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A Survey of Views on Motor Vehicle Accident Compensation and the Concept of Fault

MARTIN SILVER*

INTRODUCTION

Law, the governmentally enforceable rules controlling the relations of man with his fellows, necessarily changes with the evolution of society. Where law rules, tranquility dwells.

Throughout history legal institutions have developed to meet the new situations. Law is a vital, changing force.¹

Industrial accident law was made over by Workmen's Compensation Acts in the early part of the century.² Ontario was a pioneer jurisdiction in this type of legislation and now all jurisdictions in North America have some sort of Workmen's Compensation Act. Under the common law, employers careless of their employees' safety were shielded from liability by such defences as contributory negligence, voluntary assumption of risk and negligence of a fellow servant. The injured who recovered inadequate damages or no damages at all, were thrown upon the mercy of the state and charity.

The problems posed by traffic accidents today are not the same as those of industrial accidents fifty years ago. The victims of traffic accidents generally fare better in court than did industrial accident victims. The same defences do not protect the injurer. For example, in Ontario, contributory negligence is no longer a complete bar³ though it continues to be so in most jurisdictions in the United States. Awards, by and large, are generally considered adequate and the very high number of drivers with liability insurance, plus the existence of the Motor Vehicle Accident Claims Fund combine to make some compensation generally available to most victims.

Nevertheless, dissatisfaction with the present system has been expressed in recent years and the volume of adverse comment has grown. The principal arguments in favour of a change in the law seem to be:

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¹ Stanley F. Reed, (Associate Justice of the Supreme Court of the United States) *The Living Law, An Essay* contained in *Legal Institutions Today and Tomorrow*, (1959 Columbia University Press), 310.

² Ontario passed its Workmen's Compensation Act in 1886.

³ Negligence Act, R.S.O. 1960, c. 261.

(1) that findings on issues of fault are most difficult, being based on evidence that is often unreliable at best, and, that on the whole, the concept of fault has been misapplied to the problem;

(2) that computation of general damages in terms of dollars results in "jackpot" justice; and

(3) that the state must still intervene in situations where the defendant is impecunious, has no insurance or cannot be identified. The problem of trial delay is serious in some jurisdictions although, it would not seem to be too significant in Ontario.

It should be noted that much of the criticism of litigation on automobile accidents comes from the United States where the situation in most jurisdictions is far worse for the injured victim. Contributory negligence, whatever the degree, is generally a good defence and only in New York and Massachusetts are motorists compelled to have liability insurance. Trial delays of several years are quite common in some U.S. centres, and litigation expenses plus counsel fees eat up as much as half the award.⁴ The net result is, that in Ontario, with a very high rate of insured drivers,⁵ a recently enacted Motor Vehicle Accident Claims Fund and the *Negligence Act*, the injured victim is in a better position than in most North American jurisdictions. But in spite of this, the law in this area does merit examination.

THE CONCEPT OF FAULT

In Ontario, the basis of liability is fault or negligence. It is this aspect of traffic accident law that has received the most criticism of late. Should there be a different basis of liability? It would require a volume rather than an article to probe deeply into the many problems presented by the concept of fault and its operation in the courts today. Thus, unfortunately, a brief discussion will have to suffice to demonstrate some of the major weaknesses of the concept.

There has been no serious attempt by the courts to create any new rules of liability for automobile accidents. Yet, in other areas of tort law, rules of strict liability have been devised.⁶ Early in the process of developing doctrine applicable to motor cars, the courts rejected the notion that drivers should bear absolute liability, and, instead, based their reasoning on the notion that liability should be by reference to the standard of due care under the circumstances.⁷

⁴ Zeisel, Kalven & Buchholz, *Delay in Court*, (Little, Brown & Co., 1959).

⁵ Recent computation puts the percentage of insured drivers in Ontario at 97.4%.—Dept. of Transport.

⁶ The law has imposed strict liability for injury caused by animals and dangerous activities. The Dog Tax and Live Stock Protection Act, R.S.O. 1960, c. 111; *Dokuchia v. Domansch*, [1945] O.R. 141 at 146, per *Laidlaw J.A.*: The rule of *Rylands v. Fletcher* was not confined to landowners but made the owner of a dangerous thing liable for "any mischief thereby occasioned"; and it was immaterial whether damage be caused on or off defendant's premises.

⁷ *Phillips vs. Britannia Hygenic Laundry*. [1923] 1 K.B. 539, 552-3.

