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# Dual Protection: A Program for Improving the Automobile Accident Compensation System

Vestal Lemmon\*

Today contemporary America finds itself in an era of critical self-evaluation. Consumers, legislators, regulators, and representatives of the media are examining almost all social institutions and systems to determine whether they are operating efficiently and in the best interests of the public.

The system of compensating persons incurring losses from motor vehicle accidents is one which has been given increasing amounts of attention. While efforts to modify the existing compensation system began as early as 1914, the intensity of these efforts has never been as great as in recent years.<sup>1</sup> The 57-year-old debate concerning the compensation system has generated an enormous amount of literature and ignited federal and state investigations into other insurance areas such as the availability of insurance, underwriting practices and profitability. The publication of the Department of Transportation's (DOT) final report on the compensation of motor vehicle crash losses in the United States was a high point in the debate.<sup>2</sup> However, much to the disappointment of those individuals and groups advocating extreme modifications of the existing system, the final DOT report was "final" only in that it was the last report. Perhaps the most vivid illustration of the controversy initiated by this report was the evaluation made by a former DOT staff member who labeled the report a "disgraceful shame" and "shockingly inadequate."<sup>3</sup>

The subject of automobile insurance and compensation of accident victims lends itself to emotional outbursts because it encompasses both empirical and

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\* President of the National Association of Independent Insurers. The author wishes to acknowledge with thanks the work of William T. Hold, the NAI's research consultant and special representative who assisted in the research and documentation of this paper.

1. See Gurash, *Needed: A Solution for the Automobile Insurance Dilemma*, 68 *INS. MANAGEMENT REV.* 18 (1971).

2. U.S. DEP'T OF TRANSPORTATION, *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* (March 1971) (prepared by John A. Volpe) [hereinafter cited as *MOTOR VEHICLE CRASH LOSSES*].

3. Chicago Sun Times, March 22, 1971, at 3, col. 3.

philosophical questions. The 27 volumes of research underlying the Department of Transportation's recommendations clearly indicate that numerical data alone will not supply answers to the automobile problem. The implementing of genuine and lasting solutions necessitates the integration of quantitative and qualitative considerations as well as the balancing of factors such as the level of insurance costs and adequate compensation, the needs of the individual accident victim, equity and efficiency.

The National Association of Independent Insurers (NAII) has chosen to undertake an active role in the development and implementation of a balanced reform program called Dual Protection. The balanced approach and meaningful reforms embodied in Dual Protection received the explicit approval of the state of Illinois when its legislative representatives enacted, without significant modification, what is essentially the Dual Protection Plan.<sup>4</sup>

The enactment of reform legislation in Illinois, as well as in Delaware, Florida, Massachusetts, Oregon, South Dakota and Minnesota within a year of the publication of the final DOT report demonstrates the desire and ability of responsible members of both the insurance and legislative communities to move expeditiously in bringing about solutions at the state level.

A logical examination of any program to alter the existing motor vehicle accident compensation system requires an examination of the basic considerations underlying the program, and the individual provisions of which that program is composed. Thus, the objective of this paper is essentially two-fold: first, to examine the basic factors underlying Dual Protection and, second, to discuss the significant provisions incorporated within the Dual Protection program.

#### *Considerations Underlying Reform*

The fundamental considerations underlying the construction or alteration of an automobile accident compensation system can best be understood if the tasks of a compensation system are kept firmly in mind. Briefly stated, the major tasks of a motor vehicle accident compensation system are the following:

1. To define the incurred damages in terms of whether or not they are compensable, and to define their method of valuation.
2. To allocate the above-defined damages among the involved parties.
3. To furnish funding media or the assurance of the financial sol-

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4. ILL. ANN. STAT. ch. 73, § 1065.150-160 (Smith-Hurd 1972).

veny of the party or parties upon whom the burden of the loss is placed.

