

Compensation for Traffic Injuries: New York and Comparative Systems

Josephine Y. King

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

King, Josephine Y. (1971) "Compensation for Traffic Injuries: New York and Comparative Systems," *St. John's Law Review*: Vol. 45 : No. 3 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol45/iss3/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

COMPENSATION FOR TRAFFIC INJURIES: NEW YORK AND COMPARATIVE SYSTEMS

JOSEPHINE Y. KING*

The long debate over automobile accident reparation in the United States, enriched by the contributions of eminent legal scholars, has reformed some insurers, and educated many consumers, but has failed to move legislatures to action. In a nation of more than 200 million people, 100 million registered vehicles and an equal number of licensed drivers,¹ automobile accidents are responsible for some 56,000 fatalities and 4.6 million injuries annually, at a monumental cost of 16.5 billion dollars.² These awesome human consequences are "the neglected disease of modern society."³

Federal legislation has attempted to reduce the toll by enacting measures for highway and vehicle safety.⁴ Nonetheless, car manufacturers continue to produce extravagantly powerful engines within fragile chassis, while the incompetent or criminally negligent driver continues to operate these vehicles uninhibited by effective national licensing standards. The slow progress of accident prevention magnifies the need for implementing a better system of compensation. It is disappointing that the many years and many volumes of legislative hearings on the subject of automobile insurance have not produced proposals for basic reform. It seems redundant at this stage to accumulate more opinions of insurers, disgruntled policyholders, or frustrated regulators. Legislative and executive initiative should be directed toward putting before the public constructive and substantive recommendations. It is to be hoped that the Federal Department of Transportation will come forward with proposals based on the excellent study of automobile compensation it has recently completed.⁵ At the

* Professor of Law, Hofstra University, School of Law. A.B., University of Pennsylvania, 1942; A.M., Bryn Mawr College, 1943; Ph.D., Bryn Mawr College, 1950; J.D., State University of New York at Buffalo, 1965.

¹ U.S. DEPT OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 550 (1969).

² Insurance Information Institute Press Release (Dec. 18, 1969).

³ U.S. DEPT OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON TRAFFIC SAFETY 4 (1968).

⁴ The Highway Safety Act of 1966, 23 U.S.C. § 401 *et seq.* (Supp. V, 1970); The National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (Supp. V, 1970).

⁵ U.S. DEPT OF TRANSPORTATION, AUTOMOBILE INSURANCE & COMPENSATION STUDY (1970) [hereinafter COMPENSATION STUDY].

state level, where insurance regulation has been reposed by special dispensation of Congress,⁶ only three significant reparation plans have emerged.⁷ Only one of these qualifies as a thorough revision—the New York Plan, which shall be considered in the course of this article.

It is not difficult to identify one of the causes of legislative timidity. The organized bar has been critical of comprehensive revision of the present system. Instead, it has advocated fragmentary procedural and substantive changes such as voluntary arbitration, comparative negligence, and modest increases in first-party medical coverage.⁸ Such proposals probably reflect the attitude of many lawyers who do not encourage radical departures from accustomed patterns. For the general practitioner on his own or the small partnership, a little negligence work helps pay the office rent. His income is often quite modest; understandably, he would not welcome its diminution by elimination or significant curtailment of negligence actions.⁹

The national and various local bar groups have reacted adversely to suggestions that all or a portion of personal injury litigation be transferred to another forum, that proof of fault as a condition precedent to recovery be abrogated in all or some classes of claims, that contingent fees be subjected to a maximum (below the going rate in most cases) or be replaced by a "reasonable fee" principle, or that tort damages for pain and suffering be substantially reduced or abolished.¹⁰ Such reservations entertained by some members of the legal profession point to a continuation of the split system of accident and liability insurance rather than adoption of a pure, no-fault system.

These generalized observations upon the need for reform and the obstacles to achieving it apply in force to New York, sister states, and probably to most highly developed countries. New York is chosen as an illustrative jurisdiction because the number of claimants, attorneys and dollars involved in the business of personal injury lawsuits emphasize the urgency of seeking a solution. At the same time, by placing accident compensation in a comparative context, we are aided by the experi-

⁶ See The Insurance Antitrust Moratorium Act, 59 Stat. 33 (1945), as amended, 15 U.S.C. § 1012 (1964).

⁷ Massachusetts Personal Injury Protection Plan, ch. 670, [1970] Laws of Mass. 40 (Jan. 1, 1971); NEW YORK DEP'T OF INS., AUTOMOBILE INSURANCE . . . FOR WHO F BENEFIT (1970) [hereinafter N.Y. PLAN]; CONNECTICUT INS. DEP'T, A PROGRAM FOR AUTOMOBILE INSURANCE & ACCIDENT BENEFITS REFORM (1969).

⁸ A.B.A., REPORT OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATION 1-4 (1969).

⁹ See generally J. CARLIN, LAWYERS' ETHICS (1966); J. CARLIN, LAWYERS ON THEIR OWN (1962).

¹⁰ See A.B.A. REPORT, *supra* note 8.

ences, perspectives and creative innovations of other communities equally concerned with mitigating and repairing the human devastation which results from accidental injuries.