It was this same theory that was generally applied to meet the problems of injury to workmen resulting from the Industrial Revolution. Had the judges who adapted this doctrine to motor vehicle accidents been able to visualize the congested high-speed highways of today, one wonders whether they would have done so. However, the law of automobile liability was made to depend on negligence because of prevailing social interest. The fact that motoring has increasingly become a major source of injuries over the years has had little effect on substantive tort law.⁸

But the application of negligence liability to what many say is the "inevitable result" of such activity, has deprived the negligence test of its original meaning. The foresight of the reasonable man has come to be applied to innocent, even involuntary, acts. If negligence is the causing of foreseeable and avoidable harm, harm caused by driving a motor vehicle is negligently caused.⁹ This is so, if one accepts the premise that there will be a certain number of accidents on the roads regardless of the normal care taken by average drivers. But, having been permitted or even encouraged by the law, the conduct of the defendant lacks the "immorality" required for the imposition of liability for negligence.

The situation presents a contradiction. On the one hand, adherence to the theory of liability based on fault would indicate that moral wrongdoing ought to be punished with a resultant improvement in the character of the wrongdoer. Yet, there appears to be a preoccupation with the fate of the victim, rather than with the fault of the alleged tortfeasor, even when the entire action is cast in the form of liability for negligence, as evidenced by the reluctance of the courts to award exemplary damages.¹⁰ In such a situation, any moral lesson for the defendant, (if there is any such lesson as the words "negligence" and "fault" imply) tends to be lost amid a mass of evidence dealing with the social and economic aspects of the plight of the victim. Moreover, it is suggested that any possible moral lesson is diluted by delay in coming to trial and is insulated from the parties by the use of counsel.

The whole concept of liability for "fault," it is suggested, is largely a legal fiction. In the days of horse and buggy, when accidents occurred slowly and injuries were few and generally less severe, a finding of fault was more feasible.¹¹ Now, cars move at high speed and accidents happen very quickly, almost before anyone

⁸ There was at first a judicial inclination to regard cars as akin to wild beasts: (*Walton vs. Vanguard* (1908) 25 T.L.R. 13) but this was soon abandoned: *Phillips vs. Britannia*, *supra*, footnote 7.

⁹ For a complete discussion of the theory, read: A. A. Ehrenzweig, *Negligence Without Fault*, (University of California Press, 1951).

¹⁰ Punitive damages cannot be recovered unless there has been such a lack of care as to raise a presumption that the defendant realized the consequences of his actions, but did not heed them. *Jackson vs. C.P.R.* (1915) 8 W.W.R. 1043, 1050.

¹¹ Clarence Morris, *Morris on Torts*, (Foundation Press, 1953.) 342, 343.

realizes it, and the results are often very serious. In many cases it is virtually impossible to determine who was at fault or how to apportion blame. The distribution of negligence between plaintiff and defendant means very little except that the plaintiff will have that much deducted from his damages.¹²

But, the doctrine of negligence would be equally unfair to the defendant if the plaintiff did not have to prove fault. Suppose, for example, the onus was entirely shifted to the defendant to disprove his negligence once the plaintiff established that he had been injured as a result of the defendant's actions. As long as fault is the basis of liability, the burden of disproving it would be as great as that of proving it, perhaps greater. In either case there would be unfairness, except that in the latter the plaintiff would have a *prima facie* case on proof of injury, as in pedestrian accidents now. Such a step would benefit plaintiffs greatly, but would not reduce the problems of litigation based on proof of fault.

Could these difficulties be removed by the adoption of absolute liability? Perhaps so, but would absolute liability be justified? If the injurer were truly innocent, why should *he* bear the loss rather than the victim himself, or any equally innocent third party, such as the owner of the vehicle? The only logical answer would be to base the injurer's liability on the fact that he is better able to bear the loss. This would mean that insurability rather than causation should be the test. If so, does it matter what form of insurance the injurer carries, liability for negligence or an accident policy compensating the injured regardless of fault.

It has been suggested that the "foreseeability" test is meaningless in most accident situations as a test of negligence. However, if related to the activity *per se* rather than to the immediate causative conduct, it again becomes meaningful. In other words, the test of individual foreseeability should be replaced by a test of general possibility or "typicality".¹³ This change in emphasis, though not adopted by the courts, would seem to express the missing rationale of a negligence liability for enterprise. A clue can perhaps be gained by examining the liability for breach of contract, which can be, and often has been, invoked to obtain strict liability in the absence of a tort rule to that effect.¹⁴

¹² The basic premise of this part of the essay is that the fault doctrine has, at best, been improperly applied and the *Negligence Act* complicates matters. There seems to be the idea amongst practicing lawyers that juries tend to increase general damages to compensate for the distribution of negligence thus negating the purpose of the *Negligence Act*.