How these tasks are carried out depends to a significant extent on the validity of certain basic premises. For example, if automobile accidents are the result of controllable human action, then the intangible losses incurred by accident victims should be compensated and the responsibility for the compensation of these losses should, to the greatest extent possible, be placed on the party or parties at fault. Given this analytical framework, the following discussion will focus on the role of fault in a compensation system, the economic aspects of the automobile insurance problem, and the part the system has played in creating problems and effecting solutions.

### *The Role of Fault*

Possibly the single most important consideration underlying the compensation of automobile accident victims is the role of fault. The concept of fault or responsibility has a significant impact on the definition, valuation, and allocation of losses arising from all motor vehicle accidents. The importance of fault is vividly illustrated by the popular usage of the term "no-fault" to describe a wide range of reform proposals.

Whether fault will remain as a viable concept in compensating automobile accident victims depends on the nature of automobile accidents. In short, are motor vehicle accidents or crashes someone's responsibility? There appears to be little doubt in the minds of both those persons investigating the causation of accidents and those drafting alternative compensation systems that controllable human action plays a dominant role in the occurrence of motor vehicle accidents. Thus, fault or negligence should remain a relevant concept.

Evidence supporting the continuing relevance of fault comes first from accident investigators. Exhaustive investigations of motor vehicle accidents made by the United States Department of Transportation indicate that driver error, such as intoxication, speeding, and failure to obey traffic signals, was the dominant factor in well over 90 percent of the accidents investigated.<sup>5</sup> As is the case in almost all areas of inquiry there are competent researchers who forward opposing theses, *i.e.*, "that many, if not most, cases of driver error are not intentional or negligent but are beyond conscious control."<sup>6</sup> However, the weight of contrary evidence compels the authors of the preceding statement to make the following observations:

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5. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 48 (1969).

6. U.S. DEP'T OF TRANSPORTATION, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES 72 (July 1970) (prepared by D. Klein & J. Waller).

. . . intentional risk-taking and gross negligence undoubtedly play a part in some crashes—especially the more severe ones. . . .<sup>7</sup>

. . . .

Impairment by alcohol has been clearly identified as the single most important human factor underlying unsafe action by drivers or pedestrians in severe and fatal crashes.<sup>8</sup>

. . . .

There is no doubt that a substantial proportion of what is generally regarded as safe and proper driving behavior falls within the competence and under the conscious control of most drivers most of the time.<sup>9</sup>

It is interesting to note that the insurance consumer perceives the underlying causes of motor vehicle accidents in much the same fashion as do those involved in their investigation. For example, a recent analysis of consumer attitude toward auto insurance indicated that 51 percent of the individuals surveyed believed that almost all accidents are someone's fault, while 40 percent believed that most accidents are the fault of drivers.<sup>10</sup> Support for such findings can be drawn from various other sources. A prime illustration is the finding of one Department of Transportation research team which indicated that of a representative sample of seriously injured accident victims, 82 percent "felt that it was easy to say who was at fault."<sup>11</sup>

A recognition of the basic nature of motor vehicle accidents and the role of negligence or fault has compelled authors of no-fault plans to include fault in their proposed systems. For example, the enacted no-fault proposals in Delaware, Florida, Illinois, Puerto Rico and Massachusetts all allocate a role of major importance to fault. Prime illustrations are the Massachusetts plan and the Puerto Rican plan. The Massachusetts plan retains the traditional role of fault for all accidents in which an individual incurs more than \$500 for medical expenses or suffers serious injury. The Puerto Rican plan allows the fault concept to operate when the victim has incurred \$2,000 of economic loss.<sup>12</sup> Even

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7. *Id.*

8. *Id.* at 74.

9. *Id.* at 129.

10. MARKET FACTS, INC., CONSUMER ATTITUDES TOWARD AUTO INSURANCE 71 (1970) (survey conducted on behalf of Allstate Insurance Co., Kemper Insurance Co., Liberty Mutual Insurance Co., and State Farm Insurance).

