

1972

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Recommended Citation

Nelson A. Rockefeller, *A Better Approach to Compensation of Automobile Accident Victims*, 21 Cath. U. L. Rev. 351 (1972).

Available at: <https://scholarship.law.edu/lawreview/vol21/iss2/8>

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A Better Approach To Compensation Of Automobile Accident Victims

Nelson A. Rockefeller*

The present legal structure for compensating victims of automobile accidents is the product of a horse and buggy age having little resemblance to the present day. The structure has become irrelevant to our times because it has failed to keep pace with the new realities and demands of modern life.

The critical fault of the existing automobile liability insurance system is the "fault" principle upon which it is based. We are fortunate, however, to be witnessing month by month an increased public awareness and understanding of this inherent and basic defect in the present system of compensating automobile accident victims, and indeed a growing public demand for a fundamentally different and more equitable way of dealing with the problem.

The "Fault" System

The glaring failings of the present system in practice are evident to any observer.

Accident victims are shortchanged as a result of the enormous expenses incurred in operating the complex structure required by the present system. Of every dollar paid in personal injury liability insurance premiums, lawyers and claims investigators receive 23 cents and the expenses of running the insurance company and paying agents consume another 33 cents. Only 44 cents is left for compensating injured parties to an accident.¹ By any standard the system is grossly inefficient and wasteful of vast sums which would be better spent compensating victims. In New York State the fault system pays absolutely nothing to one out of every four persons injured in an automobile accident, and other studies show that the proportion of uncompensated victims in some jurisdictions may be somewhat larger.²

The present system fosters overcompensation of the slightly injured and undercompensation of those seriously injured. The high administrative cost of

1. NEW YORK STATE INSURANCE DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 34-35 n.59 (1970) [hereinafter cited as *Governor's Report*].

2. *Id.* at 18 n.25.

processing any claim and the uncertainty of an eventual award in a particular case create an incentive for the insurer to dispose of small claims quickly at high settlement figures, because it is cheaper for the company to settle a small claim at an inflated value than to keep the claim open and argue about it. However, in the case of a large claim involving substantial out-of-pocket expenses, the claimant is often in pressing need of compensation and there is less incentive for the insurer to meet the claimant's demands. The typical large claim is underpaid partly because the seriously injured victim can be bought out cheaply since he cannot afford to wait for his money.

The complexity and built-in inefficiency of the fault insurance system result in inordinate delays for accident victims in collecting under automobile liability insurance. The delays for automobile liability insurance are forty times as long as those in collecting under accident and health insurance and ten times as long as those under collision, homeowner, or burglary insurance.³ Whether or not the claim goes to trial the delays are unduly long, but those cases going to trial face truly unconscionable delays.

The system overloads the courts with automobile accident cases, seriously hampering the effective administration of justice not only for automobile accident victims but in other civil matters and sometimes in criminal matters as well. Moreover, the system often has other undesirable social effects, not the least of which is its tendency to induce persons on both sides of a case to engage in overreaching and even outright dishonesty. Among these practices are undue delays in settling cases of clear liability for a reasonable sum, gross exaggeration of pain and suffering claims, the offering of medical testimony of dubious validity, and the filing of claims which are often groundless.

All too often a citizen's only contact with the courts and the legal profession is the result of an automobile accident. The unfavorable impression he receives from the sharp or dishonest practices he sees and his experiences in such cases adversely affect his confidence in the administration of justice.

Origins of The Present System

Since the present system of fault insurance is so patently a failure in economic, social, and human terms, it would be well to consider briefly the origin of the legal structure which has brought us to the present sad state of affairs. The failures of the system may be traced to its basic principle.

Fault or negligence as applied to automobile accidents had its origin in the English common law, and was the result of a very uneven evolution of legal rights and responsibilities. Gradually a body of case law arose which governed

3. *Id.* at 19.

the resolution of obligations of one person to another whom he had unintentionally harmed by his actions. The unifying theory was that a person should be liable to compensate another's injuries only where he was found guilty of some kind of fault.⁴

Legal fault has not, however, corresponded exactly with the concept of moral guilt. The standard of legal fault was generally an objective standard—that one must act as a reasonably prudent man would have acted under the circumstances. Many of the unique shortcomings of the person allegedly at fault are not taken into account if they are below the general level of the community. This means that persons are often found to be legally at fault for failing to abide by a standard which they cannot as a matter of fact reach. As Mr. Justice Holmes stated:

The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason.⁵

Under the fault system the victim must prove another party responsible for the injury and must prove himself fault-free. These determinations are made to turn upon how the persons involved conducted themselves at the moment of the accident. Although the fault principle has a certain appeal in terms of an abstract discussion of punishing the guilty and rewarding the innocent, it has had disastrous effects when applied to the unbelievably complex factors which contribute to and cause automobile accidents. The fault system forces people to attempt to ascertain blame in the collision of automobiles driven at speeds and under conditions undreamed of when the present system of negligence was developing. It is simply unrealistic to expect that objective truth can be established concerning the causes of accidents particularly when the details of the accident are expected to be recalled in a court room years after the event. Research has demonstrated causation to be usually the culmination of numerous and subtle factors, happening in split seconds. It is inequitable and inefficient to make an innocent victim's protection from potentially ruinous economic loss depend on his ability to establish that someone else was solely at fault.

But the most critical defect of the fault system as applied to modern automobile accidents results from the way that it interacts with liability insurance. Fault law makes its determinations in an abstract setting, ignoring the reality of insurance, as though it were deciding whether the victim should bear the accident loss or whether the loss should be borne by another person. With

4. O. HOLMES, *THE COMMON LAW* 108 (1881).

5. *PUBLIC PAPERS OF GOVERNOR NELSON A. ROCKEFELLER* 1065-66 (1967).

liability insurance, however, what is really being decided is whether the loss will be transferred to an insurance company, or, since each insurance company obtains its funds from a cross-section of all drivers, whether the loss should be borne by the victim or whether it should be borne by all persons who own and operate automobiles.

The original appeal of fault law in a moral and legal sense was based upon the justice of making a wrongdoer pay for the damage he does. Automobile liability insurance, universally obtained by a class of people likely to include an automobile accident victim has the effect of making sure that the wrongdoer does not pay. In the conflict between fault law and liability insurance, liability insurance has prevailed to the extent that the wrongdoer has been assured that the financial burden which the law would shift to him will be borne by all drivers. From another perspective, however, the common law of negligence has prevailed in that the fault principle determines which victims shall be paid, so that a victim may recover from all drivers only if he can establish that some third person was solely at fault.

All too often, the victim recovers nothing because he is unable to establish the fault of someone else, even if the victim is "innocent" as a matter of objective reality and the standards of the fault system. Indeed, the present fault system is intended to operate in this manner, since the thrust of the system is to establish fault and not to pay benefits to everyone who suffers loss in an automobile accident.

The Governor's Committee

My concern about the serious defects and disastrous effects of the fault insurance system led to the appointment of a Governor's Committee on Compensating Victims of Automobile Accidents in 1967. At that time I said:

Our present tort liability system for compensating the victims of automobile accidents has been authoritatively criticized as slow, expensive and unfair. The system has remained essentially unchanged while the nation has passed from the horse and buggy era to an age dominated by the automobile—with the highway accident an all-too-common occurrence.

. . . .

The time has come for a thorough study of how automobile victims are affected by the lengthy and difficult process of determining fault and resolving claims following automobile accidents with a view to possible changes in the system.⁶

The committee was chaired by Judge John Van Voorhis, distinguished former

6. Letter from Judge John Van Voorhis to Governor Nelson A. Rockefeller, Sept. 17, 1969.

judge of the New York State Court of Appeals. Its members included representatives of governmental agencies and civic, labor, professional and, consumer groups. A request was submitted for an appropriation of \$50,000 for 1967-68 for the initial expenses of the committee and \$300,000 in 1968-69 to finance the full study. The Legislature failed to appropriate any of these funds. The committee in the interim organized itself and began taking testimony, but subsequently had to suspend operations as a result of its failure to obtain financing. When funds were again not made available for the committee in 1969 it concluded that it had no alternative but to disband. Judge Van Voorhis wrote to me on September 17, 1969 reporting the committee's decision and expressing the hope that the study it had initiated might be carried on in some other way. His letter reviewed the problems found in the existing system of compensation for victims of automobile accidents and concluded:

A substantial majority of the Committee members desire it to be said, however, that they do not believe that these problems can be solved by temporizing or by any measure short of an overhaul of the existing system.⁷

On September 26, 1969 the State Insurance Department, headed by Superintendent Richard E. Stewart was designated to carry forward the study. The study was based principally on the impressive body of published material on automobile accident victims' compensation; on the records of the Van Voorhis Committee; on the study of closed claims made by Insurance Department examiners; on new analyses of existing data by actuaries and statisticians; on new data furnished by the United States Department of Transportation; on responses to a request for comments directed to interested groups and the public; and on the advice of a panel of leading scholars of accident law and automobile insurance.