¹³ *Negligence Without Fault*, *supra*, footnote 9 at p. 50. This "typicality" test, unlike the general "foreseeability" test of the fault doctrine, delimits the liability for hazardous lawful activities as "one of the necessary burdens and expenses incidental to such activities".

¹⁴ *Lockett v. Charles* [1938] 4 All E.R. 170.

The rule of the classic case of *Hadley v. Baxendale*¹⁵ is that damages for breach of contract are "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." This rule, by relating the foreseeability test to the time of the making of the contract, rather than to the time of its breach, may be the way out of this problem in tort law. The rule, by thus limiting liability, on the one hand shows a policy of encouraging enterprise by reducing the extent of risk, and on the other, imposes liability for harm foreseeable as possible at the time of the *start* of the activity, whether or not that harm was foreseeable at the time of the causation of the particular harm.

At present, the contract rule can be directly applied to tort situations only where the law recognizes strict liability, i.e., ultra-hazardous activity.¹⁶ Here, the contemplation test may be related to a constructive "contract" between the actor and society, under which the enterprise is allowed in spite of the known danger, in consideration of the assumption of full liability for those, and only those, damages which "may reasonably be supposed to have been in the contemplation of both parties at the time when they made the contract." Causing such harm would be considered as bringing this "contractual" liability into operation whether or not the harmful event was preceded by "fault".

The contractual contemplation test in analogy to *Hadley vs. Baxendale* is distinct from the traditional foreseeability test and similar to the typical tests of strict liability. Note in the Restatement, the basis of liability for ultrahazardous activity: *Anticipation of harm at the time of the start of the activity rather than at the time of the injurious conduct determines the scope of liability*.¹⁷ It might be said that this basis of liability is the price which must be paid to society for the permission of a "hazardous" activity.

Basically, the problem to be faced is with the current attitude toward the use of automobiles. Because cars are so commonly and widely used there seems to be a general reluctance to consider the activity any more hazardous than other "usual" or "normal" activities.¹⁸

The psychological factors involved in driving are important when the causes of accidents are studied. The psychology of driving has a relationship to the traffic laws since the laws function as the framework by which the driver gives order to the various objects which he perceives and must deal with as he moves down the road in his car. Enough is known about the process of driving to say that

¹⁵ *Hadley vs. Baxendale* (1854) 9 Exch. 341.

¹⁶ *Read vs. Lyons* [1947] A.C. 156. *Rylands vs. Fletcher* (1868) L.R. 3 H.L. 330.

¹⁷ See: American Law Institute, *Restatement of Torts*, sec. 519.

¹⁸ Fleming, *The Law of Torts*, (2d ed.), 282.

it is not a series of entirely reflex actions. But, on the other hand, it is not such a complex operation as to require the constant attention of the highest levels of conscious thought.¹⁹

The behaviour characteristics of driving would seem to be difficult to reach by the procedures customarily employed in litigation. Such behaviour rarely has any of the "intent" which is an essential element of crime, and is deemed to lack the legal element of deliberate calculation which is involved in most situations where "risks" are taken. Yet, most accidents are caused, not by negligence in this strict sense of the word, but by a faulty psychological reaction built into the makeup of the driver. Some studies indicate that a relatively small percentage of drivers are responsible for a disproportionately large number of accidents. These are the "accident prone".²⁰

All this would indicate that there are many factors influencing accidents other than negligence and mechanical breakdown. Only in some cases is fault the sole factor in producing an accident. The studies on accident proneness and the psychological factors influencing the use of automobiles do not show a great deal yet, except that there might be less of an argument in favour of the fault doctrine than in the past. If a certain number of accidents are to be considered the inevitable price society must pay for the general use of motor cars, does the fault doctrine really fit into such a scheme?

