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National No-Fault Auto Insurance: The People Need It Now

Philip A. Hart*

A favorite opening line for any politician is "The time has come . . . ." He generally fills in the blank with a description of a program which he claims the public desperately needs and must not endure one more day without. The effect is to proclaim him—in not too subtle tones—as the saviour of mankind, for discovering this great human need and championing it. Knowing that I risk being put in this category, I still cannot resist making one of those proclamations: The time has come for a just system of motor-vehicle-accident law which would seriously reduce the costs of accidents and accident-avoidance.¹ The time has come for traffic-accident victims to be fairly, humanely, adequately and efficiently compensated and rehabilitated.

The time, indeed, has come—not that justice and mercy were not always needed when we sought to compensate auto accident victims—but because finally there is a growing awareness that motor vehicle accidents, their resulting injuries and deaths are a national public health problem of epidemic proportions.²

¹ The source for this general observation is G. GALABRESI, THE COSTS OF ACCIDENTS (1970).
And there is an awareness that we can treat this problem with safer engineering of cars and roads, increased use of seatbelts, and other restraint systems, improved emergency medical care, and improved driver performance and behavior—all of which would reduce the number and severity of accidents, and the amount of accident costs.3

To provide incentives for reducing accident costs and the burden they put on victims and their families, Senator Warren Magnuson (D-Wash.) and I have introduced a legislative program.

Three bills in this package seek to bring greater efficiency to the private auto insurance marketing system. First is the Group Motor Vehicle Insurance Act.4 Today, auto policies are sold mostly on a one-salesman, one-motorist basis. This is inefficient and costly for consumers. For example, of the $14.6 billion of written motor vehicle premiums in 1970, $1.8 billion was consumed by commissions and brokerage fees.5 In contrast, three-fourths of those carrying health insurance are covered under group programs. If auto insurance followed this three to one ratio, motorists could save an estimated one billion dollars a year.

But even more substantial savings in dollars—and more importantly in lives and injuries—could come from enactment of the Motor Vehicle Information and Cost Savings Act.6 Under this bill, the Secretary of Transportation would set property-loss-reduction standards requiring manufacturers to build cars more resistant to damage and less expensive to repair. Also, a study commission would go to work on finding the best methods of determining various automobiles’ susceptibility to damage, their repair costs and the degree of occupant protection—model by model.7 Armed with this type of information, consumers

7. S. REP. NO. 92-413, 92d Cong., 1st Sess. 15-19 (1971). This bill would also require the Secretary of Transportation to establish motor vehicle diagnostic demonstration projects. Through
could make more informed purchasing decisions—with the assumption they would choose the cars less likely to incur damage and high repair bills. In turn, manufacturers likely would compete to build cars which met these standards in order to get the sales. Eventually, insurance companies could rate cars by make and model according to the vulnerability of an occupant to death or injury, the susceptibility to damage and the probable repair costs.

In short, the bill seeks to put the marketplace itself to work in providing safer cars which are less expensive to keep in repair and less expensive to insure.

Perhaps the most ambitious of the three bills is the National No-Fault Motor Vehicle Insurance Act. This Act would write finis to the inefficient, insufficient and inhumane tort-liability insurance system which wastes consumer dollars, human lives and court time. The tort insurance system discourages companies from varying premium rates according to the damage-resistance, repairability and post-crash-injury-minimization qualities of the policyholder's car. Auto-bodily-injury and property damage liability insurance pay for damages to a stranger and the stranger's car. Under tort-liability insurance, companies "can never know . . . what car they would end up paying for—both as to injury to its occupants and as to damage to the car itself."

Worse than that, the present system reflects several basic and conflicting expectations—few of which are met. First, tort law is expected to shift accident loss from the victim only if a wrongdoer can be found, and then only if the victim was without fault. By making the wrongdoer "pay for his damages," tort law is expected to deter careless or dangerous driving behavior. Second, liability insurance is expected to protect the wrongdoer by defending him and also to pay for the losses he caused. A common fund is created by the premium diagnostic inspection, it is anticipated that the driving public could further reduce maintenance costs and vehicle repair charges. Once the demonstration projects have been established, there will be a data base upon which a sound national policy can be developed for safety and emission inspection of automobiles.

8. S.945, 92d Cong., 1st Sess. (1971). References in this article are to the latest published version of this bill in the Senate—Committee Print No. 1 of S.945 reprinted in 118 CONG. REC. S550 (daily ed. Jan. 26, 1972) with accompanying staff analysis. [Editor's note] After this article went to press, the Senate Commerce Committee published Committee Prints Nos. 2 and 3 of S.945.

9. FOR WHOSE BENEFIT 120; see also MOTOR VEHICLE CRASH LOSSES 99-100.

10. FOR WHOSE BENEFIT 13-14; Bombaugh, The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform, 71 COLUM. L. REV. 207, 210 (1971) [hereinafter cited as Bombaugh, DOT Study]; MOTOR VEHICLE CRASH LOSSES 29-30.


12. FOR WHOSE BENEFIT 120. See sources cited note 11 supra.
dollars of liability-insurance buyers, mainly through the compulsion and inducement of state financial-responsibility laws. The combination—tort and insurance—gives rise to the third expectation—full compensation for innocent victims of auto accidents.\(^\text{13}\)

That this present system cannot in theory, and has not in practice, lived up to these conflicting expectations has been well-documented and analyzed over the past half-century.\(^\text{14}\) As Professor H. Laurence Ross commented in 1969:

> [W]e ought to be impressed by the fact that the problems [of inadequately and uncompensated victims] first noted so long ago . . . have recurred again and again at different times and in different places. There have been no disconfirmations of the major findings! If our knowledge of all social problems were in a state similar to our knowledge of the traffic victim, we would be a fortunate and enlightened people.\(^\text{15}\)

That statement was made before the landmark two and one-half year auto insurance and compensation study by the Department of Transportation (DOT) under a joint resolution of Congress was completed.\(^\text{16}\) The wealth of new information in this twenty-four volume study provides an incisive analysis of the human, social, economic and institutional dimensions and workings of the present system. To the data contained in the DOT study, one must add the evidence which fills more than 11,000 pages of twenty-four volumes of Congressional hearings.\(^\text{17}\) This mountain of documentation amply supports Secretary of Transportation John A. Volpe’s conclusion: “the present system needs

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change badly and needs it now." The "now" was March, 1971. Secretary Volpe summarized his findings about the tort-liability system in these words:

In summary, the existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. Both on the record of its performance and on the logic of its operation, it does little if anything to minimize crash losses.19

To the thousands of motorists who have written to their Senators and Congressmen about auto insurance and claims problems, these findings are neither startling nor new. For instance, a motorist from Louisiana wrote:

We who have to drive, who cannot do without cars, are burdened with outrageous insurance bills, plus capricious cancellations of our insurance for no cause, plus the prospect of having to pay huge lawyer's fees if we are involved in any accident, either to recover our own damages or to attempt to get them from the others involved. This business of suing, of having to prove "blame", of crowding already over-crowded court calendars, digging up witnesses, losing time from work, paying out enormous lawyer's fees, has simply reached the point of intolerable burdensomeness. We are begging Congress for relief—we the common people of America.20

The "common people of America," the typical citizen and his family, fare the worst under the present system—both as auto-insurance buyers and as auto-accident victims. For example, poor and moderate-income families, particularly those with teenage drivers, who live in large metropolitan areas, pay the most for auto liability insurance and receive the least.21 In serious and fatal injury


19. MOTOR VEHICLE CRASH LOSSES 100.

20. Letter to the author, June 14, 1971, on file with the Senate Antitrust and Monopoly Subcommittee.

21. The "pay the most" assertion is demonstrated in Table 1, below. "Receive the least" is shown in Table 2. Note also Table 17, note 85, infra, and U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS, vol. II, at 108-19 (1970) [hereinafter cited as PERSONAL INJURY CLAIMS II]. These statistics indicate that residents of urban areas (where most of the poor and moderate income families live) do in fact "receive the least" in payments under tort insurance.
### Table 1

COMPARISON OF PRIVATE PASSENGER AUTO LIABILITY INSURANCE RATES FOR FAMILY WITH TEENAGE OPERATOR LIVING IN TEN SELECTED CITY AREAS WITH ESTIMATED NATIONAL AVERAGE RATE FOR SIMILAR INSURANCE

<table>
<thead>
<tr>
<th>Family with Teenage Operator</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brooklyn, N.Y.</td>
<td>$630</td>
</tr>
<tr>
<td>Chicago (Central)</td>
<td>386</td>
</tr>
<tr>
<td>Cleveland</td>
<td>348</td>
</tr>
<tr>
<td>Detroit</td>
<td>334</td>
</tr>
<tr>
<td>Hartford</td>
<td>382</td>
</tr>
<tr>
<td>Los Angeles (Central)</td>
<td>405</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>467</td>
</tr>
<tr>
<td>Phoenix</td>
<td>311</td>
</tr>
<tr>
<td>Queens, N.Y.</td>
<td>509</td>
</tr>
<tr>
<td>St. Louis</td>
<td>338</td>
</tr>
</tbody>
</table>

National Average Rate*  $73

Note: The above Family rates are for bodily injury $5,000 property damage, compulsory, and financial responsibility limits, and $500 medical payments in effect January 1, 1971. They are based on Class 7A of the Mutual Insurance Rating Bureau 22 Class Plan and the Insurance Services Office 19 Class Plan.

* This was derived by deducting (a) excess limits premiums estimated to be $2.3 billion (approx. 35% of total bodily injury premiums of $6.6 billion) and (b) commercial motor vehicle premiums estimated to be $2 billion, from total bodily injury and property damage liability insurance premiums of $9.5 billion in 1970, and dividing the difference of $5.2 billion by an estimated 72 million insured private passenger cars in 1970.

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Family rates were derived from information submitted to the Subcommittee by the Mutual Insurance Rating Bureau in January, 1971.
cases, families with incomes under $10,000 (64 percent of the families in this country in 1969) recovered from all sources only 45 percent of their medical, wage and property damage losses, while families with incomes over $10,000 received from all sources 61 percent of their losses. The alternative, ready and available, is "no-fault" auto insurance.

TABLE 2

PERCENT OF NET REPARATIONS RECEIVED FROM ALL SOURCES TO LOSS BY FAMILY INCOME

(Dollars in Billions)

<table>
<thead>
<tr>
<th>Family Income</th>
<th>Loss*</th>
<th>Net Reparations**</th>
<th>Reparations to Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $5,000</td>
<td>$1.9</td>
<td>$0.7</td>
<td>38%</td>
</tr>
<tr>
<td>5,000 - 9,999</td>
<td>2.1</td>
<td>1.1</td>
<td>52</td>
</tr>
<tr>
<td>10,000 - and Over</td>
<td>0.8</td>
<td>0.5</td>
<td>61</td>
</tr>
<tr>
<td>Unknown income</td>
<td>0.2</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>$5.1</td>
<td>$2.4</td>
<td>49%</td>
</tr>
</tbody>
</table>

* "Loss" means "personal and family loss" of seriously injured and fatality victims, i.e., medical and wage loss and property damage; future earnings of fatality victims with dependent survivors.

** After legal costs. Means benefits from families' medical, life, auto medical payments, collision and other insurance, fault-insurance ("net tort"), sick leave, workmen's compensation, social security disability, and other sources.

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from ECONOMIC CONSEQUENCES 1. Table 45FS1 at 337.