The resulting report, entitled *Automobile Insurance . . . For Whose Benefit?*, was submitted to me and released in February 1970. The Report confirmed the Van Voorhis Committee's conclusion that a fundamental overhaul of the existing system is necessary. It concluded that the defects inherent in the traditional fault-negligence system are so deeply rooted that there is no choice but to replace the present system with a more equitable and humane system of compensating virtually all victims of automobile accidents for objectively measurable losses. The Report, a landmark treatise on the subject of compensation of automobile accident victims, made detailed and comprehensive recommendations for a new system to replace the vague "pain and suffering" measure of damages in existing law with clearer and more objective mea-

7. Automobile Accident Compensation Bill, S. 8922, A. 6133 (1970).

tures of compensation, and to eliminate the basic conflict of purpose between accident liability insurance and negligence law.⁸

The following month a bill implementing the Report's recommendations was submitted as a part of my legislative program.⁹ The bill was also the subject of a Special Message to the Legislature urging its enactment at the session then in progress.

The Report and the bill generated great interest and continuing debate on the state and national levels and received the enthusiastic support of leading consumer and labor organizations, the academic community, and a number of prominent attorneys. The proposal also received widespread editorial endorsement from newspapers, magazines, and television and radio stations, but was actively opposed by a number of attorneys' groups and some, but not all, representatives of the insurance industry.

The 1970 Proposal

Under the proposal, present tort actions for the negligent operation of an automobile would be largely abolished. Actions arising out of the manufacture, distribution or repair of an automobile would not be affected.

The owner of a vehicle would be responsible without regard to fault for net economic loss resulting from personal injury arising from accidents in which his vehicle was involved, except for personal injury to the occupants of another vehicle. The purchase of insurance to cover this responsibility would be compulsory. Persons injured by the vehicle including the driver, passengers, and pedestrians would present their claims to the vehicle owner's insurance company.

The minimum compulsory coverage would offer the following kinds of benefits:

- (1) *Medical expense*. There would be no restriction on reasonable hospital, surgical and medical expenses insured and no ceiling on the total amount reimbursable.
- (2) *Income loss*. Compensation for lost earning power would be unlimited in total amount; in most cases, it would be the continuation of the victim's wage level at the time of the accident. Loss of income benefits would be adjusted to approximate what the victim would have earned net of federal, state and, municipal income taxes.
- (3) *Rehabilitation*. Full compensation for physical and vocational

8. *Governor's Report*, *supra* note 1, at 83-100.

9. Automobile Accident Compensation Bill, S. 8922, A. 6133 (1970).

rehabilitation expenses, including prosthetic devices and job retraining.

(4) *Other Expenses.* Payments for necessary household help, transportation, and other miscellaneous expenses incurred as a result of the accident.⁹

Benefits would be paid periodically, as the victim's losses and expenses accrued.

The plan has none of the recognized restrictions which some other plans have since adopted. There are no dollar ceilings on income loss or medical expense, no deductibles and no coinsurance provisions.

Insurance benefits for personal injury would be payable even if the victim subsequently died of his injuries, but loss to the survivors due to his death would be unaffected because the New York Constitution forbids impairment of actions to recover damages for injuries resulting in death.¹⁰

Benefits are provided for net economic loss. Accordingly, the compulsory automobile insurance would pay only for those losses not repaid from some other sources.

Although the legal relationships would be the same for property damage as for personal injury, the compulsory insurance requirements would not. The vehicle owner would be responsible for damage to his own vehicle but would not be compelled to insure himself; he would also not be liable for damage to someone else's vehicle. He could, of course, optionally choose to insure his own vehicle through collision insurance. The vehicle owner would also be responsible for damage to non-vehicle property, *e.g.*, clothing, belongings and roadside buildings. Insurance coverage for damage to non-vehicle property would be compulsory.

Owners of commercial vehicles would have the same responsibility as owners of private passenger vehicles, plus an added responsibility for damage to a private passenger vehicle or injury to its occupants. Insurance against the additional liability of commercial vehicles would be compulsory. In a two-car collision between a private vehicle and a commercial vehicle each set of occupants would recover first from their own vehicle's insurer. After this initial recovery, costs would be shifted from the insurer of the private car to the insurer of the commercial vehicle. If the private automobile was uninsured for collision coverage, there would be no shifting of costs. Where two commercial vehicles were involved, there would be no secondary shifting of costs between their insurers.