11. U.S. DEP'T OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 56 (1970).

12. DEFENSES RESEARCH INSTITUTE, INC., ANALYSIS OF MAJOR AUTO COMPENSATION PROPOSALS I (1971).

extreme no-fault proposals such as the one advocated by the American Insurance Association make the vehicle owner absolutely liable or at fault for damage to non-vehicular property, and the commercial vehicle owner absolutely liable for damage to non-commercial vehicles and their occupants.<sup>13</sup> The most interesting inclusion of fault in a no-fault plan appears in a program that was introduced in the state of Minnesota, but which died aborning. This proposal would allow a person injured by a grossly negligent driver to proceed against the negligent driver in a tort action.<sup>14</sup>

Since research concentrating on motor vehicle accidents and alternative compensation systems clearly indicates that fault is a relevant concept, it is not surprising to find that all recognized reform proposals retain fault either fully or to a substantial degree. It is equally clear that the term "no-fault plan" is a misnomer. The majority of reform alternatives simply ignore fault in specific cases or situations. While a compensation system may reflect the underlying causes of motor vehicle accidents, it cannot remove those causes or significantly alter them. The relationship between the basic nature of accidents and the compensation system parallels the relationship between the recognition of fault and the basic factors underlying compensation costs. The latter relationship is the focus of the following discussion.

#### *Economic Factors*

In large measure, the auto insurance and accident compensation debate is based on the economic factors underlying the price of auto insurance. The increasing cost of automobile liability and physical damage coverages have led some advocates of extreme *ignore*-fault proposals to claim that the consumer will receive large premium reductions if their plan is adopted. Foremost among those alleging significant cost reductions is an association of insurers. Their specific claim is that an average savings of 45 percent will result from an "adequate rate" for the purchase of minimum amounts of liability insurance.<sup>15</sup> While such cost reduction claims undoubtedly gain publicity, a more realistic evaluation of the cost implications of alternative compensation systems was given by Secretary of Transportation John Volpe before the United States Senate Commerce Committee. In his testimony on the results of the DOT study he stated, "It is also clear that there exists genuine and warranted concern as to the unknown

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13. *Id.*

14. Davies, *The Minnesota Proposal for No-Fault Auto Insurance*, 54 MINN. L. REV. 921, 925 (1970).

15. T. JONES, *THE COMPLETE PERSONAL PROTECTION AUTOMOBILE INSURANCE PLAN 9* (1969) (published by American Insurance Association).

and essentially unknowable price and cost implications of any major change in the system . . .<sup>16</sup> Even after an exhaustive research effort, the Department of Transportation was unable to determine the precise cost and price effects of major system alternations. This clearly indicates that discretion must be used in tying no-fault to promises of reduced premiums and opening insurance markets.

An examination of those insurance markets where fault is not a relevant consideration in the compensation of losses reveals many of the same problems which exist in automobile insurance. Three excellent examples are fire, crime, and accident and health coverages.

Fire insurance is a classic form of first party no-fault coverage, yet the unavailability of fire insurance at almost any price has become an acute problem in some areas of the United States. To cope with the problems in the fire insurance field, FAIR plans were created to spread the undesirable risks across the entire fire insurance industry. As of January 1971, 27 states—as well as Puerto Rico and the District of Columbia—had established FAIR plans.<sup>17</sup> Since their inception in 1968, FAIR plans have issued some 500,000 policies with insurance in force of about \$14 billion.<sup>18</sup> In New York State the FAIR plan writes 25 percent of all the fire and extended coverage insurance and is the state's largest fire and extended coverage insurer.<sup>19</sup>

Crime insurance coverages also are no-fault insurance. However, the substantial increases in crime-related insurance losses have led necessarily to increased premium costs for potential insureds in some urban core areas, and have significantly restricted the crime insurance market. In fact, the problems facing crime insurance have grown to an extent that the federal government has deemed it necessary to market crime insurance directly to the public.

