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Let's Compensate - Not Litigate

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LET'S COMPENSATE – NOT LITIGATE

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HOW much longer shall we try to force an automobile-atomic age into a legal pattern cut to fit the horse and buggy days of a century ago? Not much longer! The inexorable impact of the facts of present day life makes this impossible. Last December the millionth automobile fatality was recorded. Since then another million automobile casualties have occurred.[1] The highways are crowded beyond capacity with swift automobile traffic.

With or without fault, accidents to life and property are an inevitable risk of automobile travel on the highways. Safety measures are good brakes but highway accidents are still as inevitable as industrial accidents in our shops, factories and mines.

Since the out-dated damage suit is still the only method of compensation for autimobile accident damage, our courts are bursting with personal injury and property damage claims which cannot be decided for years! Recent publicity has brought to public notice the scandalous delay in reaching these cases for trial. Chicago was highlighted.[2] Judge Peck one year ago reported a four years' delay in New York and a backlog of 16,000 cases.[3] He said that this was an explosive statistic in terms of the human tragedy of the dependents of the dead and of the disabled who could not secure either justice or compensation under our present system for four long years.

The methods proposed to break this log jam would at best only serve to reduce the time by one year. The average delay throughout the country in larger centers of population, where the need is greatest, is from two to three years. The courts and the personal injury system are as inadequate as the highways to carry the load place upon them by the motor vehicle.

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* Nichols, Wood, Marx & Ginter, Cincinnati, Ohio. *Reprinted from Federation of Insurance Counsel Quarterly, Pages 62 through 76, January 1953 Issue, Vol. 3, No. 2.*

1. *Accident Facts*, National Safety Council, 1951; *What's Wrong with our Streets and Highways*, General Motors Better Highway Awards Fact Book, 1952.

2. Life Magazine, November 10, 1952, p. 126.

3. Peck, *Pillar of Justice*, Presiding Judge, Supreme Court, N. Y., App. Div., 1st Dept. (address to members of the bar and casualty insurance companies,) January 14, 1952, 1: "(The delay) is a measure of court failure, in one important field of litigation, and of public suffering. A shaming and explosive document could be written, but it should not require a recording of case histories to impress upon our minds the human tragedy of families deprived of their breadwinner, men and women suffering incapacitating injuries, saddled with medical expense, their earnings cut off or curtailed, and denied recourse to the courts for the redress of their wrongs for four long years. There is stark demonstration that justice delayed is justice denied, and it should hang heavy on the conscience of every one of us."

The inexorable impact of events today has also been felt by the liability insurance world, which has come to realize the present system of liability insurance must be changed. Rising costs of property damage, increased verdicts and the inflation of all items involved have sharply cut the profits of the liability insurance business.[4] Higher premiums for liability insurance will not solve the problem of vanishing profits. There is no sound actuarial basis upon which insurance companies can determine their ultimate exposure to losses under the present system of unlimited liability. No one can calculate the jury verdicts with actuarial accuracy. The present high premiums will make it more difficult to sell coverage. Coupled with the danger of being priced out of the market is the further danger that the high and ever higher premiums charged in an effort to keep "heads above water" will cause a dangerous public reaction. The public will not stand ever-increasing premium charges.

For these and many other reasons, farsighted legislators and progressive insurance executives are now searching for a modern system of compensating the victims of automobile accidents which will yield a profit to the insurance companies and do away with the gamble and delay of litigation. Impartial students of the problem are rapidly reaching the conclusion that the only sensible solution of the present day problem is to *compensate,* not litigate.

Compensation in place of litigation is desirable from every approach. From the standpoint of the insurance company interested in the assurance of profitable business, it is highly desirable. Compensation according to fixed schedules of indemnity will enable insurance actuaries to calculate with reasonable certainty premium rates which will yield a fair profit. Since all compensation plans contemplate that all automobile licensees will be covered by such insurance the field of coverage will be definitely determined and enlarged. The experience gained in writing Workmen's Compensation Insurance can be utilized to improve and better any plan

4. From their own figures, casualty companies have been losing large amounts on automobile liability business. A press release issued August 11, 1952, by the National Bureau of Casualty Underwriters states in part: "The insurance companies don't like to have to seek higher rates. They would prefer it if they could keep rates down, because that would mean fewer accidents and fewer claims to be affected by inflationary costs. Proof of this is quickly found in the fact that since 1946, when rates began to rise, the stock companies' underwriting losses from automobile liability insurance have reached a total $200,000,000. In 1951, when stock company losses amounted to $100,000,000, accidents caused by insured motorists cost the companies that much more money in incurred losses and expenses than they received in premiums for automobile liability insurance. However, the companies will welcome the opportunity to reduce rates whenever and wherever improved experience permits them to do so."