22. This figure is derived from the following table:

TABLE 3

MOTOR VEHICLE OWNERSHIP BY FAMILY INCOME IN EARLY 1969

(Number of Families)

<table>
<thead>
<tr>
<th>Income level</th>
<th>No vehicles</th>
<th>1 vehicle</th>
<th>2 or more vehicles</th>
<th>All families</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $5,000</td>
<td>8,855,460</td>
<td>8,277,930</td>
<td>2,117,610</td>
<td>19,251,000</td>
</tr>
<tr>
<td>$5,000 to $7,499</td>
<td>1,291,680</td>
<td>5,564,160</td>
<td>3,080,160</td>
<td>9,936,000</td>
</tr>
<tr>
<td>$7,500 to $9,999</td>
<td>633,420</td>
<td>5,278,500</td>
<td>4,645,080</td>
<td>10,557,000</td>
</tr>
<tr>
<td>$10,000 to $14,999</td>
<td>571,320</td>
<td>5,141,880</td>
<td>8,569,800</td>
<td>14,283,000</td>
</tr>
<tr>
<td>$15,000 or more</td>
<td>242,190</td>
<td>2,179,710</td>
<td>5,651,100</td>
<td>8,073,000</td>
</tr>
<tr>
<td>Total</td>
<td>11,594,070</td>
<td>26,442,180</td>
<td>24,063,750</td>
<td>62,100,000</td>
</tr>
</tbody>
</table>

Source: U.S. Senate Antitrust and Monopoly Subcommittee; derived from 1969 SURVEY OF CONSUMER FINANCES at 8, 67, and 72.

23. See TABLE 2, supra note 21.
"No-fault" comes in many forms, sizes and shapes. To add to the confusion the name has even been attached to plans that don't deserve the title. The proposal which Senator Warren G. Magnuson and I introduced and which has been progressively refined after extensive hearings, investigations and analyses is Committee Print No. 1 of S. 945. It is a simple, yet comprehensive bill. Basically, the "National No-Fault Motor Vehicle Insurance Act" would establish a compulsory nationwide system of speedy, complete and efficient compensation of all the economic losses of all drivers, passengers and pedestrians killed, maimed or injured by automobiles. This no-fault, no-lawsuit plan would provide these benefits to be paid by the policyholder's own insurance company:

(a) all costs of medical, hospital, surgical, and nursing services appropriately and necessarily incurred; (Sec. 2(13)(A));

(b) all rehabilitation expenses, such as psychiatric, physical and occupational rehabilitation, appropriately and necessarily incurred (Sec. 2(13)(B));

(c) all lost after-income-tax earnings for the period during which the victim is unable to work as a result of the auto injury, including lost earnings anticipated or those that could be reasonably expected—up to $1,000 a month (Sec. 2(13)(C) and (D));

(d) all appropriately and necessarily incurred expenses for services the victim would have performed for self or family, but for the accident and injury (Sec. 2(13)(E)(i));

(e) all funeral expenses appropriately and necessarily incurred (Sec. 2(13)(E)(ii));

(f) all attorney's fees and court costs incurred in actually collecting benefits (Sec. 2(13)(E)(iii));

(g) an amount equal to the damage or loss to property incurred plus the rental cost of a substitute vehicle pending repairs (less optional deductibles) (Sec. 2(16)(B)).

Committee Print No. 1 is consumer legislation, designed to protect the tens of millions who buy automobile insurance each year as well as to compensate the millions injured. The insurance buyer would be protected in several ways:

(a) no longer need he fear being sued for damages—there is total freedom from tort lawsuits, unless the owner, operator or user was engaged in criminal conduct (Sec. 3);

(b) no longer need he fear cancellation or non-renewal of his insurance if he files a claim, is found liable in a lawsuit or belongs to a minority group— insurers can refuse to insure only if the applicant lacks or loses a valid driver’s license or fails to pay the premium (Sec. 5(g));

(c) no longer need he wait months or years after an accident to receive benefits—amounts unpaid 30 days after the insurer receives reasonable proof of loss bear interest at the rate of two percent a month (24 percent a year) on the unpaid balance (Sec. 5(c)(1));

(d) no longer need he buy both “collision” and “property damage liability” insurance policies—the two forms of overlapping coverage are merged on a “no-fault” basis (which the motorist can buy or not as he chooses) (Sec. 5(c)(1));

(e) no longer would he be the “victim” of the complexities of insurance-policy language in trying to choose between competing insurers—the bill requires the gathering and publication of complete price and claim-payment information in much the same manner that truth-in-lending legislation requires information on the true cost of credit (Sec. 6).

In addition, this bill provides that:

(a) insurance companies would not be allowed to shift losses among themselves—“subrogation,” either by lawsuit or arbitration would be disallowed;

(b) the automobile-accident victim, if he does not have automobile insurance (i.e. a pedestrian), shall recover non-pecuniary “general damages,” for example, for pain and suffering, and for inconvenience, from the company which insures the driver who struck him (Sec. 5(b)(1)); in other cases the victim may recover such non-pecuniary losses if he buys an optional “pain and suffering” rider on his automobile insurance policy25 (Sec. 5(c)(2)(B));

25. For a description of the elements which together constitute “general damages,” see FAULT OR NO-FAULT 32 (Nat’l Conference on Automobile Ins., 1970). The following elements could be said to be “non-pecuniary”:
   —inconvenience and discomfort
   —fright or shock
(c) the injured policyholder would receive benefits from any public health insurance and from any private insurance, before looking to his automobile policy (Sec. 2(15)), and the insurance company must offer premium reductions reflecting these benefits (Sec. 5(e));

(d) no part of any no-fault personal injury benefit payments may be applied as attorney’s fees—if the victim must go to court to collect, the insurance company must pay reasonable attorney’s fees to the lawyer in addition to the benefits and interest (Sec. 8(a)).

**Injustice and the Tort System**

Many trial lawyers vehemently defend the present system on the ground that it compensates the “innocent” and punishes the “guilty.” In fact, it seems it was the trial lawyers who popularized the phrase “no-fault” to describe first-party automobile accident compensation insurance by using the term widely and constantly as a pejorative. “No-fault” was “immoral” because it deviated from the “Judeo-Christian” concept of individual responsibility and treated the

- humiliation, indignity or insult
- physical pain and suffering
- mental anguish
- loss of enjoyment of life
- loss of consortium (society or companionship)
- worry about the future consequences of an injury.

The following elements might be considered “pecuniary”:

- loss of earning capacity
- temporary and permanent disability
- aggravation of a pre-existing physical condition or disease
- impairment of physical ability
- impairment of mental ability
- disfigurement
- dismemberment
- loss of bodily function

These “pecuniary” elements would be covered under the no-fault benefits of S. 945, Committee Print No. 1, and optional coverages. (See Secs. 5(a) § (c)(2)(A)).

In the DOT study lost future earnings were estimated in two ways. One estimate was based on the concept of societal loss. This estimate includes the discounted value of future lost earnings of all fatalities and seriously injured persons and does not adjust downward the future earnings of fatalities because of savings in maintenance cost. [i.e., if the individual had been permanently disabled there would have been costs for maintaining him]. Homemakers were imputed on earnings equivalent of $4,000 per year. Future losses, estimated in this manner, are referred to as “societal” losses. The other concept of future lost earnings is referred to as “personal and family loss.” It was computed by excluding from societal losses:

1. Future lost earnings, due to fatality, of all members of the household except heads of households and their spouses,
2. Future lost earnings of all fatalities who had no surviving members of the family,
3. Maintenance costs [discounted cost of $2,000 per year was used] of all persons killed in accidents.
“innocent” and “guilty” alike. In due course the pejorative connotation disappeared, as the benefits and advantages became more and more evident, but the label “no-fault” stuck, and the tort-liability insurance system was called the “fault” system.

Under the theory of tort law there can be a shifting of losses from the “defendant” driver to the “plaintiff” driver only if the defendant was negligent and the plaintiff was free from negligence. If both parties were negligent, there should be no recovery; if neither party was negligent, there should be no recovery; if the plaintiff was free from negligence but incurred no loss there should be no recovery. Application of the theory to the world of automobile accidents in fact shows that no more than one-third to one-half of automobile-accident victims are entitled to compensation under the tort system. One DOT study of seriously injured accident victims (the cases which the insurers contest the most) found just that—only 45 percent of the seriously injured victims recovered from the tort system.


<table>
<thead>
<tr>
<th>Table 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traffic Violation Status of Driver Insured Vehicle</td>
</tr>
<tr>
<td>Possible Criminal Type Conduct:</td>
</tr>
<tr>
<td>Drunk driving</td>
</tr>
<tr>
<td>Reckless driving</td>
</tr>
<tr>
<td>Speed</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Violations Not Involving Possible Criminal Type Conduct</td>
</tr>
<tr>
<td>No Violations Reported</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

See also H. Ross, supra note 13, at 22; Letter to the Editor from Prof. J. O’Connell, New York Times, Jan. 4, 1972.

26. The use of the word “guilty” implies criminal type driving conduct. A DOT study (HIGHWAY CRASHES) found that 93 percent of those drivers causing injury to “innocent” accident victims were not cited for possible criminal type driving behavior (drunk or reckless driving, or even speeding). See the following table:

27. ECONOMIC CONSEQUENCES I at 23. MOTOR VEHICLE CRASH LOSSES 35, 94; see Pinnick v. Cleary, 271 N.E.2d 592 (1971). This case was commented on in 117 CONG. REC. 10,939, 92d Cong., 1st Sess. (1971) where it was observed:
Fundamental fairness suggests that each of these "innocent" plaintiffs should fare equally well under the present system. Nevertheless, some categories of seriously injured persons do considerably better than others.

Of the 494,000 seriously and fatally injured accident victims with known loss, 214,000 received some payment, and 280,000 received nothing from tort-

Justice Reardon... dwelt on one advantage of no-fault which has not received the attention it deserves. He wrote:

No one who has for any time been in charge of a trial court system (as was the author of this option [sic] for a number of years) can be unfamiliar with the devastating effect upon the administration of justice which the automobile has produced. For years, in the face of countless experiments the trial calendars of this country, particularly in metropolitan areas, have become increasingly clogged with motor vehicle tort litigation. No one as yet, notwithstanding heroic efforts in this regard, has found a satisfactory method of disentangling this morass.

The problems of society to which the courts have been called no longer permit the luxury of using them as a forum for resolving the ever increasing numbers of automobile accident claims to the extent that has obtained hitherto.

Other non-American court systems, heirs with ourselves of the common law, have managed to solve this problem of the super-abundance of motor vehicle tort claims in one way or another. It remains, however, a cancer to be rooted out in American Courts. [271 N.E.2d 602-04.]

Mr. President, to demonstrate just how pervasive this cancer is, I call attention to a chart [see TABLE 5, below] which I ask unanimous consent to have printed at the conclusion of my remarks. This shows that, as of December 31, 1970, the 10 leading auto insurers alone were defending 359,540 personal injury liability cases filed during the preceding 8 or more years. Most of these cases, of course, involved seriously injured auto accident victims seeking compensation. Yet, 57 percent of the cases filed 3 or more years ago; 40 percent filed 4 or more years ago; and 13 percent were filed 6 or more years ago. Since cases are usually filed sometime after the accident occurred—and State statutes of limitations vary from 1 to 6 years—this data actually understates the period these accident victims must wait for any possible compensation. Prompt compensation and any needed rehabilitation for these victims are indeed dim prospects. It is inhumane to perpetuate a reparations system which permits this.