The third illustration involves accident and health insurance coverages. These forms of insurance bear the greatest resemblance to the first-party insurance contemplated under the various no-fault insurance proposals. However, accident and health insurance has experienced the same problems as other forms of no-fault coverage. An illustration of these problems is the fact that in 1970 group medical losses for all companies amounted to approximately \$600 million.<sup>20</sup>

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16. *Hearings on Automobile Insurance Before the Senate Commerce Comm.*, 92d Cong., 1st Sess. 3 (1971) (Statement by John A. Volpe).

17. NAT'L ASS'N OF INDEPENDENT INSURERS, FAIR PLANS—REPORT OF OPERATIONS 1 (October 1971).

18. Bernstein, *The Federal Role in Meeting Consumer Insurance Needs*, ABA SECTION OF INSURANCE, NEGLIGENCE, AND COMPENSATION LAW 7 (June 1971).

19. *Id.*

20. Wall Street Journal, March 10, 1971, at 41, col. 1.

In addition, some accident and health insurers are modifying their contracts in order to stem the tide of increased losses.<sup>21</sup> While there exist other insurance markets experiencing significant increases in loss costs and loss potentials, the previously discussed examples clearly indicate that the fault concept cannot be singled out as the primary cause of price or availability problems.

Just as in fire, crime, and accident and health insurance the problems of price and availability in automobile insurance lie in the area of loss costs. This fundamental point was clearly recognized by Secretary John Volpe when he stated that:

. . . the inflationary spiral has been the overriding reason for widespread and frequently severe underwriting losses of automobile insurers and, consequently, for the insurance price and availability problems that have followed in the wake of unprofitability.<sup>22</sup>

In the case of auto insurance these costs are concentrated in areas of repairing automobiles and people. In recent years a combination of increases in the accident rate, substantial increases in the price of automobile crash parts, and increases in the vulnerability of autos to damage have led to significant increases in the costs of auto insurance. The increasing costs of repairing automobiles is clearly demonstrated by a comparison of crash parts prices. For example, the cost of a front fender for a Ford Galaxie 500 was \$49.35 in 1965, while the cost of a front fender for a 1971 Ford Galaxie was \$74.10—an increase of 50.2 percent. Price increases of the same magnitude may also be found for a Chevrolet Impala and Plymouth Fury III. In the case of the Chevrolet, the increase in fender cost between 1965 and 1971 was 52.5 percent, while for the Plymouth the increase was 49.4 percent.<sup>23</sup>

Cost increases such as these must be reflected in the structure and composition of auto insurance premiums. In fact, the major cost component of the usual package of auto insurance purchased by the consumer is directly related to vehicle damage. For example, in Dallas, Texas, only 16.6 percent of the cost for a package of automobile insurance is allocated to Bodily Injury (BI), while 68 percent is allocated to Property Damage (PD), Comprehensive (Comp.) and Collision.<sup>24</sup> In Cleveland, Ohio, the percentage allocated to BI is 26 percent.

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21. *Id.* at 34, col. 1.

22. MOTOR VEHICLE CRASH LOSSES, *supra* note 2, at 63.

23. NAT'L. ASS'N OF INDEPENDENT INSURERS, AUTO CRASH REPAIRS STUDY 1-3 (June 1971).

24. Percentages are based on the following factors: class 1A risks (*i.e.*, no driver under 25 and no business use), symbol group 4 (*i.e.*, value of automobile \$2701-\$3000), age group 1 (*i.e.*, current model year), and \$50.00 deductible collision. Rates are based on those currently promulgated by the Insurance Services Office.



while 69 percent is allocated to PD, Comp. and Collision.<sup>25</sup> In Atlanta, Georgia, the allocations are 22 percent and 69 percent, while in Atlantic City, New Jersey, they are 36 percent and 59 percent.<sup>26</sup> The cost allocation pattern illustrated by the preceding examples is indicative of the national pattern. It is interesting to note at this juncture that collision insurance, a major cost component of auto insurance, is a no-fault coverage.

