Legislature Amends New York's No-Fault Statute

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child by increasing the potential sources of support funds;\(^{143}\) on the basis of the decision, both parents will be required to contribute support payments according to their financial capabilities.\(^{144}\) It is submitted, therefore, that the Carter court has adopted a reasonable and desirable interpretation of Family Court Act sections 413 and 414 which hopefully will be accepted by other New York courts.

**Insurance Law**

**Legislature amends New York’s No-Fault Statute**

In order to insure prompt and equitable compensation for victims of automobile accidents, and reduce the necessity for expensive personal injury litigation, the legislature in 1973 adopted a “no-fault” insurance statute.\(^{145}\) Although some authorities heralded this legislative enactment as an insurance premium reducing device, recent years have witnessed a steady increase in the cost of automobile insurance.\(^{146}\) Prompted by these rising costs, as well as abuses of the original statute,\(^{147}\) the New York Legislature recently amended the no-fault law,\(^{148}\) effecting significant changes in the statutory scheme.

\(^{143}\) See Bauer v. Bauer, 55 App. Div. 2d 895, 897, 390 N.Y.S.2d 209, 212 (2d Dep’t 1977) (mem.) (Latham, J., concurring). DRL § 240 directs the supreme court in any marital action to consider “the best interests of the child” in determining the award for custody and support. See O’Shea v. Brennan, 88 Misc. 2d 233, 387 N.Y.S.2d 212 (Sup. Ct. Queens County 1976) wherein the court noted that children should be afforded “[t]he right to the most adequate level of economic support that can be provided by the best efforts of both parents.” Id. at 236, 387 N.Y.S.2d at 215.

\(^{144}\) See Fox, Divorcee Held Liable to Share Child Support with Ex-Husband, N.Y.L.J., July 26, 1977, at 1, col. 2.


\(^{146}\) See, e.g., Cerra, Auto Premiums Up 100% for Many New Yorkers, N.Y. Times, July 25, 1976, § 1, at 1, col. 1.

\(^{147}\) Memorandum of State Executive Department, reprinted in [1977] N.Y. Laws 2445, 2452 (McKinney).

\(^{148}\) Ch. 892, §§ 1-17, [1977] N.Y. Laws 1824 (McKinney). According to the State Executive Department, the purpose of the legislation is:

To amend the State’s No-Fault Automobile Insurance Law to eliminate various costly abuses, more adequately protect the victims of uninsured drivers, permit greater protection for insured drivers; and to contain the costs of automobile comprehensive and collision coverages by requiring insurers to inspect automobiles, verify their existence and determine their values in advance of loss; and to make other appropriate changes in the automobile insurance system. Memorandum of State Executive Department, reprinted in [1977] N.Y. Laws 2445 (McKinney). The need for a change in the law has been recognized by authorities who have realized the many problems created by the original statute. One commentator has noted that:
A major aspect of the original no-fault legislation was the imposition of a serious injury standard as a prerequisite to an action by a "covered person" against another covered person for "non-economic loss." This requirement could be satisfied by demonstrating, under an objective test, that the medical expenses resulting from the injury exceeded $500. The amendment has eliminated the threshold amount, substituting in its stead a purely verbal definition of serious injury. Under the new provision, a suit may be maintained whenever an automobile accident causes

[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.
Judicial interpretation of this passage undoubtedly will be necessary. In carrying out this task, it is suggested that the New York judiciary turn for guidance to the decisions of jurisdictions which have adopted similar provisions. Such an approach should prove

of cases dropped by approximately 50%. N.Y. Times, Dec. 19, 1976, § 4, at 8, col. 2. One positive feature of no-fault, however, was the achievement of prompt payment to accident victims entitled to first party benefits. N.Y. Times, Dec. 28, 1976, § 1, at 44, cols. 2-3.