See also, Force,*Auto Business Has Toughest Year,* National Underwriter, June 27, 1952.

for automobile compensation. The insurance world can make a very real contribution by cooperating in the drafting of a workable plan of compensation insurance which will be non-monopolistic and competitive. On the other hand, an antagonistic attitude toward any such plan on the part of private liability companies could only have unfavorable results.

The compensation plan would help all agencies connected with social welfare. The uncompensated injury from automobile accidents now constitutes a burden estimated in hundreds of millions of dollars annually. This burden falls upon hospitals, charitable and welfare agencies. Under the compensation plan insurance would take care of this burden.

The victim of an automibile accident is, sooner or later, *everyone who travels the highway.* A successful automobile trip is a series of avoided accidents. Eventually, everyone incurs damage to himself or to his automobile. When such damage occurs, the victim should receive compensation without the necessity of litigation to recover for loss or damage.

The automobile owner and driver will welcome a plan of compensation insurance which frees him from the necessity of litigation and assures compensation to his victim or to himself.

The public, which is concerned with the administration of justice, will be important beneficiaries of any plan of compensation insurance which radically reduces personal injury litigation. From seventy-five to ninety per cent of the time of the courts is now consumed in a hopeless effort to hear the thousands of personal injury cases which clog the dockets and take up most of the time of our entire judiciary machinery. The gain which will result from freeing the courts of this burden is incalculable.

Compensation Insurance Is Not New Or Untried

Compensation insurance is not new. It has been in successful operation for nearly half a century. Compensation insurance was accepted in Europe prior to its adoption in the United States. Before 1910, the prevailing system with respect to industrial accidents was to compel the injured workman to litigate with his employer. It was the same liability system that is now in force with respect to automobile accidents. The abuses and evils inherent in this system brought about agitation by labor and the public for compensation insurance. Such insurance has supplanted the liability system in every state in the Union and has been in successful operation for

more than a quarter of a century.[5] No one today would change back to a system of employer's liability. Granted the need for improvement of Workmen's Compensation Insurance and for increased schedules of compensation, there can be no question about the fact that it is a tried and proved plan of insurance.

There is no question that a similar plan can be adopted to compensate victims of automobile accidents who suffer death, personal injuries or even property damage. The Council for Research in the Social Sciences of Columbia University under a grant from the Rockefeller Foundation made a careful, thorough and actuarial study of whether compensation insurance could be successfully applied to death and personal injury resulting from automobilie accidents. The results of this study were published in 1932.[6] The conclusion of the Committee was that such a plan was practicable and advisable and the framework of such a law was included with the report.[7] Within the past year the Law School of Yale University has re-examined the factual basis of the Columbia report and reached the conclusion that said report is basically as sound today as it was twenty years ago.[8]

In 1946 the Province of Saskatchewan, Canada, adopted a compensation plan for automobile accidents applicable originally to death and personal injuries.[9] Successful experience caused the Province to extend the plan to property damage. This compensation plan has now been in operation for six years. There can be no denial of the fact that the plan has worked.[10] It is not the purpose of this article to defend the Saskatchewan plan or to propose its adoption in the United States. I call attention to the Saskatchewan plan at

5. The plans in effect vary. Ohio and six other states use a monopolistic state fund, while in the rest, insurance is written by private carriers, alone, or in competition with state funds.

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

7. *Ibid*, p. 237. The principle adopted is as follows: "Sec. 2. Owner to pay compensation: Every owner of a motor vehicle shall pay compensation for disability or death from personal injury caused by the operation of such motor vehicle, without regard to fault as a cause of injury or death. . . ." (Exclusions follow).