SOLUTIONS

How then, is the problem to be met? If we do impose on automobile drivers the tests of liability that a "dangerous" activity merits, then insurance will become more expensive in the cost of automobile operation. It has been suggested that no matter what is done or not done, the cost of automobile accidents will not change; however, the cost will be allocated differently. This then, is really the crux of the problem. It must be decided whether we are able to alter more fairly the distribution of the costs of the social phenomenon known as the automobile. It is in this matter that one most hears emotional and political arguments in favour of or against any modification of the law. In order to visualize the effect of any future change, we require a detailed study of the present law in order to know its social and financial impact on the people involved, both injured and injurer. What is the influence of the medical care and hospitalization plans and the various income protection plans? All of these social insurance schemes bear on this problem and the

¹⁹ R. D. Netherton, *Highway Safety Under Differing Types of Liability Legislation*, 15 Ohio St. L.J. 110, 114 (1954).

²⁰ For discussions of accident proneness and the psychology of driving, some articles are: VanLennep, *Psychological Factors in Driving*, 6 Traffic Quarterly 483 (1952). Stack, *What Makes Drivers Act That Way?*, 1 Traffic Quarterly 29 (1947). James & Dickinson, *Accident Proneness and Accident Law*, 63 Harv. L. Rev. 769 (1950). *Accident Proneness* (1951) 115 Just. P. 290, 614. McNeice & Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. Rev. 585 (1952).

whole field deserves special study before any drastic changes are attempted.²¹

The impact of liability insurance deserves special attention. If liability were not insurable, the courts would never have been able to extend this liability to cover those actions called negligent, but which involve no moral fault. It has been suggested that automobile liability insurance ultimately owes its legality to the desire to protect the victim rather than the insured.²² If so, such insurance is lawful only because it covers, primarily, accidents caused by insured drivers without moral fault. On the other hand, it is the availability of this insurance that will induce courts and juries to give verdicts against "blameless" defendants. The uninsured will be treated as if insured, and the insured will be held liable without regard to the amount of coverage.

It would seem then, that the present form of insurance, for the sake of the victim, tends to cover both guilty and innocent alike. For this reason, it could be considered a threat to highway safety and the promotion of care that has been stressed in defending the present system.

There have been various suggestions in recent years in the form of concrete proposals for the modification of the common law. It is my intention to briefly describe some of the more important ones.

THE SASKATCHEWAN SOLUTION

This plan, in operation since 1946, is based on the recommendations contained in the Columbia Report of 1932²³ and operates somewhat like Workmen's Compensation. The Act provides that "every person is hereby insured" against loss resulting from bodily injury sustained in an accident while driving or riding in a moving motor vehicle in Saskatchewan, or as a result of a collision with or being run over by a motor vehicle, regardless of fault.²⁴ The insurance protects not only the person named in the issued certificate, but any other person in Saskatchewan riding in the vehicle while it is being operated by a properly licensed driver. Any person injured who is not named as an insured is also "deemed to be a party to the contract and to have given consideration therefor" and is protected. The insurance itself protects all persons domiciled in Saskatchewan injured while driving or riding in a vehicle outside Saskatchewan

²¹ For the type of studies indicated, see: Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. of Penn. L.R. 913 (1962). Franklin, Chanin and Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 Col. L. Rev. 1 (1961). Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961).

²² A. A. Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 L. & Cont. Prob. 445, (1950).

²³ Report by the Committee to Study Compensation for Automobile Accidents to Columbia University, Council for Research in the Social Sciences (1932).

²⁴ Automobile Accident Insurance Act, R.S.S. 1953, c. 371, s. 19(1).

anywhere on the North American continent.²⁵ Coverage is secured under an exclusive provincial insurance fund and payment is concurrent with applications for renewal of licenses and registrations.

Briefly, the benefits provided under the plan are:

- (1) personal injury coverage;
- (2) compensation for impairment of bodily functions;
- (3) supplementary allowance;
- (4) weekly indemnity;
- (5) third party liability coverage; and
- (6) comprehensive coverage.

Personal injury benefits range up to a maximum of \$10,000 for any one death, the amount payable depending on the category and age of the victim and the extent of his injury and length of disability.²⁶ Permanent impairment of bodily function is compensated under a schedule with a maximum of \$4,000 allowed.²⁷ A supplementary allowance, previously payable in varying sums up to \$2,000 for incidental medical costs is now largely covered by the recently adopted medical care plan.²⁸ A weekly indemnity is payable during periods of incapacity up to 104 weeks.²⁹ In addition, the plan has comprehensive coverage with a \$200 deductible clause.³⁰

Since the Saskatchewan plan does not eliminate an injured person's common law rights, the insurance includes third party liability coverage up to \$10,000 per person, \$20,000 per accident and \$5,000 for property damage.³¹ This may be supplemented by additional liability insurance. If a victim sues at common law, and damages are awarded, sums that have been paid to him under the compensation plan are deducted. Thus, the Act remains a compensation scheme supplementing the common law remedies of the victim.