While charges for medical services are not now the dominant cost underlying automobile insurance premiums, they are important and cannot be ignored. The potential for medical costs becoming a more important segment of the automobile insurance premium is shown by the significant changes taking place in the structure of medical costs. One of the more vivid examples of these changes can be found in costs of hospital beds. Between January 1970, and January 1971, the number of hospital beds in the United States costing less than \$30 per day decreased by 60.7 percent, while the decrease in the \$30-\$39 price range was 23.5 percent. These decreases are a marked contrast to the 27 percent increase in beds within the \$50-\$59 range, the 104.9 percent increase within the \$60-\$69 range, the 167.8 percent increase within the \$70-\$79 range, and the 764.4 percent increase in the \$90 and over range.<sup>27</sup> Increases such as these cannot mean anything but higher insurance premiums for the consumer.

Because the ignore-fault concept can have little or no effect on the costs previously examined and, therefore, no significant effect on the costs underlying auto insurance, the substantial savings alleged to accrue from some extreme ignore-fault proposals are, at best, one-shot reductions in the benefits the accident victim would receive under a system which recognizes the responsibility of the negligent driver. Simply reducing the amount of the compensation received by the accident victim is not an acceptable solution.

Costs rather than benefits should be reduced. Costs *can* be reduced through a reduction in the highway accident toll and through more efficient systems of compensating accident victims, repairing motor vehicles and providing medical services. Dual Protection and the various research programs undertaken by the NAIH, especially those relating to vehicle damageability and repair, will be of material benefit in reducing the costs of automobile insurance.

When dealing with the problems surrounding the motor vehicle accident compensation system and all their philosophical, legal, social and political implications, there exists a tendency to place the responsibility on the "system." The following discussion focuses on the role of the "system."

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25. *Id.*

26. *Id.*

27. AMERICAN HOSPITAL ASSOCIATION, SURVEY OF HOSPITAL CHARGES 36-37 (1971).

*The System*

Various elements of the insurance community and government have attempted to rationalize the problems confronting the existing system of compensation by declaring the system is at fault. This argument is almost meaningless because it ignores the fact that individuals such as doctors, attorneys, insurance agents, insurance executives, automakers, legislators and accident victims are the system and will be part of any alternative system. If the system is at fault, then the individuals who constitute the system are responsible. No system can operate in the best interests of the public when the accident victim is attempting to enrich himself through a fraudulent claim, when the attorney presses unreasonable demands and protracts settlements, when the insurer refuses to make a fair settlement, or when the politician attempts to further a reelection campaign by highlighting problems for which he has no viable solutions. Moreover, drivers must be made to understand that the way they operate their automobiles ultimately determines the course of their insurance rates.

Until those individuals making up the system recognize their respective areas of responsibility take action to bring about solutions, a simple alteration of the rules governing the role of fault will not change the system.

The previous discussions dealing with the roles of fault, economics, and the system in no way mean that the NAII has failed to recognize the need for changes in the framework of the current motor vehicle accident compensation system. While a documentation of problem areas within the current system is beyond the scope of this paper, it is clear that more efficient and comprehensive methods of providing accident victims with compensation must be implemented.

The NAII is attempting to meet this important public need, not by abolishing the accident victims' rights, or by eliminating or severely reducing his compensation or restricting his coverage, but by promoting a well-balanced program of improvement, which is the topic of the following discussion.

*Dual Protection*

To a significant extent the final report published by the Department of Transportation coincides with the Dual Protection program and the position of the NAII. The following points illustrate the parallel nature of the DOT's recommendations and Dual Protection:

1. Both recognize that automobile insurance should be the primary source of recovery for accident victims.<sup>28</sup>

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28. MOTOR VEHICLE CRASH LOSSES, *supra* note 2, at 129.

2. Both emphasize the testing and evaluation of alternative compensation proposals.<sup>29</sup>
3. Both are restrained in their emphasis of insurance premium reductions.<sup>30</sup>
4. Both emphasize solutions at the state level.<sup>31</sup>

A significant improvement in the accident compensation system requires that several basic factors be recognized. These factors include:

1. The exposures and losses inherent in accident situations.
2. The need for adequate compensation by both negligent and innocent accident victims.
3. The need to retain the concept of responsibility for negligent actions on the road.
4. The need to curb excesses in the claims settlement process.
5. The need to stabilize or reduce insurance costs.