**TABLE 5**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>State Farm</td>
<td>300</td>
<td>363</td>
<td>819</td>
<td>1,915</td>
<td>3,328</td>
<td>6,911</td>
<td>9,788</td>
<td>16,679</td>
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<tr>
<td>Allstate</td>
<td>2,326</td>
<td>1,744</td>
<td>2,970</td>
<td>5,487</td>
<td>9,782</td>
<td>16,702</td>
<td>14,454</td>
<td>31,815</td>
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<tr>
<td>Aeina Casualty</td>
<td>417</td>
<td>345</td>
<td>918</td>
<td>1,790</td>
<td>3,024</td>
<td>4,616</td>
<td>3,257</td>
<td>7,687</td>
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<tr>
<td>Travelers</td>
<td>903</td>
<td>759</td>
<td>1,428</td>
<td>2,512</td>
<td>5,015</td>
<td>8,219</td>
<td>8,137</td>
<td>11,313</td>
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<tr>
<td>Nationwide</td>
<td>1,026</td>
<td>833</td>
<td>1,288</td>
<td>1,555</td>
<td>2,634</td>
<td>4,313</td>
<td>5,518</td>
<td>6,731</td>
</tr>
<tr>
<td>Liberty Mutual</td>
<td>523</td>
<td>407</td>
<td>750</td>
<td>1,225</td>
<td>2,640</td>
<td>4,942</td>
<td>4,546</td>
<td>6,371</td>
</tr>
<tr>
<td>Hartford Accident</td>
<td>878</td>
<td>600</td>
<td>1,204</td>
<td>1,941</td>
<td>3,307</td>
<td>5,276</td>
<td>4,239</td>
<td>7,159</td>
</tr>
<tr>
<td>Government Employees</td>
<td>140</td>
<td>195</td>
<td>392</td>
<td>911</td>
<td>2,060</td>
<td>4,206</td>
<td>3,477</td>
<td>7,323</td>
</tr>
<tr>
<td>INA</td>
<td>588</td>
<td>535</td>
<td>1,079</td>
<td>1,598</td>
<td>2,577</td>
<td>3,611</td>
<td>2,729</td>
<td>3,987</td>
</tr>
<tr>
<td>Lumbermens Mutual</td>
<td>424</td>
<td>472</td>
<td>750</td>
<td>1,315</td>
<td>2,608</td>
<td>3,791</td>
<td>3,823</td>
<td>5,740</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7,525</strong></td>
<td><strong>6,253</strong></td>
<td><strong>11,599</strong></td>
<td><strong>20,359</strong></td>
<td><strong>36,975</strong></td>
<td><strong>62,477</strong></td>
<td><strong>59,968</strong></td>
<td><strong>106,805</strong></td>
</tr>
</tbody>
</table>

Note: These 10 companies wrote approximately 40 percent of the personal injury liability premiums in 1970.

Source: 1970 annual statements, schedule P, pt. 1, filed with State insurance departments.
insurance. The 214,000 victims were able to show that another driver was "at fault," and that they were free from fault. All of these victims receiving payment were "paid" claimants, "an implicit concession that they passed the liability threshold." These victims were "innocent" within the meaning of the present tort-insurance system. Yet, 52,000 victims with losses of $2,500 or more recovered less than one-half of that loss. In all, 53 percent of these 214,000 "innocent" victims recovered something less than their tangible loss and absolutely nothing for their intangible loss, such as "pain and suffering."

According to one DOT study, pedestrians seriously injured in an automobile accident recovered 93 percent of their total economic loss from all sources, whereas passengers in a car, truck or commercial vehicle recovered only 36 percent, and the drivers of cars, trucks or taxis recovered only 58 percent of their total economic loss.

Most important, tort insurance may force the law-enforcement and the judicial systems to spend precious police-investigative time, judges' time, and court time to find that the defendant was at "fault" in a particular accident. But this

28. See the following table:

**Table 6**

DISTRIBUTION OF NUMBER OF PERSONS KILLED AND SERIOUSLY INJURED BY RATIO OF NET TORT SETTLEMENT TO TOTAL ECONOMIC LOSS BY AMOUNT OF TOTAL ECONOMIC LOSS (1967)

<table>
<thead>
<tr>
<th>Ratio of settlement to total economic loss</th>
<th>$1 to $999</th>
<th>$1,000 to $2,499</th>
<th>$2,000 to $9,999</th>
<th>$10,000 or more</th>
<th>All persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under .50</td>
<td>7,526</td>
<td>26,555</td>
<td>26,068</td>
<td>60,149</td>
<td></td>
</tr>
<tr>
<td>.50 to .99</td>
<td>4,441</td>
<td>22,397</td>
<td>22,380</td>
<td>4,625</td>
<td>53,843</td>
</tr>
<tr>
<td>1.00 to 1.99</td>
<td>16,445</td>
<td>26,569</td>
<td>19,270</td>
<td>1,562</td>
<td>63,846</td>
</tr>
<tr>
<td>2.00 to 3.99</td>
<td>10,132</td>
<td>13,701</td>
<td>3,349</td>
<td>246</td>
<td>27,428</td>
</tr>
<tr>
<td>4.99 or over</td>
<td>6,300</td>
<td>1,307</td>
<td>1,242</td>
<td>8,849</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>37,318</td>
<td>71,500</td>
<td>72,796</td>
<td>32,501</td>
<td>214,115</td>
</tr>
<tr>
<td>None</td>
<td>42,352</td>
<td>91,795</td>
<td>103,125</td>
<td>42,743</td>
<td>280,015</td>
</tr>
<tr>
<td>Settlement unknown</td>
<td>18,968</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total in study</td>
<td>513,098</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from ECONOMIC CONSEQUENCES I, Table 25FSI at 238.

29. PERSONAL INJURY CLAIMS I at 66.
30. TABLE 6, supra note 28.
31. Id. See also MOTOR VEHICLE CRASH LOSSES 37.
32. ECONOMIC CONSEQUENCES I, Tables 3.27, at 55; Table 49S at 344-45, and Table 49FSI, at 346-47.
finding has no real meaning. The damages are paid by an insurance company, and no sanctions whatever in the form of loss of license or prison sentence are imposed on the person found at "fault." What kind of a "fault" system is this?

Malapportionment, Insufficiency, Delay, and Inefficiency

Let us return to our examination of the actual workings of the present system. The DOT study has confirmed an assumption that has commonly been made for a number of years: "small claims tend to be settled sooner, and perhaps with less controversy, than larger claims." In one survey:

half of the claims were settled in less than six months after the accident. Half of the loss dollars involved in all claims had not been settled until more than a year had elapsed, and the same is true for total payments on these claims.

This finding evidences, once again, the present system's misguided priorities with respect to human needs—the least seriously injured not only get relatively more benefits per loss dollar than the more seriously and fatally injured, but they get them much faster.

33. Motor Vehicle Crash Losses 42; see also Bombaugh, DOT Study, supra note 10, at 219.
34. Motor Vehicle Crash Losses 42.
35. See the following table:

<table>
<thead>
<tr>
<th>Nature of Victims' Injury</th>
<th>Number of Victims</th>
<th>Injured</th>
<th>Recovering from Tort</th>
<th>Average Recovery to Average Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Injured</td>
<td>Recovering from Tort</td>
<td>Average Loss</td>
</tr>
<tr>
<td>Fatal</td>
<td>59,173</td>
<td>19,703</td>
<td>$39,325c $5,497</td>
<td>14%</td>
</tr>
<tr>
<td>Very Seriousd</td>
<td>31,139</td>
<td>13,181</td>
<td>71,371 8,767</td>
<td>12</td>
</tr>
<tr>
<td>Seriouse</td>
<td>423,027</td>
<td>181,231</td>
<td>3,648 2,263</td>
<td>62</td>
</tr>
<tr>
<td>Less-Seriousf</td>
<td>3,750,000</td>
<td>1,050,220</td>
<td>224 916 309</td>
<td></td>
</tr>
</tbody>
</table>

a. "Personal and family loss," i.e., medical and wage loss, and future earnings loss of fatality victims with dependent survivors. See Economic Consequences I at 23. Property loss has been excluded from all data in this table.
b. After legal fees and expenses.
c. Includes some $920 million of young adult future lost earnings.
d. Victims with $25,000 or more of "personal and family loss."
Further evidence of the system's malapportionment of benefits between those with small dollar loss and the more seriously injured with large dollar loss is found in the DOT "Economic Consequences" study. This study:

e. "Serious injury," as defined in ECONOMIC CONSEQUENCES I at 17 is an injury which resulted in: "Medical costs (excluding hospital) of $500 or more, or two weeks or more of hospitalization, or, if working, three weeks or more of missed work, or, if not working, six weeks or more of missed normal activity."

f. Estimated by dividing net tort recovery of $1,062 million by 1967 bodily injury average paid claims cost of $916, after deducting average loss adjustment expenses of $200 [Best's Aggregates and Averages, 131,203 (1968) and average plaintiffs' attorneys fees of $316 (27.3% of $1,232—see PERSONAL INJURY CLAIMS I at 73) from $1,423 [gross bodily injury average paid claims cost as reported in Insurance Facts—1971 at 52].

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from data in MOTOR VEHICLE CRASH LOSSES 2, 5, 6 (Table 2) and 11; ECONOMIC CONSEQUENCES I, Table 7S at 83, Table 7F at 87, Table 7SF at 89, Table 15S at 149, Table 15F at 151, and Table 15FS at 155.

36. See the following tables:

**Table 8**

<table>
<thead>
<tr>
<th>Category of Loss</th>
<th>Number of Victims</th>
<th>Average Loss</th>
<th>Average Recovery</th>
<th>Pay/Loss Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Tort after Legal Costs</td>
<td>Other Sources</td>
</tr>
<tr>
<td>$1 to $9,999</td>
<td>166,349</td>
<td>$2,718</td>
<td>$2,365</td>
<td>$2,275</td>
</tr>
<tr>
<td>$10,000 and over</td>
<td>28,063</td>
<td>$45,056</td>
<td>$8,779</td>
<td>$4,404</td>
</tr>
</tbody>
</table>

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from ECONOMIC CONSEQUENCES I, Table 27S at 248-49.

**Table 9**

<table>
<thead>
<tr>
<th>Amount of Loss</th>
<th>Persons Injured</th>
<th>Average Loss</th>
<th>Average Benefits after Legal Costs</th>
<th>Ratio-Benefits To Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1 to $999</td>
<td>37,318</td>
<td>$634</td>
<td>$1,408</td>
<td>2.22</td>
</tr>
<tr>
<td>1,000 to 2,499</td>
<td>71,500</td>
<td>1,678</td>
<td>2,399</td>
<td>1.43</td>
</tr>
<tr>
<td>2,500 to 9,999</td>
<td>72,796</td>
<td>4,624</td>
<td>4,052</td>
<td>0.88</td>
</tr>
<tr>
<td>10,000 or more</td>
<td>32,501</td>
<td>52,659</td>
<td>9,048</td>
<td>0.17</td>
</tr>
</tbody>
</table>

* "Personal and family loss", i.e., medical and wage loss and property damage; future earnings of fatality victims with dependent survivors.
** Includes fatality victims.

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from ECONOMIC CONSEQUENCES I, Table 27FS at 250.
is without question the most comprehensive and carefully conducted study of the plight of people injured by motor vehicles ever produced and no solution to the myriad problems of the compensation system is possible without a thorough understanding of its implications.\textsuperscript{37}

“Economic Consequences” shows that auto accident victims who are killed, or who endure very serious injuries suffer the greatest amount of uncompensated lost future earnings.\textsuperscript{38} The very seriously injured, not only fare poorly with respect to recovering their future earnings loss, but also with respect to recovering their out-of-pocket medical expenses. For example, seriously injured victims with medical expenses of $5,000 or more recovered 55 percent of those expenses from all sources.\textsuperscript{39} Yet, those victims with medical losses under $5,000 recovered 90 percent of their losses.\textsuperscript{40}

Seriously injured accident victims 25 years of age or older, who had no formal education or completed 12 years or less of schooling recovered only 38 percent of their losses from all sources, while those who received some college education recovered from all recovery sources 73 percent of their losses.\textsuperscript{41}

The youthful driver pays high auto liability insurance rates, but when injured or killed in an auto accident he recovers low benefits from the system. For example, a 20-year-old with a clean driving record who lives in a large city will pay from three to nine times the national average rate for private passenger auto

\textsuperscript{37} ECONOMIC CONSEQUENCES I, at iii. The study focuses “on economic losses (on a per individual or per family basis) due to serious injury or death from motor vehicle accidents and reparations for such losses from various sources.” Id. at 17. “Serious injury” is defined in the study to be an injury which resulted in:

- Medical costs (excluding hospital) of $500 or more, or two weeks or more of hospitalization,
- or, if working, three weeks or more of lost work, or, if not working six weeks or more of missed normal activity.