A study of the Act reveals that the benefits payable appear to be rather low, but it is to be noted that the premiums are also low.³²

²⁵ *Ibid.*, s. 19(2).

²⁶ *Ibid.*, Part II Coverage, ss. 22 and 23.

²⁷ *Ibid.*, s. 20.

²⁸ *Ibid.*, s. 22(1).

²⁹ *Ibid.*, s. 21(1).

³⁰ *Ibid.*, Part III Coverage s. 33.

³¹ *Ibid.*, Part IV Coverage s. 37 et seq.

³² In 1960, the rates on private passenger vehicles were fixed as follows:

Year Model prior to and incl. 1948	Wheelbase	Wheelbase	Wheelbase
	Under 100"	100"-120"	over 120"
1949 and 1950	\$ 5	\$ 5	\$ 5
1951 and 1952	7	12	12
1953 and 1954	9	15	15
1955 and 1956	15	20	25
1957 and later	20	25	30
	30	35	40

Also, a premium of \$2.00 is payable on each operator's permit. The insurance rate is increased for motorists with bad driving records. There is a

[FOOTNOTE CONTINUED ON NEXT PAGE].

In any event, a person dissatisfied with the compensation given him, is free to pursue his common law remedies³³ in court on the basis of negligence as in Ontario. As this scheme is at present the only one in actual operation in this field, most of the criticism of any sort of modification of the law is aimed at this plan. However, there have been other concrete proposals.

THE EHRENZWEIG PLAN

One of the most intricate and original plans was offered by Professor Albert A. Ehrenzweig of California in his book, *Full Aid Insurance for the Traffic Victim*.³⁴ The plan develops in three steps. The first would be a new form of insurance, "full aid" insurance, providing compensation for victims on strict liability in certain minimum amounts, based on the type of injury suffered.³⁵ Any driver or owner carrying such insurance would be relieved, by statute, of any common law civil liability based on negligence. The statute would not relieve anyone for criminal liability. Thus, where a person was criminally negligent, common law liability would remain. The insurance would not be compulsory and the ordinary form of liability insurance would also be available.

The second step of this plan involves the creation of a fund for uncompensated injuries where the injurer has no insurance and is insolvent. The fund would be administered by the insurance companies from which the victim of such an accident could recover the same amounts as if the injurer had "full aid" insurance. This fund would be financed partly by taxation and partly by fines levied against persons guilty of traffic violations.³⁶

rate appeals board established to hear appeals on the insurer's rate. By section 5 of the Act, the rates are fixed by regulation, promulgated by the Lieutenant Governor in Council.

Compensation for impairment of bodily function is by schedule, part of the schedule being as follows:

For loss of:	
Both hands by severance at or above the wrists	\$4,000
Both feet by severance at or above the ankles	4,000
One hand at or above the wrist and one foot at or above the ankle, by severance	4,000
Entire sight of both eyes, if irrecoverably lost	4,000
Entire sight of one eye, if irrecoverably lost, and one hand at or above the wrist by severance	4,000
One arm by severance at or above the elbow	2,700
One leg by severance at or above the knee	2,700
Either hand by severance at or above the wrist	2,000
Entire sight of one eye, if irrecoverably lost	2,000
Thumb and index finger of either hand at or above the metacarpophalangeal joints	1,000
Thumb of either hand at or above the metacarpophalangeal joints	500

These amounts are set by section 20.

³³As well as this right, the right of action against the Saskatchewan Government Insurance Office to recover benefits lawfully due to an insured is expressly provided by section 45.

³⁴A. A. Ehrenzweig, *Full Aid Insurance For the Traffic Victim*, University of California Press, 1954.

³⁵*Ibid.*, 30.

³⁶*Ibid.*, 31.

The third step consists of the fines to be levied against both drivers and victims who are truly negligent.³⁷ Thus, the deterrent aspect of civil liability based on fault would be replaced by "tort fines" which would be measured by the gravity of the defendant's fault and his financial circumstances, rather than by the extent of the harm done.