Early in 1976, the state began considering seriously alternatives to the $500 threshold. Superintendent of Insurance Harnett suggested initially an increase of the threshold to $2000. See N.Y. Times, Jan. 25, 1976, § 1, at 1, col. 5; at 30, cols. 3-4. Various other proposals included outright elimination of the threshold, suggested by the New York State Trial Lawyer’s Association, and the elimination of no-fault, proposed by New York State Senator Schermerhorn. See N.Y. Times, Apr. 22, 1977, at A14, cols. 3-5. Governor Carey proposed a bill which included a threshold of “significant and permanent injury” or long-term disability: “death, disability resulting in at least 150 days of work or significant and permanent loss of use or limitation of use of a body organ, member, function or system.” Id. This definition was not adopted, because it proved to be too elusive and controversial. According to Superintendent Harnett, the “loss of one finger would be regarded as a significant injury to a violinist, but not to an office worker.” L. Greenhouse, Carey Moves to Cut No-Fault Cost, N.Y. Times, Apr. 21, 1977, at D20, cols. 2-3. The late Dean Ralph Semerad favored the retention of the $500 threshold: “The threshold has done its job. . . . It has cut down automobile claims 70 percent statewide since it was instituted.” Dean Semerad believed the real problem centered around property damage claims.

Meislin, Bar Supports Carey on No-Fault Suits, N.Y. Times, Apr. 29, 1977, at D15, col. 3.

133 See N.Y. Ins. Law § 671(4) (McKinney Supp. 1977-1978). Certain phrases such as “death,” “dismemberment,” and “fracture” should present no construction difficulty.


Among the states which allow suit for pain and suffering based upon either a monetary threshold or a verbal definition are Massachusetts, Florida, Connecticut, New Jersey, and Pennsylvania. The Massachusetts statute provides in pertinent part, that suit may be brought when medical expenses are in excess of $500, or when “injury, sickness or disease . . . causes death, . . . or consists in whole or in part of permanent and serious disfigurement, or results in . . . loss of sight or hearing, . . . or consists of a fracture.” Mass. Gen. Laws Ann. ch. 231, § 6D (West Supp. 1975). For a discussion of the Massachusetts no-fault statute, see Donahue & Sugarman, The Automobile Reparation System in Massachusetts—Has No-Fault Insurance in Massachusetts Improved the System? 8 Forum 11 (1972). The Florida statute requires that medical expenses exceed $1000, or that there be “permanent disfigure-
helpful in ameliorating the construction problems posed by the new definition, and thereby preclude the increase in litigation which otherwise might result from the amendment. By employing a technique which discourages an increase in litigation, the courts would be furthering the basic intent underlying enactment of no-fault legislation.

...
Even assuming, however, that the new threshold is precisely defined, it does not appear that the amendment will lead to a reduction in the cost of insurance or in the number of accident-injury suits filed in the courts. One factor militating in favor of this conclusion is the new law's effect with respect to fractures. Prior to the amendment, an action could be maintained for noneconomic loss sustained by virtue of a "compound or comminuted fracture." Since the recent legislation deleted the adjectives, any fracture presumably will satisfy the serious injury requirement. A possibility therefore exists that suits involving limited pain and suffering will be encountered on a regular basis; yet the very purpose of the no-fault concept is to eliminate litigation stemming from nonserious injuries. Perhaps the legislature should reexamine this troublesome provision and reinstate the former statutory language. No legitimate cause of action would be denied should something more serious than "any fracture" be the threshold, as other aspects of the serious injury definition furnish ample coverage.