Id.

The total “economic losses” attributed to an individual in the study consisted of two types of economic losses. One type is referred to as ‘losses to date’ and consists of actual expenses or losses incurred during or attributable to the period of time between the date of the accident and the date of the interview. Included in this type of loss are actual hospital costs, other medical costs, property damage and accumulated wage loss for the period.

Id. at 19. The other type of economic loss is expected medical, earnings and other future losses. Future losses were discounted to present values using an interest rate of six percent and in inflation factor of three percent. (Id. at 23).

\textsuperscript{38} Compare “$25,000 or more” loss category in ECONOMIC CONSEQUENCES I, at 86, 88, 90 with that cited at 148-50, 151-53, 154-56. See also PERSONAL INJURY CLAIMS I, at 28, 32 and Tables IV-6, IV-7, at 33.

\textsuperscript{39} ECONOMIC CONSEQUENCES I at 281.

\textsuperscript{40} Id.

\textsuperscript{41} ECONOMIC CONSEQUENCES I, Table 46S, at 338.
liability insurance. Yet, if the data that was uncovered in the DOT study of compensation for accident victims in the Washington, D.C. metropolitan area holds true nationwide, the odds are only about one in two that this 20-year-old would collect anything from tort insurance if he were injured or killed in an accident. The District of Columbia study showed that the families of 99 of 202 fatalities received nothing from tort insurance—as did more than 9,000 of 21,000 injury victims. In that study, 78 percent of the medical, wage, property and future earnings loss for fatality victims was uncompensated—with tort insurance compensating for only 6.8 percent.

Persons who had been "working" at the time they were injured in the auto crash accounted for two-thirds of all seriously and fatally injured claimants, and incurred two-thirds of the total medical expenses and almost seven-eighths of the total current and future wage loss. The "working" individual and his family, although they contribute the most to the private and public common insurance pools—including auto liability insurance—receive little in return. The average loss for the "working" auto fatality claimant was $40,400 (93 percent of this figure is attributable to future wage loss); the average settlement his family received from all recovery sources, including tort insurance, was a meager $2,080—five percent of the loss. The "working" individual who was injured sustained an average loss of $11,500; he received from all recovery sources—including tort—an average settlement of $4,380—38 percent of his

42. Derived from information submitted to the Senate Antitrust and Monopoly Subcommittee by the Mutual Insurance Rating Bureau in January, 1971. See TABLE 1, supra note 21, for "National Average Rate." The bodily injury and property damage financial responsibility rates including medical payments for a 20-year-old are, for example: $579 in Los Angeles; $542 in Chicago; $676 in Philadelphia; $486 in Cleveland; $459 in D.C.; $699 in Newark; $224 in Atlanta; $471 in Brooklyn; $437 in Queens; $465 in Detroit; and $605 in San Francisco.


44. Id.

45. Id.

46. ECONOMIC CONSEQUENCES I, Table 53FS1, at 356.

47. See the following table:
### Table 10
AVERAGE RECOVERY UNDER PRESENT SYSTEM TO AVERAGE LOSSES, AND BREAKDOWN OF LOSSES OF FATALLY INJURED WHO WERE "WORKING," "KEEPING HOUSE" OR "GOING TO SCHOOL"

<table>
<thead>
<tr>
<th>Occupational Status</th>
<th>Number of Claims</th>
<th>Average Losses</th>
<th>Average Recovery from All Sources</th>
<th>Pay/Loss Ratio</th>
<th>Medical</th>
<th>Wage</th>
<th>Property Damage</th>
<th>Personal or Family</th>
<th>Societal¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working</td>
<td>26,409</td>
<td>$40,960</td>
<td>$2,080</td>
<td>5%</td>
<td>$9</td>
<td>—</td>
<td>$63</td>
<td>$995</td>
<td>$2,271</td>
</tr>
<tr>
<td>Keeping House</td>
<td>6,381</td>
<td>3,133</td>
<td>377</td>
<td>12%</td>
<td>4</td>
<td>—</td>
<td>16</td>
<td>—</td>
<td>190</td>
</tr>
<tr>
<td>Going to School</td>
<td>8,746</td>
<td>1,954</td>
<td>133</td>
<td>7%</td>
<td>4</td>
<td>—</td>
<td>13</td>
<td>—</td>
<td>920</td>
</tr>
</tbody>
</table>

¹ “Societal” includes the estimated lost future earnings of all fatal victims, including those without dependent survivors. See ECONOMIC CONSEQUENCES I at 23.

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from ECONOMIC CONSEQUENCES I. Table 53FS at 354, Table 53S at 355, Table 53FS at 356, Table 54FS at 357, and Table 54S at 358.
loss. And the more serious his injuries are, the greater the financial burden he and his family must carry alone without the support of funds from private and public insurance sources—the money which is needed for decent medical, and rehabilitative care, and to support his family while he is incapacitated. But the terrible irony of the present system is that those least seriously injured receive a disproportionate share from tort-insurance in relation to their medical and wage loss. The corollary of these two observations is that as the magnitude of the victim's injuries, his need for care, and his resulting loss increase, the victim

48. See the following table:
### Table 11

**Average Recovery Under Present System to Average Losses, and Breakdown of Losses of Seriously Injured Who Were “Working,” “Keeping House” or “Going to School”**

<table>
<thead>
<tr>
<th>Occupational Status</th>
<th>Number of Claims</th>
<th>Average Losses</th>
<th>Average Recovery from All Sources</th>
<th>Pay/Loss Ratio</th>
<th>Medical</th>
<th>Wage</th>
<th>Property Damage</th>
<th>Future Earnings Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working</td>
<td>274,280</td>
<td>$11,500</td>
<td>$4,380</td>
<td>38%</td>
<td>$498</td>
<td>$840</td>
<td>$210</td>
<td>$1,601</td>
</tr>
<tr>
<td>Keeping House</td>
<td>42,688</td>
<td>4,550</td>
<td>3,232</td>
<td>71%</td>
<td>69</td>
<td>--</td>
<td>44</td>
<td>86</td>
</tr>
<tr>
<td>Going to School</td>
<td>41,658</td>
<td>3,550</td>
<td>3,677</td>
<td>103%</td>
<td>83</td>
<td>--</td>
<td>13</td>
<td>53</td>
</tr>
</tbody>
</table>

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from Economic Consequences I. Table 53S at 355 and Table 54S at 358.
and his family must by necessity rely more and more on private and public sources other than tort-insurance.\textsuperscript{49}

The families of those auto death victims who were "going to school" or "keeping house" at the time of the accident recover pitifully little from the tort

\textsuperscript{49} See the following table:
Table 12

PERSONAL INJURY RECOVERY FROM NET TORT, AND OTHER SOURCES AS PERCENT OF TOTAL LOSS AND TOTAL RECOVERY BY NATURE OF VICTIM'S INJURY
(Millions of Dollars)

<table>
<thead>
<tr>
<th>Nature of Victim's Injury</th>
<th>Total Loss</th>
<th>Total Recovery as Percent of Loss</th>
<th>Net Tort Recovery as Percent of Loss</th>
<th>Recovery from Other Sources As Percent Of</th>
<th>Total Percent of Recovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fatal</td>
<td>$1,327</td>
<td>66%</td>
<td>7%</td>
<td>59%</td>
<td>100%</td>
</tr>
<tr>
<td>Very Serious c</td>
<td>2,208</td>
<td>16</td>
<td>5</td>
<td>11</td>
<td>100</td>
</tr>
<tr>
<td>Serious d</td>
<td>1,314</td>
<td>74</td>
<td>32</td>
<td>42</td>
<td>100</td>
</tr>
<tr>
<td>Less Serious</td>
<td>840</td>
<td>178</td>
<td>126</td>
<td>52</td>
<td>100</td>
</tr>
</tbody>
</table>

a. See Table 7, supra note 35, subnote a.
b. See Id., note 35, subnote b.
c. See Id., note 35, subnote c.
d. See Id., note 35, subnote d.

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from ECONOMIC CONSEQUENCES I, Table 7FS1 at 89-90 and Table 15FS1 at 154-56; MOTOR VEHICLE CRASH LOSSES 4-7, 11-13.
insurance system. A person who was "going to school" had an average loss of $1,954, exclusive of any future earnings loss, but his or her family received an average settlement from all sources of only $133, or seven percent. If "societal" future lost earnings of $920 million had been included, the average loss per student would have been $106,500 but recovery would have remained the same $133. A person who was "keeping house" at the time of the accident had an average loss of $3,133, exclusive of any earnings loss, yet his or her family would have recovered an average settlement from all sources of only $377, or 12 percent. If potential future lost earnings of $190 million had been included, the average loss would have been $32,800, but his or her family's recovery would have remained only $377.

Future lost earnings are the biggest element of loss for seriously injured auto accident victims who were "working" at the time they were injured—$1.6 billion as compared with $1.5 billion for their current wage, medical and property loss combined. In fact, current wages and future lost earnings account for 63 percent of the total losses (exclusive of property damage) recovered by all seriously or fatally injured auto accident victims.

The DOT studies point up clearly that the present system completely malapportions benefits to the detriment of those fatally and very seriously injured who qualify under tort law for compensation. Eighty-nine percent of the losses of fatality victims and 68 percent for the very seriously injured are compensated by sources other than tort. Furthermore, fault-insurance delivers its malapportioned benefits under an outrageously costly and exasperatingly slow pace of operations. Small losses are routinely overcompensated with or without attorney representation, and large losses are tragically undercompensated.

In one study—a survey of auto personal injury liability claims closings made by 16 leading auto insurance companies over a two week period in late 1969—89 percent of all paid claimants with medical and wage loss (excluding future lost earnings) under $1,000 accounted for 23 percent of the total medical and wage loss suffered but they received 46 percent of all payments after plaintiffs' attorneys fees. On the other hand, one-half of one percent of all-paid

50. See Table 10, supra note 47.
51. Id.
52. Id.
53. Id.
54. Id.
55. See Table 11, supra note 48.
56. ECONOMIC CONSEQUENCES I, Table 7FSI, at 89.
57. See Table 12, supra note 49.
58. PERSONAL INJURY CLAIMS I, Tables V-8 and V-9, at 50-55.
claimants with medical and wage loss of $10,000 or more sustained 16 percent of all such loss, but these claimants only received seven percent of all payment dollars after attorneys' fees. In fact, paid claimants with no medical or wage loss whatsoever received twice as much money as paid claimants who suffered loss in excess of $25,000!

Ninety-eight and six-tenths percent of claimants with losses between $1 and $500 recovered at least three-fourths of their loss from the tort system, but only 27 percent of claimants suffering losses over $25,000 recovered three-fourths of their loss. One-third of the claimants with loss between one dollar and $500 (72 percent of all paid claimants) recovered over four and one-half times their medical and wage loss; but, only one-twentieth of the claimants with loss between $10,001 and $25,000 (0.4 percent of all paid claimants) did as well. The families of those killed, and the victims with permanent total disabilities fare worst under tort-insurance. The overwhelming bulk of loss absorbed by these victims with total loss in excess of $25,000 was lost future earnings.