Certain drivers are deemed to be performing an antisocial act simply by their presence on the road. The proposed system charges to these drivers the total

10. N.Y. Const. art. 1, § 16.

cost of accidents in which they are involved. This category includes drunken drivers, drugged drivers, drivers using a car in the commission of a felony, and drivers intentionally causing accidents.

Other supplementary insurance would be available, on an optional basis, and could include insurance for other than net economic loss—*i.e.*, disfigurement, dismemberment, collision insurance for damage to one's own car, increased limits of liability insurance for the remaining fault law situations, and payment for medical expense or income loss that was compensable from another source.

The proposed law is of limited territorial applicability. It applies to all accidents occurring in New York, but to no others. The plan applies equally to all vehicles driven in the state, regardless of where the vehicles are registered. An out-of-state vehicle owner would have to carry New York's compulsory first-party coverage if he wished to operate his vehicle in New York, just as he must now carry liability insurance. On the other hand, New York's no-fault accident program would not follow New York motorists out-of-state. New York vehicles driven outside the state would be under the accident law of the jurisdiction in which the accident occurred.

Conclusion

The program outlined above was the first comprehensive no-fault automobile victim compensation system to be proposed by any state chief executive.

Since the appointment of the Van Voorhis Committee in 1967, at a time when support for the no-fault concept was fragmentary at best, the increased public interest in and demand for no-fault legislation have culminated in the adoption of a number of proposals based in part on the no-fault principle. All of these laws, however, are modifications of true no-fault legislation, and in my view all fall short of the change required to afford the public a truly effective system for compensating automobile accident victims.

A basic change in the fault insurance system is a major public issue for the beginning of this decade. Public awareness of the inequities of the present system has advanced to the stage where few will dispute the need for change, the only controversy being the extent to which the present system should be overhauled.

As was the case in every major social advance in this century, proposals for fundamental change in automobile insurance have generated and will continue to generate the opposition and criticism of those who find it difficult to abandon the old concepts even when the tragic consequences have shown them to be outmoded and not responsive to the demands of modern society. Those engaged

in the public debate on the merits of the no-fault concept should maintain a degree of perspective in the context of the history of earlier and comparably far-reaching social advances. Those who opposed laws providing for workmen's compensation, for example, argued that:

To the extent that it absolves the workman from the consequences of contributory negligence and permits him to recover from his employer, even though the latter be blameless and the workman blameworthy, the tendency of this legislation is to increase accidents, to multiply injuries, to militate against the safety of the workman, and to jeopardize life and limb, by the very fact that a less degree of care is imposed upon him than has heretofore been required.¹¹

The sociology which underlies this legislation has carried us far within the boundaries of socialism. Not only does this legislation arbitrarily declare that the innocent employer shall compensate his guilty workman for the consequences of an accident, inevitable so far as the employer is concerned, but avoidable so far as the employee is concerned, but the legislature directs the amount of money which shall be taken out of the pockets of the employer and placed into those of the workman or his dependents, on the occurrence of such an accident.¹²

A new era is ushered in by this legislation, potent with mischief, destructive of all ideas of liberty and property heretofore prevailing in this country; an era when majorities, unless restrained by the mandate of the Constitution, and by the independence of the judiciary, will be apt to resort to measures which are nothing short of confiscation.¹³

Although my proposal for a no-fault insurance system has not yet been adopted and has generated widespread criticism from some groups, I feel that it is the duty of all public leaders to advocate and continue to advance progressive legislation with the assurance that the desire of the public for laws relevant to their needs will ultimately find expression in legislative enactment.

Accommodation to change is a keystone of our American legal system. Indeed, the courts have often recognized the needs of society by upholding progressive legislation to serve those needs, notwithstanding the doctrine of stare decisis.

Neither blind adherence to legal principles, which were never intended to apply in a modern context, nor excessive concern for the special interests of

11. Brief for Appellant at 31, *Ives v. South Buffalo R.R.*, 201 N.Y. 271, 94 N.E. 431 (1911).

12. *Id.* at 33.

13. *Id.* at 36.

certain groups should prevent society from abandoning an existing system which fails every test of human and social need, and replacing it with one that meets such tests.

As I had occasion to state earlier:

There is no justification for having the people of this State burdened with this painful and expensive anachronism any longer. There is a better way.

.

It is no half-way measure or palliative to still temporarily the voices of auto insurance reform.

.

In an age where the plea is for relevance in our daily lives, few institutions are less relevant to current realities than the present system for compensating automobile accident victims. The no-fault system for the protection of injured victims is both humane and practical.¹⁴

14. Special Message by Governor Rockefeller to the N.Y. Legislature, Mar. 1, 1971.