Professor Ehrenzweig claims that his plan would achieve the following:

- (1) insurance will remain voluntary;
- (2) there would be no diminution of safety incentives and probably an increase in them;
- (3) common law rights would be retained against those not having "full aid" insurance;
- (4) costs of premiums, while unpredictable without detailed actuarial study, would seem to be comparable to the present U.S. system, due to savings in the costs of adjustment and litigation;
- (5) there would be easy calculation of awards based on schedules related to the injuries suffered, much like the Saskatchewan Plan; and
- (6) there would be the widest possible coverage of the public.³⁸

Will the plan work as claimed? It would provide recovery for all auto accident victims, since every victim will be the beneficiary of either the "full aid" insurance or regular liability insurance; and if these fail, the victim can claim from the fund. If the plan does work, it will substantially reduce the cost of litigation and processing claims. Although Professor Ehrenzweig freely admits that "the facts and figures [are] yet to be gathered and studied," it can be argued with some force that the cost of premiums under his plan will be less than the cost of liability insurance. In fact, if the plan is to be voluntary, they must be less if the plan is to work.

While space does not allow a thorough analysis of the plan, there are certain flaws which seem clear. For example, drivers will be reluctant to exchange their liability insurance, which protects them from all forms of negligence, for his "full-aid" insurance, which seems to leave them still civilly liable if "criminally negligent." To get around this, Professor Ehrenzweig would use statutory inducements to promote the use of "full-aid" insurance.³⁹

THE GREEN PROPOSAL

A more recent suggestion rejecting the Workmen's Compensation analogy is that of Dean Leon Green in the 1958 Rosenthal Lectures at Northwestern University School of Law, under the title

³⁷ *Ibid.*, 33.

³⁸ *Ibid.*, 31-40, inclusive.

³⁹ For example, Professor Ehrenzweig would make "full aid" insurance compulsory after one accident.

*Traffic Victims: Tort Law and Insurance.*⁴⁰ Dean Green claims that "the courts are powerless to reconstruct a rational process for general use. They have reached a dead end. As a means of giving adequate protection against the machines of the highway, negligence law has run its course. Something better must be found."⁴¹

Dean Green presents an outline of a plan almost radical in its simplicity. His scheme has three basic provisions:

- (1) compulsory insurance of motor vehicles;
- (2) the insurance to be an accident policy which inures to the benefit of anyone injured by the vehicle; and
- (3) damages are to be measured as at common law, except that pain and suffering would not be grounds of recovery.⁴²

In the choice between what he considers adequate damages and the burden of higher premiums, Dean Green comes out in favour of adequate awards. In the matter of deterrence, he places reliance on strict enforcement of traffic laws.

These, then, are some of the more wide sweeping changes that have been suggested. But, minor changes that would contribute to a smoother operation of the present Ontario law have been put forward.

*LAW SOCIETY SPECIAL COMMITTEE ON THE TRIAL OF
DAMAGE ACTIONS SUBMISSION*⁴³

A Special Committee made up of prominent Ontario lawyers appointed by the Law Society favours maintenance of the present system with regard to the retention of the fault concept. Their report took the position that litigation as a means of obtaining compensation is used only in a very small percentage of cases and that most are settled fairly, without undue delay.⁴⁴ However, the Committee did suggest that there was room for improvements. Among these would be:

- (1) the abolition of the "gratuitous passenger" section of the *Highway Traffic Act*, sec. 105(2),⁴⁵

⁴⁰ Leon Green, *Traffic Victims: Tort Law and Insurance* (Northwestern University Press, 1958).

⁴¹ *Ibid.*, 82.

⁴² *Ibid.*, c. 4.

⁴³ Submission to The Select Committee of the Legislature on the Present System of Compensating Automobile Accident Victims in Ontario, with Possible Improvements, and an Examination of the Proposed Establishment of an Automobile Accident Commission to Compensate Automobile Accident Victims Without Regard to Fault; Prepared by a Special Committee on the Trial of Damage Actions Appointed by Convocation of the Benchers of the Law Society of Upper Canada. Terence Sheard, Q.C., Chairman; Edson L. Haines, Q.C., W. S. Martin, Q.C., Brendan O'Brien, Q.C., Ralph D. Steele, Q.C., R. F. Wilson Q.C.

⁴⁴ The Committee claims 98% of claims are never brought before a Court in any way (p. 7) and that of the 2% which do involve legal action, 90% are settled without completing trial (p. 11). If this is so, then only 1 in 500 accidents go to final judgment in court.

⁴⁵ R.S.O. 1960, c. 172; *ibid.*, 12.