Fatality victims recovered only 43 percent of their average medical, wage and future earnings loss of $22,894. Victims with permanent total disabilities received a mere 16 percent of their average loss of $78,000. These loss recoveries have been computed before any deductions for plaintiffs' attorneys fees. Other data in this study, however, show "a clear pattern of greater attorney involvement in more serious injury cases." The report of the insurance industry's representatives on the study observed that "nearly 41% of these cases [permanent injury or death cases] go to suit and another 31% have attorney representation, compared with 15% and 29% for the remaining cases." Plaintiffs' attorneys represented 41 percent of paid claimants and 55 percent of loss dollars of those with $1 to $500 of medical and wage loss; they represented, however, 86 percent of paid claimants and 89 percent of loss dollars of those with $25,000 or more of loss. The impact of amount of loss on overall fee income of plaintiffs' attorneys compared to their workload is indicated by the data. For instance, claimants with losses under $1,000 constituted 82 percent

59. Id.
60. Id.
61. Id., Table V-16, at 58.
62. Id., Table V-8, at 50.
63. Id.
64. Id., Table V-16, at 58.
65. ECONOMIC CONSEQUENCES 1 at 53 and Table 7FSI, at 90.
66. PERSONAL INJURY CLAIMS 1 at 53.
67. Id. at 73.
68. Id. at 122.
69. Id., Table VI-1, at 73.
of plaintiffs' lawyers' clients, 73 percent of all successful lawsuits, and 42 percent of plaintiffs' attorneys fees. On the other hand, claimants with losses in excess of $5,000 accounted for 2.6 percent of plaintiffs' lawyers' clients, 4.5 percent of all successful lawsuits, but 18.5 percent of plaintiffs' attorneys fees.

Some would say that the compensation problems of certain non-qualifying victims (e.g., under contributory negligence, guest and other similar type immunity rules), and qualifying victims who have insolvent or inadequate defendants (insurers) to collect against, would be solved by comparative negligence, abolition of immunity rules, and compulsory liability insurance with high limits. Others would claim that no auto accident victim need go uncompensated if some medical and income loss benefits were to be paid on a first party, absolute liability (i.e., insurer would pay regardless of fault) basis with such benefit payments to be set off against any subsequent amount recovered by the victim from a negligent party's insurer.

These proposals, and others advanced from time to time, only reinforce society's expectation that tort insurance should compensate auto accident victims. Because of the present system's inherent inefficiencies and self-defeating contradictions, "the only prospect for the present system is more delays, higher premiums and worse misallocations of resources." As New York State Superintendent of Insurance, Richard E. Stewart pointed out:

Further attempts to modernize the fault insurance system by tinkering with it, while leaving its essentials intact, are sure to be expensive and self-defeating. The operators of the present system would just be buying themselves time with other people's money.

The tort-insurance system, in attempting to effectuate the compensation expectation, completely malapportions benefits, aids and abets the misallocation of other recovery sources, inhibits the restoration of health and productivity, wastes valuable judicial resources, and discourages more efficient and fairer methods to maximize the reduction of accident and accident avoidance costs.

Tort-insurance, as the theoretical main source for compensation of auto accident injuries, blinds us as to the human needs of the families of the fatally injured, the permanently disabled and all victims suffering from short and long-term impairments. By focusing on the human shortcomings of individual drivers and assessing loss costs on the basis of driving errors, we are denying

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70. Id., Table VI-3, at 75.
71. Id.
72. FOR WHOSE BENEFIT 55.
73. Id.
ourselves a systematic approach to reducing accident costs.74

Compared with other accident reparation systems, such as workmen's compensation, automobile tort insurance is excruciatingly slow in delivering benefits to victims. The Division of Industrial Accidents for the State of California reported that for the period July through December, 1970, 77.9 percent of workmen's compensation cases were paid their first check within fourteen days of the date of disability, and the balance of the cases were all paid their first check within twenty-nine days.75 On the other hand, a DOT survey showed that within thirty days after the date that auto accident injuries were sustained, only 21 percent of all paid claims had been settled, and the benefits paid on these

74. For instance, "about one-half of all fatalities involves drinking drivers, and at least one-half of that one-half involves problem drinkers". J. O'Connell, THE INJURY INDUSTRY 132 (1971). But, we are now beginning to approach the problem of alcoholism from a public health perspective rather than viewing it solely as a problem of public order—the "punitive" and "moralistic" approach. See TRAFFIC SAFETY REPORT 73-80; The State of the Union—Address by the President of the United States, 118 CONG. REC. H154 (daily ed. Jan. 20, 1972), wherein President Nixon called for "stronger programs to help the problem drinker" [emphasis added]. See also U.S. DEPT OF TRANSPORTATION, ALCOHOL AND HIGHWAY SAFETY: BEHAVIORAL AND MEDICAL ASPECTS (1971) (prepared by M. Perrine, J. Waller, and L. Harris).

Former Attorney General John N. Mitchell wrote recently, with respect to the problem of handling public drunkenness: "Alcoholism as such is not a legal problem—it is a health problem. More simple drunkenness per se should not be handled as an offense subject to the processes of justice. It should be handled as an illness, subject to medical treatment." Mitchell, The System Is a "Desperate Injustice" to Alcoholics, New York Times, Feb. 15, 1971, at 33, col. 5.

With respect to the problem drinker and his driving: "[I]t's not enough to get the problem drinker off the road. We want to get him out from behind wheel and into a rehabilitation program", says John W. Terwilliger, director of a $2.6 million program for problem drinkers who try to drive in the Baltimore area”. Washington Post, Jan. 16, 1972.

As Professor O'Connell stated succinctly:

[Will the prospect of being held liable months or years after the event, and thereby having his insurance company pay damages on his behalf, deter him from drinking? Conversely, will the prospect of not being paid damages from someone else, months or years after the accident, deter him? To ask the question is to answer it. If all the immediate misery the problem drinker causes himself and his family does not deter him from his dangerous drinking, to suggest that such remote and hypothetical possibilities will affect his behavior is ludicrous.

J. O'Connell, THE INJURY INDUSTRY 132. He concluded:

[T]he best thinking on traffic safety today would put the lowest priority on trying to change the driver. And it would put the lowest priority on trying to change the driver on trying to change the drinking driver; and it would put the lowest priority in trying to change the drinking driver on trying to change the drinking driver through threats concerning insurance claims. And so trial lawyers, in emphasizing as they continually do the supposedly detrimental effect on traffic safety of no-fault insurance in its treatment of the drinking driver, are emphasizing the lowest item of priority on the lowest item of priority on the lowest item of priority.

Id. at 134. For a discussion of the general proposition, see G. Calabresi, supra note 1, at 268-71.

represented a mere 3.5 percent of the total payments on all paid claims.\textsuperscript{74} This comparison points up, not only how speedy workmen's compensation is compared with tort-insurance, but it also illustrates the one-final-lump-sum-payment problem of tort-insurance—79 percent of the claimants eventually paid received nothing to cover their immediate losses for the first thirty days after the accident.\textsuperscript{77} Only 23 percent of the nearly 24,000 non-permanently injured or fatality victims in this same survey were paid within 30 days after the accident.\textsuperscript{78} Payment for these victims was even slower where their losses were large or they were represented by counsel. A mere one percent of the victims with medical and wage loss in excess of $2,000 were paid within 30 days after the accident; at least 25 percent of those victims with medical and wage loss of one dollar to $500 were paid within 30 days.\textsuperscript{79} Forty percent of the victims in the survey with medical and wage loss of any size who were without attorney representation, were paid within 30 days; one percent of the victims who were represented by an attorney were paid within that time.\textsuperscript{80}

The more serious the injuries the longer the victim must wait for compensation under the present system. Of the permanently and totally disabled claimants in this survey, none had his claim settled within 30 days after the accident, and only one had his settled within 90 days after the accident.\textsuperscript{81} Furthermore it seems to take longer for the permanently disabled represented by counsel to receive payment than it takes for those not so represented. For example, less than two percent of the permanently and partially disabled victims in the survey had their claims settled within 90 days following the accident; 25 percent of the victims with such injuries had their claims settled within that period.\textsuperscript{82}

Additional analysis of the detailed data presented in this survey shows that the multiple of payment to medical and wage loss for the permanently and partially disabled who were represented by an attorney (after deducting one-third for legal fees) was less than the multiples for those similarly injured victims without attorney representation.\textsuperscript{83} Whereas victims in the survey with large losses ($2,001 or more) who were represented by counsel received less of a multiple of payment to medical and wage loss (and less quickly) than those

\textsuperscript{76.} Personal Injury Claims I, Table VII-1, at 84.
\textsuperscript{77.} Id.
\textsuperscript{78.} Personal Injury II, at 260-63.
\textsuperscript{79.} Id.
\textsuperscript{80.} Id.
\textsuperscript{81.} Id. at 248-51.
\textsuperscript{82.} Id. at 252-55.
\textsuperscript{83.} See the following table.
<table>
<thead>
<tr>
<th>Settled within:</th>
<th>Number with Loss</th>
<th>Pay/Loss Ratio (after 1/3 legal fees)</th>
<th>Number without Attorney</th>
<th>Pay/Loss Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 year</td>
<td>78</td>
<td>1.5</td>
<td>137</td>
<td>2.7</td>
</tr>
<tr>
<td>2 to 3 yrs.</td>
<td>164</td>
<td>1.4</td>
<td>173</td>
<td>1.2</td>
</tr>
<tr>
<td>4 to 5 yrs.</td>
<td>100</td>
<td>1.6</td>
<td>92</td>
<td>4.1</td>
</tr>
<tr>
<td>6+ yrs.</td>
<td>342</td>
<td>1.0</td>
<td>402</td>
<td>5.0</td>
</tr>
<tr>
<td>Totals</td>
<td>642</td>
<td>1.5</td>
<td>712</td>
<td>2.9</td>
</tr>
</tbody>
</table>

Source: U.S. Senate Antitrust and Monopoly Subcommittee. Derived from Personal Injury Claims at 252.
not represented by counsel; those with small (or no) losses (zero to $500) who were represented by counsel received a greater multiple of payment to medical and wage loss (but less quickly) than those not represented by counsel. Similarly, another DOT study of seriously injured auto accident victims shows that

See also permanent disfigurement data in PERSONAL INJURY CLAIMS II at 256-59, where, for example, paid claimants settling claims within one-year after an accident, with attorney representation, had average losses of $4,000 and recovered (after one-third legal fees) $9,300, or two to three times their loss. Those settling claims within one-year, without attorney representation, had average losses of $3,710 and recovered $9,310, or two to five times their loss.