See also, Grad, *Recent developments in Automobile Accident Compensation*, 50 Col. L. Rev. 300 (1950).

8. James and Law, *Compensation for Auto Accident Victims: A story of too little and too late*, 26 Conn. Bar Journal 70 (1952).

9. Saskatchewan, *Report of Special Committee on the Study of Compensation* (1947).

10. An analysis of premium schedules and experience in Saskatchewan is beyond the scope of this article. Schedules of compensation are low, and the density of traffic is not comparable to congested American areas. However, it should be noted that the premium rates in Saskatchewan are also low in comparison to liability insurance rates in the United States. Obviously, increased indemnity and higher premium rates would be necessary in this country. See, in this connection, *Research Report on the Saskatchewan Plan*, to the Motor Vehicle Accident Committee, Legislative Council, State of Wisconsin, 1952. We can profit both by achievements of Saskatchewan and its experience in attempting to evolve a plan suited to our own needs.

this time primarily to show that the application of the principles of compensation insurance to the field of automobile accidents is not theoretical, experimental or untried. Whatever the merits or demerits of the Saskatchewan plan, it has now been in practical operation for a period of six years and is apparently satisfactory to the automobile owners and people under its coverage.

The Litigation System Is A Tried and Proved Failure

A century ago highway accidents were limited horse-drawn vehicles. They were few. The slow pace at which the accident occurred made it feasible to determine fault according to the crude rules of the common law. The facts of our swiftly moving life today preclude this possibility. Accidents occur in a split second. They are sudden, unforseen, over in a flash and in 95% of the cases it is impossible to say who was at fault. Fault, which is at the thoretical bottom of liability, is largely fiction. Every claim agency and every lawyer knows this. The result in most of the automobile accidents tried in court is speculative. Who wins depends upon both the vagaries of the trial and the vagaries of the jury. The amount of the verdict is equally speculative. It is frequently too big or too low. There is no standard upon which juries base the amount of their verdicts.

The gamble inherent in the personal injury case is so well known and has been so fully developed in prior discussions of this subject that, for present purposes, it is assumed, without further discussion.[11] However, the litigant is subject not only to the trial hazard but to an unreasonable delay in learning his fate. This delay, previously discussed, amounts in many cases to a complete denial of justice. The delay in reaching the case for trial is multiplied by the additional delay of appeal and error proceedings, to intermediate appellate courts and to courts of last resort. Added to these delays is the expense involved in printing records, briefs and court costs, all of which show the inflationary trend.

Recovery under the liability system is not compensation to the victim because it is customary for lawyers to handle these cases on a contingent fee basis, which takes away from the injured party twenty-five to fifty per cent of his gross recovery. The contingent fee is one of the handmaidens of the liability system, without which it does not operate. The above is true with respect to the victim of an automobile accident who is able to sue a solvent defendant.

11. For a fuller discussion of this topic, see Marx, *Compulsory Compensation Insurance*, 25 Col. L. Rev. 164 (1925).

However, thousands of accident victims can recover nothing under the present system. The defendant may be insolvent or financially irresponsible. His assets may be hidden or transferred. In such cases, not even a handsome contingent fee will induce a lawyer to spend his time suing a worthless defendant. Thousands of accidents are caused by defendants who are immunized from suit.[12] Despite all that has been done to compel the reporting of accidents, many accidents are caused by unknown drivers. The "hit and run" accident is a classic illustration.

The difficulties and evils of the liability system are so well known that further discussion here is unnecessary. The multiplication of accidents has multiplied the evils of the system and emphasized its failure.

Liability Insurance, Whether Voluntary or Compulsory, Is No Solution

In the United States it is customary for careful and financially responsible automobile drivers to carry insurance to protect them from liability in the event of an accident. The financially irresponsible motorist usually carries no insurance. To remedy this situation Massachusetts adopted a plan of compulsory insurance under which all licensees in Massachusetts must carry liability insurance with the standard $5,000/$10,000 limit or post security with the proper state authority.