Following is the manner in which the Dual Protection program recognizes these essentials.

#### *Accident Exposures and Losses*

Dual Protection recognizes that the owner or operator of an automobile faces dual exposures and dual losses. In terms of exposures he can cause damage to the person of others, or he can inflict damage to his own person. In addition to these exposures, he can inflict on himself and/or someone else two basic types of losses. The first, tangible economic loss, includes loss of income and medical and hospital expenses. The second, intangible loss, includes losses such as future earning capacity, inability to engage in sports and other activities and mental anguish and inconvenience. In order that the potential accident victim have protection against these exposures and losses, Dual Protection provides both first-party and liability insurance coverages and compensates for both economic and non-economic losses.

#### *Need for Compensation*

It is clear that both innocent and negligent accident victims should be allowed access to some source of compensation which provides a wide range of benefits

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29. *Id.* at 140-141.

30. *Id.* at 139.

31. *Id.* at 140.

in an efficient manner. It is vital to note at the outset of this discussion that it is not the policy of the NAIH to deny compensation to the negligent. The NAIH membership has marketed no-fault coverages, such as medical payments, for many years. However, great inequities will arise from the compensation of the negligent accident victim or from unreasonably restricting his recovery. Accordingly, Dual Protection is designed to include basic economic loss coverage in all automobile insurance policies.<sup>32</sup> The minimum levels of protection included under basic economic loss coverage include the following:

1. Medical expense coverage paying all reasonable medical, hospital, dental, vocational rehabilitation, funeral and similar expenses up to \$2,000. Funeral expenses are subject to a \$1,000 limit.
2. Disability income coverage for income lost from work up to an aggregate of \$6,000. Payable benefits are equivalent to 85 percent of lost income subject to a monthly maximum of \$750.
3. Lost services coverage of up to at least \$12 per day, or a maximum of \$4,500 for disabled persons such as a housewife, to pay for substitute help.

These benefits are automatically paid on a first-party basis without regard to fault to the policyholder, members of his family, permissive users of the insured car, guest passengers in the car, and pedestrians struck by the car. Because more than 90 percent of persons injured in automobile accidents incur medical and related expenses of less than \$2,000, and income loss of less than \$6,000 the Dual Protection benefit levels provide adequate protection for the great majority of accident victims.<sup>33</sup>

Except as to injuries covered by workmen's compensation systems, payments under the basic economic loss coverage are made irrespective of whether the injured party receives benefits from other sources, such as employer wage continuation payments, unemployment compensation payments or accident and health insurance. To help stabilize costs an offsetting allowance is made for benefits payable under this coverage in any liability suit the injured party may bring against a third party. Such benefits also are offset against any claim by the injured party under uninsured motorist coverage applicable to the same

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32. "Automobile" is defined as a motor vehicle not used as a public or delivery conveyance for passengers, (1) of the sedan, coupe, station wagon or jeep-type or (2) a camper, travel trailer, boat trailer, utility trailer, pickup truck, sedan, delivery truck or panel truck not primarily used in the occupation, profession or business, other than farming or ranching, of the insured; provided, however, that a motorcycle or a motorcycle with a side car attached, a snowmobile, an all-terrain-vehicle or a vehicle designed primarily for use off-the-road shall not be deemed to be an automobile.

33. NAT'L ASS'N OF INDEPENDENT INSURERS, DUAL PROTECTION 8 (January 1971).

accident. In short, duplication within the automobile accident compensation system is virtually eliminated.