84. See the following table:

<table>
<thead>
<tr>
<th>TABLE 14</th>
</tr>
</thead>
<tbody>
<tr>
<td>AVERAGE PAY/LOSS RATIO FOR PAID VICTIMS IN $2,001 OR MORE LOSS CATEGORY, WITH AND WITHOUT ATTORNEY REPRESENTATION AND TIME FROM ACCIDENT TO TORT SETTLEMENT</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>$2,001 or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Attorney</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Avg. loss</td>
</tr>
<tr>
<td>Avg. payment</td>
</tr>
<tr>
<td>Ratio (after 1/3 legal fees)</td>
</tr>
<tr>
<td>Number of victims in category</td>
</tr>
<tr>
<td>Days from accident to settlement and</td>
</tr>
<tr>
<td>% of victims' cases settled</td>
</tr>
</tbody>
</table>


85. See the following tables:
TABLE 15
AVERAGE PAY/LOSS RATIO FOR PAID "VICTIMS" IN $0 LOSS CATEGORY, WITH AND WITHOUT ATTORNEY REPRESENTATION AND TIME FROM ACCIDENT TO TORT SETTLEMENT

<table>
<thead>
<tr>
<th></th>
<th>$0 Loss</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No Attorney</td>
<td>Attorney</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lawsuit</td>
<td>Lawsuit</td>
<td></td>
</tr>
<tr>
<td>Avg. loss</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Avg. payment</td>
<td>$164</td>
<td>$972</td>
<td>$3,540</td>
</tr>
<tr>
<td>Ratio (after 1/3 legal fees)</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Number of &quot;victims&quot; in category</td>
<td>1,526</td>
<td>184</td>
<td>78</td>
</tr>
<tr>
<td>Days from accident to settlement and % of &quot;victims&quot; cases settled</td>
<td>1-30</td>
<td>91-365</td>
<td>366-998</td>
</tr>
<tr>
<td></td>
<td>63%</td>
<td>51%</td>
<td>58%</td>
</tr>
</tbody>
</table>


TABLE 16
AVERAGE PAY/LOSS RATIO FOR PAID VICTIMS IN $1-$150 LOSS CATEGORY, WITH AND WITHOUT ATTORNEY REPRESENTATION AND TIME FROM ACCIDENT TO TORT SETTLEMENT

<table>
<thead>
<tr>
<th></th>
<th>$0-$150 Loss</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No Attorney</td>
<td>Attorney</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lawsuit</td>
<td>Lawsuit</td>
<td></td>
</tr>
<tr>
<td>Avg. loss</td>
<td>$52</td>
<td>$71</td>
<td>$74</td>
</tr>
<tr>
<td>Avg. payment</td>
<td>$172</td>
<td>$437</td>
<td>$555</td>
</tr>
<tr>
<td>Ratio (after 1/3 legal fees)</td>
<td>3.3</td>
<td>4.1</td>
<td>5.0</td>
</tr>
<tr>
<td>Number of victims in category</td>
<td>8,420</td>
<td>2,747</td>
<td>1,089</td>
</tr>
<tr>
<td>Days from accident to settlement and % of victims' cases settled</td>
<td>1-60</td>
<td>91-365</td>
<td>551-999+</td>
</tr>
<tr>
<td></td>
<td>65%</td>
<td>62%</td>
<td>65%</td>
</tr>
</tbody>
</table>

those with medical, wage and future income loss in excess of $10,000 who were successful in recovering in tort without an attorney obtained a comparable percent of payment to loss as those with similar losses who recovered in tort with an attorney.86

Why is this? The pressures inherent in the bargaining process created by the tort-adversary system cause insurance company claim-adjustors who want to "control" the case (some are trained to do so)87 to offer a settlement to the victim without counsel which is somewhat comparable to a settlement with plaintiff's counsel in order to avoid the risk that the victim will get a lawyer and thereby increase total insurance company expenses.88 This is particularly

| TABLE 17 |
| AVERAGE PAY/LOSS RATIO FOR PAID VICTIMS IN $151-$500 LOSS CATEGORY, WITH AND WITHOUT ATTORNEY REPRESENTATION AND TIME FROM ACCIDENT TO TORT SETTLEMENT |

<table>
<thead>
<tr>
<th>$151-$500 Loss</th>
<th>No Attorney</th>
<th>Attorney</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avg. loss</td>
<td>$271</td>
<td>$295</td>
</tr>
<tr>
<td>Avg. payment</td>
<td>$669</td>
<td>$1,071</td>
</tr>
<tr>
<td>Ratio (after 1/3 legal fees)</td>
<td>2.4</td>
<td>2.4</td>
</tr>
<tr>
<td>Number of victims in category</td>
<td>2,571</td>
<td>2,645</td>
</tr>
<tr>
<td>Days from accident to settlement and</td>
<td>1-90</td>
<td>91-365</td>
</tr>
<tr>
<td>% of victims cases settled</td>
<td>56%</td>
<td>66%</td>
</tr>
</tbody>
</table>


86. ECONOMIC CONSEQUENCES I, Table 38FS1, at 308-11.
88. Id. at 8492-93. See also NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, AUTOMOBILE INSURANCE STUDY BACKGROUND MEMORANDUM IN REPORT OF THE SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE PROBLEMS 100 (1969); H. Ross, supra note 13, at 18-23; J. ROSENBLoom, AUTOMOBILE LIABILITY CLAIMS 98-104 (1968).

See also testimony of John J. O'Brien before the Senate Committee considering national no-fault legislation, where Mr. O'Brien, a lawyer who was employed for approximately 11 years by insurance companies in various claims positions, including those of adjuster, examiner, and manager, said "that in the insurance business a good settlement most frequently was not one that was fair . . . [and] that the present system works unfairly. It favors the affluent and mitigates against
true if the claimant has a good case on liability or would make a good witness before a jury. In addition, in small value cases the legal and administrative cost in defending a claim is greater than the cost to an insurance company of an inflated settlement. It should be noted also that the fact that the victims in the survey from which Tables 13 through 17 were derived were “paid” claimants is “an implicit concession that they passed the liability threshold.” Perhaps victims with large losses and questionable liability would not have recovered at all without the assistance of counsel. Furthermore, “large value cases are more likely to attract attorneys and be contested by suit.”

The present system is not only unjust but it is grossly inefficient. Automobile tort-insurance “would appear to possess the highly dubious distinction of having probably the highest cost-benefit ratio of any major compensation systems currently in operation in this country.” According to DOT, “tort liability insurance would appear to cost in the neighborhood of $1.07 in total system expenses to deliver $1.00 in net benefits to victims.” In other words, every dollar received by an accident victim represents $2.07 that the public has put into the system. Tort-insurance returns only 44 cents of each premium dollar to injured claimants—it could return as much as 80 cents.

the poor. The individual injured in an auto accident who is living from paycheck to paycheck is a soft touch for an experienced adjuster.

“I have in my own experience defended settlements that I have made, third-party liability settlements, to my immediate superiors, and when they didn’t compliment me, I have said to them ‘but it was a fair settlement’. And most often as not, they would turn to me and say, ‘Fair, but not a good settlement’. And we knew what was meant by a good settlement. The first call settlement made by an adjuster for the out-of-pocket expenses, plus a few dollars over and above for inconvenience, pain and suffering is considered a good settlement. Insurance companies favor first call settlements for the primary purpose of closing out claims before the injured parties fully realize the extent of their damages or injuries.”

89. J. ROSENBLOOM, supra note 88, at 138-41.
90. These cases constitute 79 percent of all paid claimants with $0 to $500 of medical and wage losses according to the data in PERSONAL INJURY CLAIMS I, at 5.
91. For example, in U.S. DEP’T OF TRANSPORTATION, AUTOMOBILE ACCIDENT LITIGATION 7 (1970) it is stated that “[d]efendants’ lawyers received an average of $819 per case regardless of the verdict.” See also J. ROSENBLOOM, supra note 88, at 99-101.
92. PERSONAL INJURY CLAIMS I at 66.
93. Id.
94. MOTOR VEHICLE CRASH LOSSES 95.
95. Id. at 51.
96. MOTOR VEHICLE CRASH LOSSES 51.
97. This assumes group no-fault auto insurance. The recently published “Study of Hawaii’s Motor Vehicle Insurance Program,” conducted by Haldi Associates, Inc., for the Legislative
**No-Fault Can Save Lives**

Theoretical reflection and statistics from Puerto Rico, the first American jurisdiction to adopt no-fault automobile accident compensation insurance suggest that the most important public-policy advantage of the system proposed by Committee Print No. 1 would be human rather than economic.

Under the tort system there are no built-in incentives to improve emergency health care facilities and programs; just as there are no built-in incentives for the victim to participate in rehabilitation programs. As a matter of fact, in those jurisdictions which impose a maximum recovery in wrongful death cases by law, but no maximums in injury cases, there is a positive economic reason for insurance carriers to look the other way when confronted with reports of the woefully inadequate state of ambulance and emergency health care facilities. For both the ambulance services and the hospital emergency rooms, the

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Auditor of the State of Hawaii (SPECIAL REPORT No. 72-1, January, 1972), and submitted to that State's legislature pursuant to House Concurrent Resolution No. 93, H.D. 1 (which requested the Legislative Auditor's Office to conduct the study), examined, among other things, the cost implications and potential savings under the five major reform alternatives displayed in the following table (STUDY OF HAWAII'S MOTOR VEHICLE INSURANCE PROGRAM 97):

**TABLE 18**

**SUMMARY OF PREMIUM SAVINGS FOR FIVE MAJOR REFORM PROPOSALS**

<table>
<thead>
<tr>
<th>Range of Savingsb</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Percent)</td>
</tr>
<tr>
<td>1. Existing tort liability/private, group insurance</td>
</tr>
<tr>
<td>2. Existing tort liability/exclusive state fund</td>
</tr>
<tr>
<td>3. Complete no-fault/private, individual insurance</td>
</tr>
<tr>
<td>4. Complete no-fault/private, group insurance</td>
</tr>
<tr>
<td>5. Complete no-fault/exclusive state fund</td>
</tr>
</tbody>
</table>

a Assumption that other sources of existing insurance coverage are consumed before automobile coverage applies. See table 14—2 for details.

b For the no-fault plans, low saving figures reflect high frequency/high severity experience and high savings reflect low frequency/low severity experience.

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98. See text at notes 114-57 infra.

99. See TRAFFIC SAFETY REPORT 43-56; and also Altman, supra note 2: "... the problem was not just one for the cities but also for "rural areas where 70 percent of deaths from highway collisions occur.""

See also The State of the Union, supra note 74, at H154. President Nixon noted that:

[The loss to our economy from accidents last year is estimated at over $28 billion [and traffic accidents accounted for some 60 percent]. These are sad and staggering fig-
tort system in financial responsibility states is a disaster. Many seriously injured victims treated with emergency services will recover no money at all because the defendant carried no insurance. In fact, 58 percent of the victims so treated never recover in tort because they are unable to prove fault or freedom from contributory negligence. Thus those who provide medical emergency services will often not be paid unless the automobile victim has other resources. In the remaining cases, particularly the more serious ones, the hospital may have to wait more than a year until the case is settled and it can be paid. The economic consequence of these facts on the emergency health care system is horrendous because “approximately one-third of all ambulance runs are made to carry persons injured by motor vehicles.” One-third of all emergency medical service is for injury resulting from vehicular accidents. Is it any wonder that the emergency room in almost every hospital in America operates at a loss? How can the directors of non-profit hospitals justify investing in emergency health care facilities such as helicopters and spectrophometers or hiring specialists rather than interns to work in such facilities? A respected Advisory Committee that evaluated the emergency health care system a few years ago concluded that “what is lacking is money.”

On the other hand, under no-fault each motorist would carry automobile compensation insurance which would assure payment of all emergency and medical costs of the driver, his passengers and any injured pedestrian. Payment must be made within 30 days after the bill is rendered or the insurance carrier must pay interest on the unpaid balance at the rate of 24 percent a year. It doesn’t take a mathematician to know that far more money will be available for emergency health care facilities under such a system than is available under the present system. In addition, since insurance carriers will pay out less money in benefits if the victim survives, recovers and returns to work, than if he dies or is permanently disabled, it will be in their economic self-interest to make

The President continued by saying that he was directing the Department of Health, Education and Welfare to develop new ways of organizing emergency medical services and of providing care to accident victims. (Emphasis added.)

100. See ECONOMIC CONSEQUENCES I, Table 7S at 86, and Table 15S at 149.
101. See ECONOMIC CONSEQUENCES I, Table 32S at 281-82, and discussion in note 37 supra.
102. See ECONOMIC CONSEQUENCES I, Table 47FS1, at 340; Table 13, supra note 83, Table 14, supra note 84.
103. TRAFFIC SAFETY REPORT 44.
104. Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, The Insurance Industry, 92d Cong., 2d Sess., pt. 18B, Table IV at 13,754 n. 6 (1971).
105. TRAFFIC SAFETY REPORT 52.
loans and grants to hospitals to enable medical facilities to invest in expensive new equipment or to expand capacity. The national no-fault legislation should be amended to require that some percentage of all automobile insurance premium dollars collected be invested in such life-saving equipment.\textsuperscript{105} Capital investments in humanity, that would pay dividends in life and health, are a reasonable requirement to make on an industry whose underwriting profit will increase under no-fault.