The Massachusetts plan has the advantage of eliminating financial irresponsibility. It has the disadvantage of increasing the evils of personal injury liability system. Liability insurance does not insure compensation to the victim. It insures protection to the alleged wrong-doer. It interposes an insurance company between the wrong-doer and the victim. This may make recovery by the victim more difficult but, at the same time, the victims and juries know there is no insurance company involved in the defense which may make it easier to obtain settlements or verdicts.

If we assume that it is better for every automobile licensee to be insured, we must also acknowledge that there is nothing in the Massachusetts experience to indicate that liability insurance is any solution of the social problem arising from damage due to automobile accidents. The courts of Massachusetts are proportionately

12. Immune drivers may include governmental agencies, who today own a large number of motor vehicles of many kinds; hospital and charitable organizations; spouses and children; and the master, in cases where it cannot be proved that the servant was in the course of his employment. In a slightly different sense, the family car doctrine and the doctrine of contributory negligence lead to many more immune drivers.

as crowded as those of New York and Chicago. The accident victim must still undergo not only the delay but the hazard and speculation of trial. The contingent fee still takes its toll from the automobile victim. Insurance rates are high. Profits are small or negligible. The trend of accident increase is only slightly less than that of other states which do not have compulsory insurance.

Generally speaking, it seems to be the consensus of opinion that compulsory liability insurance as applied in Massachusetts has served to prove that liability insurance is not a satisfactory or helpful answer to the pressing social problem caused by automobile fatalities and injuries.[13]

Financial and Safety Responsibility Laws and Impounding Acts Are Disguised Compulsion

Approximately twenty-five years ago, it was realized that the voluntary liability insurance system was completely inadequate to protect the public against automobile losses. On an average, more than fifty per cent of the motor vehicles on the highway were driven by uninsured motorists. Experience indicated that recovery for loss occasioned by an automobile driver who did not have insurance was impracticable or impossible. The casualty companies were opposed to compulsory insurance, yet realized the necessity for increasing public protection. To meet this problem, the so-called financial responsibility and safety responsibility laws were adopted.

The financial responsibility laws generally provide that *after* one accident, *if a judgment is obtained against the motorist which is not satisfied,* such motorist shall not drive again until he furnishes proof of his financial responsibility by depositing security or showing liability insurance with the usual $5,000/$10,000 limit. Such laws do not come into operation until final judgment. During the interim a financially irresponsible motorist may drive without insurance and may have additional accidents. The victims of such accidents are helpless.

The failure of such state laws to adequately protect the public led to the enactment of so-called safety responsibility laws. Such laws are a misnomer as they relate to financial responsibility and not to safety. They provide that after an uninsured motorist has had one accident he may not drive until he furnishes proof that he has secured his financial responsibility for any judgment arising from

13. For a partisan list of objections to the Massachusetts law, see *Compulsory Liability Insurance: An Old-Fashioned Idea Exploded,* Association of Casualty & Surety Companies. And for a non-partisan treatment of this and other plans, see *The Problem of the Uninsured Motorist* (A report to the New York Superintendent of Insurance), New York, 1951.

that accident by an appropriate deposit or showing liability insurance in the usual $5,000/$10,000 limit. I shall not describe the provisions of these various laws in detail. Suffice to say that they are of little assistance to the victims of the first accident. The motorist is not only permitted the so-called "first-bite" but in case no action is instituted in respect to the first accident or a release is obtained from the victim, he may even have a "second-bite" without providing financial security.[14]

It is clear that the intent of the above acts to *compel the offending motorist to take out liability insurance.* The claim that this is voluntary is patently fallacious. The hope is that the compulsion of these acts *after* an accident will induce all motorists to take out insurance *before* an accident to the end that we would then have one hundred per cent of all motorists covered by insurance. However, the acts have not worked this way, and a very large percentage of the motoring public are still uninsured and judgment proof.

The impounding acts approach the problem from a different angle. Under these acts, *after* an accident, the car is impounded by the police and held until the damages are satisfied and the motorist cannot drive again until he furnishes the necessary security. Aside from the basic injustice of depriving the owner of his automobile, regardless of any finding of fault, the acts provide no compensation for the accident victim. By the time judgment is obtained, even the value of the impounded car will have depreciated. Practically all of these cars are covered by a mortgage, which is a first lien. When the car is sold and the mortgage, storage and other costs are deducted, the residue is insufficient to cover the damage done by the impounded car.