While the overwhelming number of persons involved in auto accidents suffer losses within the basic Dual Protection limits, there is a significant number of individuals who incur what may be termed "catastrophic" losses. In order that these individuals may have a source of compensation, Dual Protection provides that every insurer make available supplemental catastrophic economic loss coverage. Benefits under this coverage begin when the benefits under the basic coverage have been exhausted. Catastrophic coverage will compensate the following types of expenses and losses up to an aggregate \$100,000 limit per person per accident, regardless of the type or cause of the automobile accident:

1. Medical, hospital, dental, surgical and related expenses.
2. Net loss of income up to a limit of at least \$750 per month for inability to work, or, in the case of a non-income producer, up to \$12 per day for expenses incurred for services in lieu of those the injured person would have performed.
3. In death cases, (1) survivorship benefits to dependents of up to \$750 per month subject to a \$25,000 limit; (2) a death benefit of \$5,000 payable to a named beneficiary.

Utilizing the basic and catastrophic coverages, the automobile owner can avail himself and his family of virtually complete protection against potential accident losses whether they be caused by the owner's own action or the action of a negligent uninsured third party.

### *Retaining Responsibility*

As indicated in preceding discussions, the concept of fault or personal responsibility plays a vital role in the occurrence of motor vehicle accidents.<sup>34</sup> Thus, there would appear to be no compelling reason to immunize an individual from the generally prevailing rules of personal accountability the moment he takes the wheel of an automobile. To completely remove the concept of personal responsibility would constitute an implied public policy declaration by the legislature that the state is no longer concerned with how badly one maims his fellow citizen, so long as he does it with a car. Such a step could very well have a damaging impact on driver attitudes and would tend to destroy the motivation for strong traffic law enforcement. In fact, research dealing with the deterrent

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34. See text accompanying notes 5-14 *supra*.

effects of holding negligent drivers responsible indicates that the abolition of fault as a consideration could lead to an increased accident rate.<sup>35</sup>

The recognition of fault means that the innocent accident victim is neither barred from initiating a legal action against the negligent individual, nor barred from recovering additional damages such as a loss of future earning power or pain and suffering. The retention of personal accountability also means the maintenance of an insurer's right of subrogation. Through subrogation, the costs of accidents can be allocated to the appropriate individuals or groups, *i.e.*, to those whose actions bring about accidents.

### *Claims Settlement Excesses*

The Dual Protection program recognizes that excesses sometimes occur in the settlement of automobile accident claims and that some individuals may receive more than adequate compensation for their economic losses. To curb these excesses and to bring about a more efficient claims settlement process, Dual Protection incorporates the following provisions:

1. *Prohibition of Duplicate Recovery.* As explained in a previous section an individual may not receive compensation for the same economic loss from both the Dual Protection Plan and a negligent third party.<sup>36</sup> A recovery in tort is reduced by the compensation received or receivable under Dual Protection. Duplicate recoveries also are prohibited when workmen's compensation or uninsured motorists benefits are applicable.
2. *Guiding Standards for Damage Awards.* While the compensation of non-economic losses such as pain and suffering has been a major source of debate, it is clear that these losses exist and the accident victim desires compensation for them.<sup>37</sup> However, it is equally clear that the right to compensation for intangible losses has sometimes been abused, especially in cases where the economic loss is less than serious. These abuses have led to increased insurance costs and protracted settlement procedures. To eliminate these abuses and aid in the stabilization or reduction of insurance costs, Dual Protection incorporates the concept of guiding standards in the compensation for intangible losses. The standards are applicable to certain cases where liability claims are lodged or suits filed against motorists who are covered by liability insurance policies

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35. L. LAWTON, *PSYCHOLOGICAL ASPECTS OF THE FAULT SYSTEM AS COMPARED WITH THE NO-FAULT SYSTEM OF AUTOMOBILE INSURANCE* 24 (1969).

36. See text accompanying notes 33-34 *supra*.

37. *CONSUMER ATTITUDES TOWARD AUTO INSURANCE*, *supra* note 10, at 13-14.

containing basic automatic-pay coverage.<sup>38</sup>

Under the standards, awards for pain, suffering, mental anguish and inconvenience would be limited to an amount equal to 50 percent of the first \$500 of reasonable medical and hospital treatment expenses and 100 percent of such expenses over \$500. Thus an innocent accident victim who sustained \$400 of medical expenses could receive up to \$200 as compensation for intangible losses from the negligent party. If the victim sustained \$1,000 of medical expenses, he could receive up to \$750 for intangible losses.