Would it make a difference? Yes. According to a study prepared for the Department of Transportation in 1971: "Twenty-three percent of fatalities died of probably survivable injuries due to problems throughout the emergency care system."\textsuperscript{106} Elsewhere the study observes:

It is furthermore quite disheartening to realize that of 67 individuals who died after leaving the scene of the crash, almost half were felt to have died of injuries that were either definitely or possibly survivable. This figure is even more startling when it is realized that the estimation of survivability was based on anatomic data only, and that the surgeon who reviewed these cases felt that the evaluation was too conservative.\textsuperscript{107}

According to another nationwide study, "it is a certain fact that a considerable number of the individuals involved would be salvaged from permanent disability or death if a more sophisticated emergency medical response system were operative."\textsuperscript{108} Dr. Robert H. Kennedy of the American College of Surgeon's Section on Trauma estimated that 20,000 lives a year would be saved with better attention at the scene of the accidents and better transportation facilities.\textsuperscript{109} Another surgeon has estimated that 25 percent of all persons permanently disabled in highway accidents would not be crippled if proper care and transportation had been available after the accident.\textsuperscript{110} Under the present system, according to a prominent Philadelphia physician: "In injury cases, we

\textsuperscript{105}1. [Editor's note:] See note 8, supra. Committee Prints Two and Three contain a provision requiring "insurers to assist State agencies administering or supervising the State highway safety program in the development and maintenance of the most effective possible emergency medical response system. To finance an effective emergency medical response, insurers in the State would be required to invest 1 percent of their gross no-fault premiums in grants, loans, or equity investments in emergency medical and transportation facilities, programs, and equipment within the State. Failure to make such investments would result in termination of the insurer's authority to write qualified no-fault policies in the State." Staff Analysis, at viii and ix; Committee Print Two. § 8, at 28-31 of Committee Print Two and § 110, at 24-27 of Committee Print Three.

\textsuperscript{106} ALCOHOL AND HIGHWAY SAFETY, supra note 74, at xxi and 248.

\textsuperscript{107} Id. at 67.

\textsuperscript{108} TRAFFIC SAFETY REPORT 46.

\textsuperscript{109} Id. at 47.

\textsuperscript{110} Id. at 46-47.
have often had trouble getting an insurance carrier to admit financial responsibility for a patient, and a hospital can't afford to carry them merely hoping for a settlement later on . . . ."111

The results of recent experiments using helicopters rather than conventional ambulances give us an example of what can be done. The Maryland State Police use three Bell Ranger jet helicopters for accident-injury rescue in conjunction with the Shock Trauma Center of the University of Maryland Hospital. In 1971, the helicopters "brought 155 badly injured persons directly from accident scenes to the trauma center. Of these victims, 129 lived. Doctors at the trauma center estimate that 94 of the survivors would have died had they not been flown to the center."112

The human consequences of no-fault in Puerto Rico are startling. In 1969, the last year of the tort system, there were 541 highway fatalities out of 538,000 registered cars driven a total of 4.3 billion miles. In 1971, the second complete year under partial no-fault, there were 481 highway fatalities out of 686,659 registered cars driven a total of 5.6 billion miles. In percentages, that means that the number of highway deaths in Puerto Rico per 100 million miles driven has declined 32 percent since no-fault was enacted.113

Furthermore, national no-fault will be a useful and effective supplement to the proposed Motor Vehicle Information and Cost Savings Act. Under no-fault, actuaries will compute premium-dollar cost on the basis of the probability of injury and the extent of such injury to the policy-holder and his family, friends and other potential passengers. Undoubtedly, the companies will demand higher premium payments from the owner of an automobile with only the minimum safety equipment and protection required by federal regulations than they will from the owner of a "maximum safety" automobile which could be involved in a serious accident without the occupants suffering more than minor bruises. The annual insurance premium cost for a "flimsy" car as opposed to a "maximum safety" car may be an important factor in the buyer's mind—and in the manufacturer's.

111. J. O'Connell, supra note 74, at 23.
113. Letter to Senator Warren G. Magnuson from Frank W. Fournier, Executive Director, Administration for The Compensation of Automobile Accidents, San Juan, Puerto Rico, January 24, 1972, filed with the Senate Commerce Committee. Note that the death-rate decrease may be greater than can be expected on the mainland because the Puerto Rican law established a state fund insurance office similar to our Social Security Administration, and that office (Administration) has established medical emergency clinics throughout the island out of premium funds collected. It will be interesting to see if private insurers in the continental United States will do the same.
Rehabilitation

Although the tort-insurance system fails to provide proper medical care and rehabilitation for the seriously injured, it encourages medical tests, X-rays and doctor’s visits “which ordinarily would not be necessary” for the less-than-seriously injured. The slightly injured person’s small medical costs are “built-up” resulting in large “pain and suffering” awards (and bigger attorney’s fees), a waste and misallocation of medical resources and the prolongation of ill-health.

A leading and active practitioner in the field of neurosurgery for twenty years testified before the House Subcommittee on Commerce and Finance that “[i]t is possible that our present insurance system can actually prolong symptoms.” He explained:

I think all doctors consider it a self-evident truth that patients who suffer from medical-legal injuries have symptoms that are markedly prolonged compared to the same injuries that occur when secondary

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115. See the following table:

<table>
<thead>
<tr>
<th>TABLE 19</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AVERAGE PAYMENT FROM TORT-INSURANCE TO AVERAGE MEDICAL AND WAGE LOSS FOR $1 TO $150 CATEGORY BY RESIDENTIAL AREAS</strong></td>
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<tr>
<td>Urban Residential</td>
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<tr>
<td>Without Attorney</td>
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<tr>
<td>Average Loss</td>
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<td>Average Payment</td>
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<td>Ratio (after 1/3 legal fees)</td>
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<tr>
<td>Number of Victims</td>
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This premise appears to be borne out by the total recovered losses in very small cases for those who settle with and without an attorney. Note also the wide difference in average losses (most—if not all—are for medical bills) on these very small claims. Since payment from tort-insurance is predicated on the amount of medical bills (and wage loss), how can it be said that the present system is “tailoring compensation to individual needs and satisfies an individual sense of justice?” If anything, this data indicates that the present system is patently unjust.

gain is not a factor. For example, if an individual suffers a fall in his own bathtub and strikes his head, he may develop a headache and he will take something like aspirin or some mild analgesic, and this will subside in a day or two. The same impact or the same force or injury that will occur with a vehicular accident can ordinarily be expected to take months and sometimes years before improving.

As a consulting physician, I see many patients every week who fall within this category. These individuals are usually involved in a vehicular accident where the extent of the trauma is minimal. However minimal the trauma, the symptoms persist and remain unabated. X-rays and many other studies are done, and these are normal, and because of the persistence of headaches or other aches and pains, consultation with one or many specialists is often requested. Almost invariably these patients with prolonged symptoms are involved in lengthy, long-drawn-out medical-legal dealings. In most cases, they have consulted with attorneys who have advised them to defer settlement of their medical claim since “you never know how long it will take to get well.”

Elaborating on this last statement, he told the subcommittee:

. . . [O]ne must realize that oftentimes the doctor who is treating his patient and wants the symptoms to subside as quickly as possible is working counter to the desires of the attorney whose job it is to secure for his client the largest possible settlement.

In attempting to do the best job for his client, the lawyer will want to assure himself that he is not settling the case too early. He will often request additional X-rays and additional tests to assure that nothing has been missed. He may feel that it is his job to ask the patient, ‘Are you sure that you still don’t have symptoms?’ or in many cases, being knowledgeable about certain injuries, may even ask leading questions. In many cases management of this sort can only tend to prolong symptoms . . .

What effect does such prolongation of symptoms have in the lives of the patients? It, of course, interferes with their activities of daily living and, in many cases, prevents them from resuming their work.

The doctor concluded by saying that he believed that “the system of no-fault insurance . . . will result in a more speedy recovery overall for many patients.”

117. Id. at 157.
118. Id. at 158-59.
119. Id. at 159.
The DOT studies explored in-depth the tort-insurance system's sickeningly slow procedures for delivering funds for medical care, rehabilitation and income security. But even if, and when, there is compensation, the money is paid in a single lump-sum. The system's standard and traditional claims procedure, a one-time lump-sum settlement, exchanged for a written and binding release in a hostile adversary environment inhibits the restoration of health and the resumption of a useful and satisfying life.\textsuperscript{120} Dr. John Henle, former administrator of public rehabilitation programs and former Director of Rehabilitation of Nationwide Mutual Insurance Company, has spelled out how the tort-system hinders rehabilitation in his study on the "Rehabilitation of Auto Accident Victims" for the Department of Transportation.\textsuperscript{121} In his words:

The traditional settlement environment for third-party auto bodily injury claims offers nothing to encourage and much to preclude the early introduction of rehabilitation. Not only must fault and degree of disability be agreed to by opposing sides, but a bargain must be struck and dollar value assigned to the damages . . . . Thus, considerable time, energy and expense must be devoted to controversy just when rehabilitation measures might most benefit the victim. The disabled person will usually be the focus of conflicting efforts toward the financial settlement of his 'case', and here questions of fault and degree of disability press for immediate answer.

Too often the accident victim's own energies are directed toward retribution instead of restoration. In this misdirected effort, he may be encouraged by his family, his attorney, the adversary posture of the company involved, or by his own bewilderment and frustration.\textsuperscript{122}

That the adversary process fails to provide for human needs is well documented in other DOT studies. One survey found that no rehabilitation program was suggested to 88.6 percent of seriously injured accident victims.\textsuperscript{123} Of the 11.7 percent to whom rehabilitation was recommended, only two percent were referred by an insurance company.\textsuperscript{124} Of those victims who participated in a rehabilitation program, 27 percent paid for the services themselves.\textsuperscript{125} Eighty-five and six tenths percent of program participants said that they did not receive

\begin{footnotesize}
\textsuperscript{120} \textit{Motor Vehicle Crash Losses 8.}
\textsuperscript{121} \textit{U.S. Dep't of Transportation, Rehabilitation of Auto Accident Victims} (1970) (prepared by J. Henle).
\textsuperscript{122} \textit{Id.} at 13.
\textsuperscript{123} \textit{Economic Consequences I, Table 216S at 377.}
\textsuperscript{124} \textit{Id.} Table 218S at 378.
\textsuperscript{125} \textit{Id.} Table 223S at 382.
\end{footnotesize}
a cash allowance for living expenses for themselves and their family during any part of the period of rehabilitation.¹²⁸

There is no question that severely injured auto accident victims could, and should, make more use of the state-federal rehabilitation programs under the Vocational Rehabilitation Act¹²⁷ than they are at present. Department of Health, Education and Welfare data indicates that at least 101,000 impairments resulting from moving motor vehicle accidents in 1967 caused substantial limitation on the victim's usual major activity (ability to work, keep house, or engage in school or pre-school activities).¹²⁸ The Staff of the Rehabilitation Services Administration recently informed Senate Antitrust and Monopoly Subcommittee staff that:

At any given time during a recent given year, 1,500 persons with severe spinal cord injuries are in rehabilitation status, and 1,000 of these stem from motor vehicle accidents. This represents only an estimated 4,000 new cases with such injuries from auto accidents each year.¹²⁹

¹²⁶ Id., Table 224S at 382.
¹²⁷ 42 U.S.C. § 1351 (1969). The Rehabilitation Act of 1972 (H.R. 8395), which would amend the Vocational Rehabilitation Act by extending and revising the authorization of grants to states, was passed by the House on a vote of 327 to 0. 118 Cong. Rec. H.2219-38 (daily ed. March 20, 1972).
¹²⁸ REHABILITATION OF ACCIDENT VICTIMS, supra note 12, at 26.
¹²⁹ Telephone interview, December, 1971. See also letter from The American Occupational Therapy Association, Inc. to Senator Warren G. Magnuson, May 28, 1971, and reprinted in Hearings Before the Senate Commerce Comm. on Automobile Insurance Reform and Cost Savings, 92d Cong., 1st Sess., pt. 4 at 1957-58 (1971), wherein it was stated:

Motor vehicle accidents are probably the greatest single cause of injuries requiring extensive rehabilitative and restoratory care. They produce a shockingly high number of spinal cord injuries each year, resulting in paraplegia (permanent paralysis from the waist down) and quadriplegia (permanent paralysis from the neck down). Auto accidents are the cause also of large numbers of amputations, extensive and often permanent damage to vital joints, internal injuries so severe that they are disabling for years or for life, and a great variety of other serious handicapping conditions.

