16] The jury is usually instructed to find insanity on a "mere preponderance of probability."[17] Recent Maryland decisions[18] have transferred the responsibility of proving sanity to the state once a "reasonable doubt" has been raised by the defense as to counter the presumption of sanity. Following an insanity acquittal in Canada, "a person who is acquitted on account of insanity is not discharged into the community, no matter what his mental condition is at the time of the verdict."[19] He is kept in strict custody in a prison until the pleasure of the lieutenant-governor of the province is known. He is then generally ordered to a mental hospital by the lieutenant-governor and can only be released with his permission.

The issues of fitness to stand trial and the insanity plea are discussed in detail and the author presents an excellent review of all the material on these two subjects. Mr. Swadron raises the subtle point that there is no appeal from an acquittal by reason of insanity. Since such an acquittal leaves the conclusion that the person did commit the act, someone might want to appeal to foster his claim that he did not commit the act.[20] For those found not guilty by reason of insanity, Mr. Swadron leans toward the use of hospitalization for the observation. He quotes from a study conducted by the *Northwestern University Law Review* where this reviewer is quoted at variance with many of his colleagues as saying that 40-50% of such cases, called to the psychiatrist's attention, can be screened successfully without hospitalization provided an adequate history is available.[21] The majority of those who were of a contrary opinion seem to be psychiatrists whose major experience was in hospital work.

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14. *Id.* at 354. The author is referring to CAN. STAT. ch. 51, § 16 (1953–54).

15. SWADRON, *op. cit. supra* note 11, at 360–61.

16. *Id.* at 356.

17. *Id.* at 363.

18. Fowler v. State, 237 Md. 508, 206 A.2d 802 (1965); Bradford v. State, 234 Md. 505, 200 A.2d 150 (1964).

19. SWADRON, *op. cit. supra* note 11, at 365.

20. *Id.* at 367–68.

21. *Id.* at 259 where the author quotes from Note, *Compulsory Commitment Following a Successful Insanity Defense,* 56 NW. U.L. REV. 409, 465–66 (1961).

As in most states, a Canadian Court cannot order hospitalization after conviction, but the person must first be sent to a prison and then transferred usually on order of the lieutenant-governor of the province. To this point, Mr. Swadron speaks clearly that a court should have the jurisdiction to order hospitalization as is now done in England. The defects of the existing procedure are clear:

> When an individual is going through the criminal trial process, he is the center of attention, and an excellent opportunity is afforded of observing the needs of his particular case. Once he is sent to prison, however, he becomes one of many, and any transfer to a mental hospital in his case depends upon the ability of the correctional authorities to single him out.[22]

This, of course, raises the question of applying hospital time to sentence time. In Canada, hospital time is counted against sentence time, a condition that was only recently remedied in Maryland.[23]

Although the use of the comparative technique in his analysis of the law is excellent, the author might have improved the clarity of his presentation by reducing this voluminous analysis to chart form at some point.[24] Otherwise, his presentation is comprehensive and informative. I personally found reading this book a valuable experience. It should be useful as a reference source and as a basis of stimulating thinking in this area for both legal and medical scholars.

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22. SWADRON, *op. cit. supra* note 11, at 449.
23. MD. CODE ANN. art. 27, §§ 698, 700 (Cum. Supp. 1965).
24. LINDMAN AND MCINTYRE, *op. cit. supra* note 9.

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