(2) the provision of limited accident benefits in liability policies for people injured but who cannot obtain damages due to the operation of the fault doctrine;⁴⁶

(3) making the owner of the vehicle responsible for its mechanical condition, so that the defence of unavoidable accident is not available;⁴⁷

(4) making the operator responsible for his physical or mental condition;⁴⁸ and

(5) the abolition of the insurer's defence of breach of statutory condition.⁴⁹

It is respectfully submitted that in conceding the possibility of limited accident benefits, the Committee has demonstrated that some changes are needed. Whether they be limited or more wide-sweeping is a policy decision on questions of need and financing, based on a study of the workings of the present system.

OBJECTIONS TO "STRICT LIABILITY"

Safety

The main criticism of any principle of liability, other than one based on negligence, seems to be that it would not encourage due care and caution in driving. This is apparently based on the idea of deterrence, that people are careful because they know they may be *personally* liable in the event of an accident. Psychological studies in this area are inconclusive as yet, but certainly seem to indicate that this thought rarely enters a driver's mind.⁵⁰ The mental processes behind accident-proneness are not well understood, but it would be safe to assume that no one would allow himself, or another, to be injured because he knew there would be compensation. The experience with Workmen's Compensation would seem to indicate this, as does the fact that in recent years the percentage of insured drivers in Ontario has increased to very high levels, yet there has been no alarming increase in the rate of auto accidents.⁵¹ People are protecting themselves as well as others, when they are careful.

⁴⁶ *Ibid.*, 14.

⁴⁷ *Ibid.*, 15.

⁴⁸ *Ibid.*, 17.

⁴⁹ *Ibid.*, 18.

⁵⁰ Netherton, *supra*, footnote 19 at 118.

⁵¹ *Accident Facts*: Ontario Dept. of Transport.

	Accidents Reported	Mileage driven (estimated)
1961	85,577	17,836,867,159
1960	87,186	17,132,324,030
1959	81,518	16,442,214,341
1958	76,884	17,331,405,740
1957	76,302	16,592,698,341

It might be safe to assume that more accidents were reported as more people carried liability insurance. Note also the fact that the estimated mileage driven has also increased.

Also, as mentioned earlier, if this objection was valid, the existence of liability insurance would have the same effect on the attitude of drivers to the safety of other road users, as would any sort of compensation plan.

Socialism

The objection that any state sponsored scheme is a step along the road to socialism or the "service state" may or may not be valid. It is suggested that it is of the same validity as the arguments against Workmen's Compensation, and other social welfare legislation. Such objections are political and not legal in nature.

Accident Compensation in General

Others declare that automobile accidents are but a small portion of all personal injury accidents, and that if the state is going to engage in or encourage any sort of compensation plan for automobile accident victims, why not for the victims of all accidents, such as a fall in the bathtub. The answer to this is that, the fall at home is an isolated event and is not in itself a social problem (although accidents in general may well be). The fall in the tub is not the product of a fast moving society, which injures thousands in the same way. The automobile accident victim is a social problem because of his numbers and the common source of his injuries.

Cost

A very important objection is the cost of any such project. As stated earlier, without careful study, the premiums for any new insurance scheme cannot be determined. However, it is submitted that overall costs would not be increased, but only distributed differently. At present, the victim who cannot recover damages must either bear the cost of his injury himself or claim from the government sponsored Motor Vehicle Accident Claims Fund. A further point is the fact that at the present time about one third of all premiums collected for private passenger automobile liability insurance goes for administration costs.⁵² In Saskatchewan, 82% of premiums collected are available to pay claims. Any plan reducing the costs of litigation, adjustment and administration would free money for actual benefits.

Benefits by Schedule

Perhaps, the most fundamental objection is to benefits according to a fixed schedule. This is based on the belief that it is unfair to

⁵² *Automobile Experience*, prepared by the Statistical Agency of the Canadian Underwriter's Association under orders from the Superintendent of Insurance, p. 5.

In Ontario, the associated companies collected, for private passenger vehicle liability insurance, premiums totalling \$50,831,572 and paid out approximately \$33,000,000 in benefits, including costs of litigation. This was for the period January, 1960 to June 1961, inc. For the Saskatchewan costs, see 1962 Consumer Reports 352.

compensate on the basis of the extent of the injury, rather than on the basis of the loss incurred due to the injury. The answer to this objection is most difficult and would depend to what degree the costs of the plan are to be distributed amongst drivers of motor cars. At one end of the scale is the plan of Dean Green, which would retain common law damages, save for pain and suffering. Without question, the costs of premiums to the individual driver would be very high as compared to the present cost of liability insurance, but, whether or not it would be prohibitive remains to be seen in the light of study and experience. Only estimates can be made at present.