However, the standards do not apply to cases of death, permanent, total or partial disability, disfigurement or loss of limb, or other special circumstances shown to involve actual substantial pain and suffering. The utilization of standards offers a method of providing needed and adequate compensation while discouraging the individual who seeks personal enrichment at the cost of other accident victims.

3. *Income Tax Factor.* Currently, damage awards for lost earnings are not subject to income taxes. Thus, when a court awards monies for income replacement the individual receiving the monies actually receives more than he has lost because his award is based on earnings before taxes. In order to bring compensation for lost earnings into phase with actual "take home pay," awards for lost earnings in liability cases would be reduced by 15 percent. However, Dual Protection provides that if the claimant can establish that his earnings would actually have been subject to a smaller income tax rate, or to no tax at all, the tax offset would be reduced or completely eliminated.

4. *Efficient Compensation Procedures.* To assure the accident victim of prompt and equitable compensation, Dual Protection includes provisions requiring the establishment of binding inter-insurer arbitration procedures and arbitration of claims under \$3,000. The inter-insurer arbitration procedure provides an economical method of determining which insurer shall bear the losses arising from multiple-car accidents. The effect of this provision is to first provide compensation to the accident victim and then allow the insurers to allocate the losses among themselves.

The claims arbitration procedure provides that liability claims under \$3,000

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38. The cost-saving benefits of the standards governing awards for intangible damages are not extended to those categories of defendants who have not purchased or otherwise been covered by a liability policy containing the prescribed Dual Protection coverage. Thus, the existing legal rules and procedures for determining damages for pain and suffering would continue unchanged for any liability claim or lawsuit against (1) an uninsured motorist, (2) a commercial vehicle (unless basic economic loss coverage was voluntarily purchased), or (3) an out-of-state vehicle not carrying a liability policy containing basic economic loss coverage.

be first processed through a three-man arbitration panel. If the panel's decision is unsatisfactory the dissatisfied party may appeal the decision. This method of settlement has proven to be of significant benefit to urban areas such as Philadelphia, Pennsylvania, where it has resulted in a more efficient utilization of judicial manpower and substantially reduced litigation.

5. *Supervision of Contingent Fees.* The existing system of contingent fees has been the center of long and heated debate. While the system is subject to abuses it is clear that it has value in terms of providing individuals injured in accidents with competent legal counsel. In an effort to establish guidelines for contingent fees, Dual Protection includes a provision which requires the courts to approve schedules of reasonable contingent fees and establish procedures for the disclosure of the contingent fee contract to the court in which a suit is filed.

6. *Insurance Costs.* Through Dual Protection, the NAII has endeavored to bring a more efficient motor vehicle accident compensation system into being. In addition to improving the system there is an urgent need to reduce both the number and severity of automobile accidents and the basic cost ingredients of automobile insurance.

A combination of consumer and insurer action would bring about more damage resistant and more easily repaired automobiles. In fact, the continual public airing of these critical issues has already significantly affected the sale of the so called "hot" cars and the development of the functional bumper systems which will appear on the automobiles to be introduced in 1973 models.

#### *A Balanced and Realistic Program*

The ultimate solution to the problems created by the human and economic toll of auto accidents requires the combined efforts of the individual motorist, the insurance community, and the state legislatures. Through the Dual Protection program the NAII is working toward a vastly improved compensation system, a system that will assure accident victims prompt payment of their basic medical bills and lost wages regardless of fault, preserve their right of recovery for additional damages from a wrong-doer, and stabilize or reduce auto premium costs.

Utilizing the Dual Protection program, the entire insurance community can demonstrate that it is indeed a part of the solution, not a part of the problem.