As originally enacted, the no-fault statute permitted claimants to choose binding arbitration as a method of resolving disputes concerning first party benefits. The amendment excised the word

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158 See ch. 13, § 1 [1973] N.Y. Laws 5657. A comminuted fracture exists when "the bone is broken into a number of pieces." Stedman's MEDICAL DICTIONARY 631 (Law Ed. 2d 1966). A compound fracture is "one in which there is an open wound of the soft parts leading down to the seat of the fracture." Id.
160 Recognizing this problem, one commentator opined that given the aggressive personal-injury bar and the money that can be made by pressing fault-based claims[,] [why . . . pass a reform that leaves intact the claims which led to the need for reform in the first place, counting on human nature to forego taking advantage of the right to press those claims? No-Fault Auto Laws, supra note 152, at 29.
161 While a simple fracture of a finger would not be actionable under the fracture provision, for instance, someone such as a concert pianist or a surgeon who requires full dexterity, would have access to the courts by virtue of the provision allowing suit for an injury which prevents a person from performing his daily activities. See N.Y. INS. LAW § 671(4) (McKinney Supp. 1977-1978).
162 Ch. 13, § 1 [1973] N.Y. Laws 56-60. Section 1 defined first party benefits as "payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle . . . ." Id. at 57. Section 1 provided that "[p]ayment of first party benefits shall be made as the loss is incurred." Section 1 further provided:
Every owner's policy of liability insurance . . . shall also provide for . . . payment of first party benefits to:
(a) persons, other than occupants of another motor vehicle, for loss arising out of the use or operation in this state of such motor vehicle; and
(b) the named insured and members of his household for loss arising out of the use or operation in this state of an uninsured motor vehicle.
Id. at 58.
"binding" and created an additional step in the procedure: "An award by an arbitrator may be vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the [insurance] superintendent."183 It is suggested that this provision may be inconsistent with the objective of arbitration, which is "to dispose of the controversy, finally and conclusively."184 To achieve this goal, an arbitrator's decision usually is made binding,185 and judicial review of the award is severely limited.186 Review by a master arbitrator under the new procedure,

184 R. COULSON, LABOR ARBITRATION—WHAT YOU NEED TO KNOW 51 (1973) [hereinafter cited as COULSON]. The power of an arbitrator is derived from law and the agreement of the parties and the extent of his authority is determined by that agreement. Id. at 55.
185 See id. at 66. Although it is within the authority of the legislature to provide for broad review of the arbitrator's decision, the binding nature of the award "is one of the salient features of arbitration." M. TROTTA, LABOR ARBITRATION 87 (1961). Thus, an arbitration award may not be appealed on the merits: "The absence of an appeal procedure prevents long drawn out litigation that is often so characteristic of our courts." Id.

Other methods employed to settle disputes, such as mediation, factfinding and advisory arbitration, often have more than a single level process. A mediator has no authority to render a final and binding decision, but can suggest a solution. A factfinding board determines the issues in dispute, the parties' positions on these issues, and may recommend solutions. Id. at 34. Under a system of advisory arbitration, the arbitrator renders an award which is not binding on the parties. See COULSON, supra note 164, at 54.

186 See COULSON, supra note 164, at 66. The grounds enumerated in CPLR 7511 for vacating or modifying an arbitrator's award are:

(b) Grounds for vacating.
1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
   (i) corruption, fraud or misconduct in procuring the award; or
   (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
   (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made; or
   (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.
2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:
   (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or
   (ii) a valid agreement to arbitrate was not made; or
   (iii) the agreement to arbitrate had not been complied with; or
   (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:
1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
however, need not be so narrowly circumscribed. Moreover, because judicial review under CPLR article 75 has not been eliminated, the alteration seems likely to prolong conflicts and increase costs without giving rise to any corresponding benefits.187

Commendably, several changes in the first party benefits area were designed to reduce premium costs. Foremost among these changes is the adoption of Workmen's Compensation rates as the measure of recovery for accident victims,188 which is expected to lower insurance costs by halting inflated billing.189 In addition, insurance companies no longer will be obligated to pay first party benefits where the injured party recovers or is entitled to recover such compensation from certain other sources.170 This latter addition is expected to eliminate double recovery and thereby favorably affect insurance rates. Finally, under a new provision, insured per-

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. the award is imperfect in a matter of form, not affecting the merits of the controversy.


187 One commentator has noted that the amendment permits "a second bite of the apple," N.Y.L.J., July 14-15, 1977, at 1, col. 3, perhaps implying that the purpose of the original provision was to eliminate long and costly procedures.