At the opposite end of the scale is the Saskatchewan solution. This scheme has a fixed schedule of benefits depending on the type of injury. To many, the benefits seem intolerably low. This deficiency could be overcome by the actuarial computation of schedules tailored to various activities. This would increase premium costs somewhat, but would be a compromise between the rigours of the present Saskatchewan plan and the high costs of the Green proposal. However, the individual who wishes to give himself additional protection could purchase an accident insurance policy. In any case, the person with special interests to protect needs protection from a large number and variety of human and natural sources of harm, and self insuring is thus both necessary and reasonable.⁵³ If such a plan were to be adopted in Ontario, the schedule of benefits could be made high enough to suit Ontario standards.

The Right to Bring Action

As has been indicated, any scheme could retain a victim's common law rights based on negligence. The Saskatchewan solution does not seek to do absolute justice to a victim, but only to allow him average justice, at low cost and with no delay.⁵⁴

Administration

The problems of administration of any such plan should not be a valid objection. While there may be lack of exact precedent, the operation of the Workmen's Compensation Act in Ontario is a valuable precedent for the operation of any plan in which the government might participate.

Conclusion

The fact that persons who cause their own injury would be compensated is true. But, it must be remembered that there is a gulf between causation and fault. At present, the fault or negligence of the defendant, alleged by the plaintiff, may consist of no more than a technically faulty reaction, often committed in the instant before collision. The courts have met this problem by recognizing

⁵³ O. E. Lang, *The Activity-Risk Theory of Tort: Risk, Insurance and Insolvency*, (1961), 39 Can. Bar Rev. 530, 540.

⁵⁴ M. C. Shumiatcher, *State Compulsory Insurance Act* (1961), 39 Can. Bar Rev. 107, 115.

"negligence without fault"⁵⁵ as a basis of compensation. By expanding the concept of "legal" fault, the present law has altered the concept of "moral" fault and yet has denied relief to many. If the injurer was "innocent", the injured must bear his own loss. The insistence of the law in basing liability on negligence—in other words, the use of a "fault" rationale for what is often non-faulty behaviour—has seriously affected the operation of the law.

One way to solve the problem is to attack its crux, that is, the law's inability to transform a set of quasi-criminal tort rules admonishing a "wrong-doer",⁵⁶ into a tool for distributing losses inevitably caused by the hazards of our mechanical age.⁵⁷

The existence of a fringe element of drivers that might "take advantage of" any plan is all the more reason for implementation of such a plan. Anyone could be a victim. The essence of the arguments against any such plan is against insurance for ourselves, whether as beneficiaries directly, or as those who must bear the ultimate loss of such accidents.

⁵⁵ *Negligence Without Fault*, *supra*, footnote 9 at 39.

⁵⁶ Fleming, *supra*, footnote 18 at 282.

"The over-all effect of these various techniques, devices and subterfuges is that the 'expressed doctrines' of the law no longer furnish an accurate reflection of the real law in operation. It is increasingly being realized that a certain spate of accidents is the inevitable price of the modern machine age, and that a reduction of the toll cannot be hoped for through the deterrent operation of tort law. Hence, the fault concept is losing much of its erstwhile importance, both as regards defendants in the manner already described and as regards plaintiffs, by partly eliminating, and partly tempering, the defences of contributory negligence and voluntary assumption of risk. Accident prevention, particularly on the road and in factories, is more effectively promoted by the deterrent effect of penal sanctions in cases of gross transgressions, or the educative pressures of road safety campaigns and demands by trade unions and insurance companies for safer working conditions in industry. This leaves to the law of torts increasingly the primary function of compensating victims of the 'typical' accidents of modern society and ensuring wide distribution of losses among those sections of the community which participate in or profit from the risk-creating activity. The most effective device for transforming tort law from its one-time admonitory to its new compensatory and loss-distributive purpose is to encourage the encroachment of strict liability and its ultimate displacement of our existing accident law based on the outmoded rules of negligence."

⁵⁷ C. Morris, *Rough Justice and Some Utopian Ideas*, (1930) 24 ILL. L. Rev. 730, 733:

"The attempt is to compensate the plaintiff for one set of reasons, and to punish the defendant for an entirely different set of reasons, by the single act of making the defendant pay a sum of money to the plaintiff."