The most that can be said is that the above acts are a piecemeal attempt to patch up the open wounds of the present liability system. They recognize the problem but fail to solve it in any comprehensive way. The purpose of these laws is to *compel* insurance and yet leave the voluntary system in effect. If compulsion is good *after* an accident, it is far preferable *before* an acident. The philosophy of these laws is ample justification for a plan which comes into effect before an accident and which will insure compensation to the victim of *every* accident.

The Unsatisfied Judgment Laws Are Mere Pallatives

Several provinces in Canada and two states have adopted un-

14. For a somewhat critical evaluation of these laws, see *The Problem of the Uninsured Motorist, supra.*

satisfied judgment laws. These laws are intended to enable a plaintiff who has recovered a judgment against a motorist which he cannot collect by the ordinary processes of law, to have his judgment paid out of a fund set up under the provisions of the law. The laws vary. In New Jersey the fund is derived (effective 1954) from a fee of $1 on insured auto owners and $3 on uninsured auto owners. The higher fee is supposedly intended to induce the uninsured to obtain coverage. The North Dakota fund is derived from an assessment on all owners equally. The New Jersey fund is to be administered by the insurance carriers, while in North Dakota it is administered by the state.

The purpose of these laws is to provide another patch to cover the sore of the helpless victim who secures a judgment which he cannot collect. It is subject to many criticisms. First, it requires that the claim be pursued to judgment, which involves all of the delays and difficulties of our present liability system. Second, its operation is subject to all kinds of collusion between the plaintiff and defendant. The burden of such collusion or fraud is placed upon the fund and hence upon solvent or responsible motorists or drivers. While provision must be made in any plan for the damage done by undentified drivers or criminal violators, under an adequate compensation plan this would be handled in the same manner as the payment of compensation, without the necessity of pursuing the claim through litigation to judgment.[15]

Compensation Insurance

Before an automobile can be driven upon the public roads, a license must be obtained from the state. Before a driver can operate an automobile he, too, must have a license issued by the state. Before a resident of Massachusetts can operate his automobile, he must give evidence of his financial security by the deposit of securities or proof tha the has liability insurance. Before a minor in New York State can operate an automobile he must prove that he has given financial security or taken out insurance. Before a taxicab can be operated, most states require that the taxicab owners provide adequate liability insurance. Before inter-state carriers can operate upon the public highways they are required to have

15. Some aype of fund will be necessary even under a compensation plan, in order to provide for cases involving hit and run accidents, et al. It could be administered by private insurers, in much the same way as under the New Jersey law. Whether the premiums necessary to support it would come from the general public, in the form of a grant by the state into this privately administered fund, or by a registration or license fee tax in all drivers, is a matter of policy which needs not be determined at this time.

adequate liability insurance. These laws are compulsory; they apply to everyone within the class. They are valid.

The precedent of the above laws applies to compensation insurance. My proposal is to condition the license to drive an automobile upon the owner having compensation insurance meeting the standards set forth by law.

Such compensation insurance would cover all death and personal injuries caused by the operation of a motor vehicle upon the public highways. The question of property damage may be reserved for later consideration. The social need for compensation insurance is based upon the fatalities and personal injuries occasioned to the body politic by the automobile.

The amount paid by the way of compensation for death or injury should be determined by fixed schedules. Our long experience with Workmen's Compensation Insurance enables us to determine comprehensive and adequate schedules. In many states the sums provided by the present Workmen's Compensation laws need revision. This is a matter of public policy and actuarial detail. It has been argued that it is easier to determine proper compensation for injured workmen who have a definite wage than it is for injured housewives or children who have no definite earnings. This difficulty can easily be overcome by providing a fixed amount per day for a determined number of days of disability, according to age and earning capacity. Medical expenses, hospital bills, surgical bills, funeral bills and similar charges would be on the same basis for wage earners and non-wage earners.

Payment would be made upon proof of an accident and disability covered by the act after a reasonable waiting period, and without regard to fault.