188 N.Y. Ins. Law § 678 (McKinney Supp. 1977-1978). It recently has been reported that some physicians have threatened to deny treatment to accident victims in reaction to the new rate schedules. See Newsday, Dec. 6, 1977, at 7; N.Y. Times, Dec. 31, 1977, at B3, col. 4.


170 See N.Y. Ins. Law § 671(1) (McKinney Supp. 1977-1978). The bill is intended to "exclude monetary payments received by an employee when such payments do not result in a reduction of the employee's income, . . . thus eliminat[ing] double recovery in those situations in which no true loss of earnings has occurred." Memorandum of State Executive Department, reprinted in [1977] N.Y. Laws 2445, 2448 (McKinney). Section 671(1) states in part:

An employee who is entitled to receive monetary payments, pursuant to statute or contract with the employer, or who receives voluntary monetary benefits paid for by the employer, by reason of such employee's inability to work because of personal injury arising out of the use or operation of a motor vehicle, shall not be entitled to receive first party benefits for "loss of earnings from work" to the extent that such monetary payments or benefits from the employer do not result in the employee suffering a reduction in income or a reduction in such employee's level of future benefits arising from a subsequent illness or injury.

N.Y. Ins. Law § 671(1)(c) (McKinney Supp. 1977-1978). In addition, § 671(2) eliminates receipt of first party payments to the extent that an injured party recovers or is entitled to recover medicare or Workmen's Compensation benefits. Id. § 671(2)(b). In accordance with this new policy, § 205(10) of the Workmen's Compensation Law, which denied Workmen's Compensation benefits to persons who received under a no-fault policy, was repealed. Ch. 892, § 16, [1977] N.Y. Laws 1836 (McKinney).
sons voluntarily may reduce their coverage and hence their premiums for basic economic loss to the extent of their coverage under health insurance plans.\footnote{N.Y. Ins. Law \$ 672(7) (McKinney Supp. 1977-1978). The new legislation also requires insurers to offer higher deductibles to policy holders. Id. \$ 167(d)(iii); Memorandum of State Executive Department, \textit{reprinted in} [1977] N.Y. Laws 2445 (McKinney), wherein it was stated:

The requirement that insurers offer a variety of higher deductibles, would reduce rates for those retaining the \$200 standard deductible or electing a higher deductible. In many cases those electing higher deductibles will be in a position to utilize tax offsets to greatly minimize the real loss suffered. \textit{Id.} at 2457.

It should be noted, however, that there is "considerable indication that any price rise in auto insurance has been due not to difficulties under inadequate no-fault laws, but to rapidly rising prices, a factor applicable to all auto insurance, in fault-based states and no-fault states alike." \textit{No-Fault Auto Laws, supra} note 152, at 35. The state, according to former Superintendent of Insurance Harnett, is powerless to prevent premium increases occasioned by the rising price of such items as replacement parts for automobiles. \textit{Greenhouse, Carey Moves to Cut No-Fault Costs, N.Y. Times, Apr. 21, 1977, at 1, col. 2.}
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Although several sections of the recent no-fault amendment appear to deal adequately with provisions of the original statute that were susceptible to exploitation and abuse, the major thrust of the legislation, a change in the definition of a serious injury, probably will not lead to a substantial reduction in litigation. It therefore is hoped that the legislature will monitor closely the operation of the statute and revamp it as necessary to attain the objectives underlying the no-fault concept.

DEVELOPMENTS IN NEW YORK LAW

\textit{Appropriation of public personality held actionable.}

Section 51 of the Civil Rights Law, which grants a cause of action for damages to "any person whose name, portrait, or picture" is used for commercial purposes without his written consent,\footnote{N.Y. Civ. Rights Law \$ 51 (McKinney 1976) provides in pertinent part:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages.

In addition to the civil cause of action provided by \$ 51, the Civil Rights Law provides a misdemeanor penalty for the nonconsensual use of a name, portrait, or picture:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having...} con-