The care required involves long periods of time in expensive hospital facilities, a vast array of medical equipment and devices (some of which must be custom-made), and the services of many types of health professionals. The amount of money required is usually far beyond an individual's or family's financial means, even with the assistance of hospital and medical insurance. If the injured person is the family's bread-winner, financial problems are obviously compounded.

The tragedy of accidental injury should not be unduly complicated by financial distress. To be most effective, total rehabilitation of the injured should proceed promptly, without delay due to financial problems. Large numbers of our professional occupational therapists work daily with patients who are the victims of these accidents and they see firsthand the results of neglect after injury, and particularly delays after the acute stages, because of the lack of an adequate system for paying the costs of full restorative care.
The total cost of spinal injury cases, if properly managed, averages around $50,000, but "a spinal cord injury case, if improperly managed, can easily add up to an expenditure of $500,000 during a victim's life time." The proper management of a spinal-cord-injury case (or any injury case requiring rehabilitation) includes beginning the rehabilitation techniques promptly. This costs money—tort-insurance pays very slowly. Instead of tort-insurance promoting a "hopefully useful and satisfying life," it helps foster a life of heartbreak for the permanently disabled needing rehabilitative treatment.

In addition to those victims with substantial limitation on their major activities, "another 459,000 . . . were limited in the amount or kind of major activity participation" in 1967.

Five hundred and sixty thousand moving vehicle accident victims could have made use of rehabilitation services. But only 29,000 or 14.2% of the total actually undergoing rehabilitation had disabilities classified as caused by 'accidents, injuries, and poisonings,' the classification in which auto accident victims would fall.

The hundreds of thousands of injured victims not being served by this "major, virtually unused resource which has scarcely been tapped by the private auto insurance industry . . ." are also victims of a system being operated more for retribution than human restitution.

Under no-fault, in general, and the Hart-Magnuson bill in particular, rehabilitation of the automobile accident victim could become the single most important element in the benefits "package." For the first time insurance companies would have an economic incentive to help and encourage their injured policyholders to enter rehabilitation and retraining programs. The victim who is helped to resume a productive life will cost the insurance company less money. According to the bill, if he is not returned to gainful employment, his insurer will have to continue to pay all his lost wages indefinitely. By joining the self-interest of the insurer in minimizing claims payments to the resources and expertise potentially available under the state-federal rehabilitation programs, no-fault will reduce much tragic and unnecessary human suffering and restore to productivity and enterprise many who are today doomed to lives of

130. Id.
132. Id. at 16-17.
133. FOR WHOSE BENEFIT 33.
134. REHABILITATION OF AUTO ACCIDENT VICTIMS, supra note 121, at 5.
135. Id. at 26.
136. Id. See also MOTOR VEHICLE CRASH LOSSES 59.
137. Id. at 27. See also MOTOR VEHICLE CRASH LOSSES 60.
empty futility by an outmoded and inhumane system. Even better results would be obtained if the bill were amended to require automobile insurers to invest a percentage of all premium dollars collected in capital loans and contributions to state and local rehabilitation centers.\footnote{137.1}{Editor's note. See notes 8 and 105 supra. Committee Prints Two and Three would “provide funds to construct new rehabilitation facilities or improve existing facilities, [and] each insurer writing qualifying no-fault policies in a State would be required to invest 1 percent of the total no-fault premiums it collects in that State in grants, loans, or equity investments for the construction or improvement of rehabilitation facilities.” Staff Analysis, at viii of Committee Print Two, and § 109, at 22-24 of Committee Print Three. § 7, at 25-28.}

In recent years, some insurance companies have begun to use various arrangements to initiate rehabilitation and to reduce the length of time it takes to get funds to the severely-injured-with-clear-liability cases. One of the more common techniques is interim or advance payments. DOT insurance industry advisory subcommittee report described this method of payment as “a new claim practice designed to speed rehabilitation and to provide some financial relief during the recovery period by advancing moneys in uncontested cases to pay for expenses as they are incurred.” This technique is normally applicable to the more serious claims.\footnote{138.}{PERSONAL INJURY CLAIMS I at 120 (emphasis added).} This “new claim practice” attempts to overcome some of the problems associated with lump-sum payments.\footnote{139.}{Id. See also J. O'CONNELL, supra note 74, at 16-19.}

But, as long as fault finding and the adversary atmosphere inherent in the bargaining-litigation-settlement process remains, there are bound to be contested claims over liability—particularly for the permanently disabled claimant with large losses. There is greater attorney involvement in more serious injury cases,\footnote{140.}{PERSONAL INJURY CLAIMS I at 73, 95.} and the percentage of tort claimants who retain counsel and the percentage of those who actually file lawsuits “tend to increase as the amount of economic loss increases.”\footnote{141.}{ECONOMIC CONSEQUENCES I at 49.} According to the DOT data, attorney representation in these types of cases has an adverse effect on the utilization of advance payments. For instance, in those cases where medical and wage loss was $10,001 to $25,000, 82 percent of the paid claimants retained counsel,\footnote{142.}{PERSONAL INJURY CLAIMS II at 5, 11.} but only 10 percent of these claimants were covered by advance payments.\footnote{143.}{PERSONAL INJURY CLAIMS I Table VII-10, at 96.} Thirty-seven percent of the claimants not represented by counsel were covered by advance payments for the same loss category.\footnote{144.}{Id.} The permanently injured claimant is placed in an impossible dilemma by a system incapable of caring. He may try to get a large monetary verdict and judgment after waiting as long
as six years (assuming that he has other resources to sufficiently cover his lost earning power, which many do not), but the price he and his family will pay for the absence of rehabilitation services may be a lifetime of otherwise unnecessary misery.

Successful claimants who manage to get advance payments are "but a tiny fraction of all third-party liability bodily injury claimants." This is because of the strict screening procedures of the companies, and because, as the DOT study reveals, 33 percent of the seriously injured in that survey were involved in one-car accidents and another 25 percent were ineligible for tort-insurance due to contributory negligence, guest passenger statutes, and immunities such as governments', inter-spousal, intra-familial, and that of charitable organizations. The DOT found that only nine percent of the seriously injured victims with loss of $2,500 or more received some advance payment before eventually recovering their tort settlement for which they had to wait an average of 15 months.

Professor O'Connell's conclusion that "Advance payments... are only a flickering indication of what a genuinely compassionate and sensible insurance arrangement could be like" is the most that can be said for this very limited remedy for the overwhelming faults of the present system. He reminds us that "In the meantime... the old adversary game based on fault—with all its harshness, delays, unfairness, and waste—goes on."

Certainly few would dispute that tort-insurance is unbelievably slow in getting compensation to injured victims. The adversary climate of the system feeds on itself and thereby promotes delay—especially for the permanently injured. The more serious a person's injuries and loss, the more likely he will retain counsel, and will file a lawsuit. As a consequence, the injured person's expen-

145. Rehabilitation of Auto Accident Victims, supra note 121, at 17.
146. Id. at 14-17.
147. Motor Vehicle Crash Losses 36; Economic Consequences 1, Table 201FS at 365.
148. See Economic Consequences 1, Table 7S at 86, and Table 15S at 149. This figure is computable as follows:

\[
\frac{194,412 \text{ (Table 15S)}}{454,166 \text{ (Table 7S)}} = 42\%
\]

42 percent recovered from Net Tort while 58 percent did not. Subtracting 33 percent (because of one-car accidents [table 201FS at 365]) from 58 percent produces the 25 percent net recovery.

149. Economic Consequences 1, Table 47FS1, at 340.
150. J. O'Connell, supra note 74, at 27. See also Motor Vehicle Crash Losses 96.
151. Id.
152. See notes 139 and 140 supra.
ses will mount, and his bargaining position will become the more "pathetically inadequate" while that of the insurance company will become stronger. The end result is that the system helps the insurance companies wax rich on their investments from liability reserves while the victim waits for possible recovery from tort-insurance. The people who can least afford it—the maimed and injured—may have to endure years of hardship and even deprivation, but the system could care less. The most seriously injured among them suffered most; 14 percent had to move to cheaper quarters, 29 percent had to miss credit payments, 30 percent had to take money from savings or sales of property, 28 percent borrowed money, 22 percent had to have another member of the family go to work, and 45 percent had to change their way of living. Of course, delay is not the only culprit—no payment and underpayment contribute their share of hardship. For instance, one DOT study of seriously injured victims disclosed that the families of 11 percent of fatality victims, and nine percent of the long and short term disabled victims, recovered no reparations from any source. In fact, one-fourth of the fatally and permanently injured recovered from all sources less than 50 percent of their medical, wage, and future earnings loss.

Thus, advance payments is a case of "too little, too late" and yet another illustration of why we must cease tinkering with a fundamentally unjust and incurable system. Instead, we must replace it with one that delivers benefits, saves lives, and rehabilitates victims.

Conclusion

Fifty years have passed since meaningful efforts were begun to produce and effectuate a humane and efficient substitute for the wasteful and unproductive tort-insurance system. Enough. The time has come for action by the Congress of the United States and the President to permit the people to enjoy the benefits of no-fault insurance compensation.

Many lawyers oppose no-fault. Lawyers have been justly and sharply criticized for putting their pocketbook interest in fees ahead of their greater interest and duty, as citizens and officers of the court, in a smooth and well-ordered system. But the most incisive expression of the case for change was written by a man who is not only a lawyer, but the lawyer who was the first President

155. ECONOMIC CONSEQUENCES I, TABLE 56FS1, at 362-63.
156. Id. Table 52 FS1, at 353.
157. Id. See also Table 7, supra note 35.
158. See Editorial, The Life and Times of No-Fault, 57 A.B.A.J. 1114-15 (Nov. 1971). The editors "repeat the hope of last May's editorial (page 487) that no lawyer will oppose no-fault
and co-founder of the American Trial Lawyers Association, the trade group which spearheads the opposition to reform. Mr. Benjamin Marcus wrote:

We are convinced that No Fault is the only way out of the wasteful, irrelevant, burdensome and exasperating procedure now employed to compensate victims of automobile injury. We feel it is probable that when the dust has all cleared, No Fault will be conceded by all to be substantially speedier, less wasteful, and more fair than our present system.\footnote{Letter from Benjamin Marcus, Muskegon, Michigan to Senator Philip A. Hart, June 28, 1971; reported in 117 CONG. REC. S12,463 (daily ed. July 29, 1971). See also Report of the Association of the Bar of the City of New York, Feb. 6, 1972, reprinted in the New York Law Journal (Feb. 7, 1972), and reported in the N.Y. Times, Feb. 7, 1972, at 1, col. 7. The Association is convinced “that the fault principle must be abolished. . . We, therefore, endorse the ‘no-fault’ principle and recommend its early enactment.”}

The time for enactment of national no-fault auto insurance is long overdue.