Payment of Compensation Without Regard to Fault Is Legally, Socially and Morally Justified

Payment of compensation without regard to fault is fundamental. It is the basis of any program for compensation insurance. Forty years ago it was argued that if an employee carelessly stepped into an opening in the shop where he worked or got his hand cut off by careless contact with a band saw that he should not be compensated, because it was his own fault. There were many answers. First, the assumption of fault was a debatable question, which only the whim and caprice of a jury would determine. Second, it was not the "fault" of the workman that he had to earn a living and his

living required him to be in contact with dangerous machinery. Third, there was an inevitable risk of injury no matter how careful he was. Fourth, the social problem resulting from the presence of a crippled workman was the same no matter how the injury ocurred.

Without repeating all the arguments then made, it is sufficient to say that they were convincing to the courts and to the public. Compensation insurance for injured workmen without regard to fault became the law of the land. No one today believes it legally or morally wrong to pay an injured workman because perchance his injury was caused by carelessness. Experience also establishes that workmen do not stick their hands into a buzz saw because they receive compensation without regard to fault.

Similar reasoning justifies payment of compensation for automobile injuries without regard to fault. It is morally right to provide compensation for the injured victim. It is necessary to use the highways and to use automobiles in order to earn a living and enjoy life today. This has created an inevitable hazard of injury. No motorist can be careful every second. The crippled pedestrian or disabled motorist presents the same social problem, whether his injury was caused with or without fault. Further, it is impossible to determine fault as such.

There is no color camera present to determine whether a motorist or pedestrian proceeded on a red or green light and the disputed question is not resolved until years later when the memory of the witness is dim.

There is nothing new or shocking about the payment of compensation for automobile injuries without regard to fault.[16] A large percentage of all Workmen's Compensation cases are now due to automobile accidents. In these cases the injured workman is paid automatically and without regard to fault. If a taxicab driver, allegedly negligent, kills a pedestrian and injures himself and a passenger, the taxicab driver will receive Workmen's Compensation regardless of fault—whereas the passenger and the dependents of the dead pedestrian will have to take their chances on a long delayed recovery under the present litigation and liability system. We have

16. The liability system has proved so unsatisfactory and expensive that many insurance company claim agents now make settlements without regard to fault in close cases wherever the claimant will accept a figure comparable to what he would receive under compensation insurance, and only compel him to litigate when his demands are excessive. Such claim agents find it cheaper to dispose of the claim in this manner even though there may be no fault, rather than to litigate.

many instances in the law of strict liability without regard to fault.[17]

The insurance companies have recently issued policies providing for medical payments without regard to fault. For a small additional premium an automobile owner can secure a medical payment clause which provides that the insurance company will pay all persons injured in an automobile accident promptly and without regard to fault, certain medical expenses, hospital bills, etc., up to a fixed limit. All types of accident insurance pay indemnities in case the insured meets with an accident without regard to fault. Collision insurance is payable to the owner without regard to the fact that the damage to his car may be due entirely to his alleged "fault." It is interesting to note that the Saskatchewan law is called an "Accident Insurance" law.

It is true that the compensation paid without regard to fault may seem relatively small alongside of jury verdicts for similar injuries. At the same time, excessive verdicts may impoverish the defendant, who would be protected under the compensation plan from suit for "ordinary negligence".

The Columbia University study established that the payments under the proposed compensation law would, on the average, be equal to or greater than the net recovery made by the injured in litigated cases after deduction of court costs and attorney fees. Further, such recovery would be paid with certainty and promptness instead of after years of delay. The same study established that such payments would be greater than settlements obtained by litigants who did not wait out trials; also, that compensation would be paid in every case, whereas, the vast majority of claimants receive nothing under the litigation system.

Compensation Insurance Should Be A Prerequisite To A License

Most of the objections to compensation insurance have been based upon the fact that motorists would be compelled to obtain insurance before being permitted to drive. It is axiomatic that any plan of compensation insurance should provide complete protection. One of the most beneficial objects of the proposed program of compensation insurance is to eliminate uncompensated loss for death or disability, due to the operation of automobiles. We wish to guard against the failure of the voluntary systems under which

17. See the *Restatement, Torts,* Sec. 519, which imposes absolute liability for ultra-hazardous activities, and Sec. 520. Absolute liability has been imposed upon storers of explosives, keepers of wild animals, etc., on the theory that the act, while legal, exposed the public to a certain degree of risk. Cf. the automobile situation.

prudent and responsible motorists carry insurance and irresponsible motorists do not.

There is nothing un-American in compelling people who wish to drive high-powered and potentially dangerous vehicles upon the highway, to protect the public from injuries which may result therefrom. As previously stated, we have long compelled public vehicles to carry insurance. The financial and safety responsibility laws are compulsory after the first accident. The New York law with respect to minors is compulsory. Driver's license laws are compulsory. Laws requiring automobiles to be tested for safety are compulsory. Registration of automobiles is compulsory. Certain safety measures are compulsory.

The objection to compulsion is without merit. It is motivated by fear on the part of the insurance companies that if everyone is required to carry insurance, it will be necssary for the state to regulate rates and to assign risks. There is no reason to fear that state supervision or regulation of rates will not operate fairly and reasonably to protect the public from unreasonable charges and the insurance companies from confiscatory rates.

Competition between insurance carriers will ordinarily bring about reasonable rates. There is now considerable regulation and supervision of rates by various states. When the railroads and public utilities were first subjected to the ratemaking provisions of the Interstate Commerce Commission and other public utility laws, there was great fear that the powers of these bodies would be exercised arbitrarily and unfairly. None of these fears have been realized. In fact, the public utility bodies generally make certain that the rates yield a fair return on the value of the properties involved. There is every reason to believe that the various State Insurance Superintendents and Commissioners would protect the insurance companies and make certain that the rates were fair and vielded a reasonable profit.

With reasonable cooperation on the part of private insurance companies, there is no reason to fear the establishment of a state fund. It was the antagonistic attitude of the employer's liability insurance companies in Ohio and few other states that caused these states to establish state funds. This attitude no longer exists and we look with confidence to constructive statesmanship and cooperative planning by the insurance companies to help develop a compensation law which will solve the public need.

The problem of undesirable risks may also call for state super-

vision. Any compulsory plan will require an examination into the fitness of certain persons to operate automobiles upon the highway. Whether such persons are desirable licensees must, in the final analysis, be determined by the public administrative tribunal. That is done now. No change will be necessary. If a motorist's application for insurance is rejected by a private company and he is deemed fit to receive insurance, the risk would be assigned in accordance with an assigned risk plan. The pattern for the handling of risks is now in operation and the situation under compensation insurance would not be substantially different from what it is now under liability insurance except that undesirable risks would gradually be eliminated.

Exclusions

No arbitrary decision need be reached at this time with respect to willful and criminal wrongdoing. It is immaterial to the individual or to a drunken driver, who was running amuck. His injury and loss are the same. The victim should receive compensation under any plan of compensation insurance. However, in the case of the willful and criminal wrongdoer, it may well be that he should remain subject to suit at common law, while the motorist, whose accident is not caused by willful and wanton misconduct, should be free from suit.[18] The fact that a willful or criminal violator remains subject to suit will give extra compensation to the victim and may act as a deterent to the violator.

It will be impossible for the victim of a "hit and run" or unidentified driver to recover from an insurance carrier. Hence, it will be necessary to require a contribution by all insurance carriers to an administered fund out of which the victim of "hit and run" or unidentified driver, can be paid compensation according to the fixed schedules of the law.

Accident Prevention

Compensation insurance is not primarily intended to prevent accidents but to meet the social problems caused by more than a million casualties each year. However, the claim has been advanced that if compensation was paid to faulty and faultless alike, accidents would increase. Experience proves the contrary to be true. Under Workmen's Compensation, where careless workmen receive the same award for injuries as careful workmen, the accident rate has

18. This is the requirement under Ohio's Guest statute, O.G.C. 6308-6. By limiting actions by guests against passengers to cases involving willful or wanton misconduct, such suits have virtually been eliminated. In case a workman is injured by wanton negligence of an employer some states (Ohio, et al) provide that awards may be increased by as much as fifty per cent and collected from the employer.

decreased. This is due to safety measures based upon the experience of all accidents. In Saskatchewan, the right to compensate has not induced anyone to carelessly or deliberately risk injury to himself or to his car. Merit rating and increased premium charges to the accident-prone motorist will help reduce accidents. The liability of the motorist for willful, wanton, or criminal conduct will be unchanged. Better accident reporting will aid in determining the cause of accidents, and will lead to better measures for safety and increased protection for the public. While no one expects to eliminate the risk of accident, there is good reason to believe that compulsory compensation insurance will furnish a foundation for better control and more scientific correction of causes leading to accidents.

Savings Resulting From Compensation Insurance

A statewide requirement for compensation insurance and the elimination of practically all personal injury litigation will result in substantial savings. A very large portion of the premium now paid for liability insurances goes for legal expenses. Of course, it will still be necessary to investigate claims but the investigation will be largely concerned with damage. The question of liability—negligence—fault, which consumes so much time and expense at present will be largely eliminated. Since payment will be made to practically all claimants upon establishment of their claims without litigation, the expense of going to court will also be eliminated. The heavy legal expenses, court costs, witness fees, record fees, printing, appeal and error will be saved.

The payment of losses according to definite and fixed schedules and the ability to determine expenses should result in premium rates which will more accurately forecast profits than can be predicted under the present system.

The danger due to high jury verdicts, and the ever increasing cost of settlements, in which must be included the plaintiff's attorney fee, will also vanish.

Premium Rates

It is not within the scope of this article to discuss the cost of compensation insurance. This is an actuarial problem to be worked out with precision and will necessarily be different with respect to different states and localities. It will depend upon the benefits provided by the compensation law and the accident rate and many other factors.

However, it is appropriate to state that calculations have been

made upon the examination of various scales of benefits and from these calculations the conclusion can be drawn that compensation insurance upon a statewide basis can be underwritten at a profit for a premium cost no greater than the present cost of liability insurance and with a strong probability that the premium cost would be lower than present liability insurance rates. In this connection, we have a number of guides. In many states we know the number of automobiles in operation, the number of fatal accidents, the number of nonfatal accidents and the number of injuries and whether serious or otherwise. We know the accident trend. We also know the average cost of each fatality and the average cost of settlements for personal injuries. We have comparable Workmen's Compensation figures with respect to automobile accidents occurring to the workmen and compensation under existing Workmen's Compensation laws. We have the insurance companies' statistics relative to their costs and experiences. From all of this information rate schedules can be determined and revised in accordance with experience and the operation of the program.

The insurance companies can make a real contribution by working out proposed policies, schedules of indemnity and indicated premium rates for public discussion and consideration.[19] It is the earnest desire of all who seek a workable solution of this problem that this done.[20] The public welfare, as well as self-interest, will be best served when this is done.

A number of legislatures will shortly have this matter under consideration, and unless the private insurance companies come forward with a concrete plan to end the evils of liability insurance and to substitute a workable plan of private compensation insurance, public pressure will compel that something be done by the state on its own account to meet the needs of its citizens.

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19. Professor Albert A. Ehrenzweig of the University of California has suggested that insurance companies could put a compensation plan into effect of their own volition, without the necessity for legislation. In order to accomplish this on a purely voluntary basis, companies could write an "alternative loss insurance" clause in the standard liability policy. When an accident occurs, the injured person would then be given the alternative of pursuing a liability claim, or accepting fixed payments under the loss insurance clause, which benefits would be paid regardless of fault. This proposal, not yet reduced to book form, was the subject of a seminar at the University of Cincinnati, November 12, 13, and 14, 1952. A detailed examination of the problem as Professor Ehrenzweig sees it appears in the Cincinnati Enquirer, November 16, 1952, page 6 (News Section).

20. The criticism of the compensation systems in *Report on Problems Created By Financially Irresponsible Motorists*, by Association of the Bar of the City of New York (1952) p. 11, is not valid. It is a statement of alleged difficulties to be encountered in the administration of compensation insurance. Analagous difficulties were met and overcome in establishing Workmen's Compensation Insurance. Certainly the American genius which can split the atom is quite capable of devising means and methods to cope with what may be the somewhat different difficulties involved in setting up automobile compensation insurance.