AN ULTRAMONTANE VIEW

It is instructive for a jurisdiction such as New York, where substantive revision of automobile liability insurance has been advanced, to consider the systems of other countries experiencing broadly similar problems in compensating traffic victims within the framework of tort law. In England, France, New Zealand, Australia and Canada, liability insurance is compulsory, or in practical effect compulsory, as it is in New York. However, the scope of the social security system is much broader in England,¹¹ France¹² and the province of Ontario,¹³ for example, and all or part of the medical expenses and wage loss resulting from an injury may be covered by some form of social insurance. In England, one who avails himself of free medical care under the National Health Service is not permitted to claim his medical expenses in a tort action. Hospital insurance covers nearly all the population of Canada. In general, a set-off of social security benefits against tort recovery is required. By contrast, in the United States, a large portion of the population purchases private medical and hospital coverage, and the operation of the collateral source rule permits double recoveries for the same injury. Another difference is the application of a strict rule of contributory negligence in New York and many other American states whereas comparative negligence is applied abroad. Other incidents of traffic injury litigation in the United States — such as contingent fee arrangements and trial by jury — are either foreign to other systems or present in a relatively minor degree.

Despite these differences, none of the reparation regimes readily comparable to American practice seems satisfactory; the sentiment for reform is international. In Ontario, a select committee recommended that all automobile policies provide a broad scope of accident benefits payable without regard to fault.¹⁴ Specific death, medical and disability benefits were proposed. As enacted, however, limited accident coverage is to be written on a voluntary basis by private insurers;¹⁵ the tort

¹¹ See HARRIS, *Analysis of the British Auto Accident Compensation System*, in COMPARATIVE STUDIES IN AUTOMOBILE ACCIDENT COMPENSATION, COMPENSATION STUDY, at 89.

¹² See Tunc, *Analysis of the French Auto Accident Compensation System*, in *id.* at 8-9.

¹³ See Linden, *Automobile Insurance Breakthrough in Canada*, in *id.* at 154.

¹⁴ *Id.* at 160.

¹⁵ *Id.* at 162-64.

action is not eliminated and will serve as the vehicle for recovery of psychic loss. While more injured claimants may be eligible to recover under the no-fault accident benefits, compensation will be "far from generous";¹⁶ and those who do not voluntarily purchase this form of insurance, as well as pedestrians who are excluded by some insurers, will not be covered.

Similarly, in British Columbia, the recommendations of the Royal Commission on Automobile Insurance were more far-reaching than the program adopted by the legislature.¹⁷ The Commission had proposed abolishing the fault system and substituting loss insurance, whereby every traffic victim would recover compensation. The compulsory, noncancelable insurance would provide a fixed schedule of benefits to the driver and his family at an estimated premium of sixteen dollars and seventy-six cents. The legislature, however, preserved the tort action, necessitating continuation of liability insurance, but did adopt the principle of no-fault accident benefits and uninsured motorist coverage.¹⁸

In New Zealand, the Royal Commission for Investigation of Industrial Accidents Compensation reported that *all* accidental injuries should be compensated regardless of fault.¹⁹ It suggested a government operated, compulsory loss-sharing system financed by employer contribution of 1 percent of wages and salaries plus a levy on motor vehicle drivers. Such a broad social security approach to personal injury reparation has received attention in other countries, including the United States.²⁰ Advantages of the system would lie in the avoidance of overlapping premiums and sources of compensation; moreover, there would be demonstrably lower costs of administration when compared with private liability insurance.

An accident compensation plan which merits consideration has been advanced by the famous scholar, Andre Tunc.²¹ He has proposed that:

1. Car owners as a class bear the cost of traffic accidents.

¹⁶ *Id.* at 165.

¹⁷ *Id.* at 167-69.

¹⁸ *Id.* at 170-72.

¹⁹ REPORT OF THE ROYAL COMMISSION OF INQUIRY INTO COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967) [the Woodhouse Report]; see also Anderson, *The Woodhouse Report on Compensation for Personal Injury in New Zealand*, 1 AUCKLAND U.L. REV. 1 (1969); Mathieson, *Royal Commission of Inquiry: Compensation for Personal Injury in New Zealand*, 31 MOD. L. REV. 544 (1968).

²⁰ See W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 83-85 (1965).

²¹ See Tunc, *supra* note 12, at 21-28.

2. Everyone injured in a traffic accident should receive compensation without regard to fault. Such compensation would cover medical, hospital and rehabilitation costs, and loss of past and future earnings. Pain and suffering would not be compensated unless of a permanent nature. Payments for loss or impairment of limb would follow a schedule of benefits but with discretion to depart from the schedule in special circumstances.
3. Faults, which the author distinguishes from errors, should subject the driver to criminal and civil sanctions depending upon the nature of the conduct causing injury.
4. Car damage resulting from collision should be compensated automatically above the applicable deductible.
5. The tort liability system would be abolished for traffic accidents.

Professor Tunc's proposal would appear to internalize the cost of motor vehicle accidents and ensure basic benefits to victims without proof of blameworthy conduct on the part of the driver. The latter principle is not a radical departure from present law which attaches *prima facie* liability to the "custodian" of a vehicle.²² Furthermore, in the author's view, most accidents are caused by inevitable errors which attend all human activity, and, therefore, attribution of "fault" cannot survive as a rational criterion of compensation.²³

Fundamentally, all of the major reforms, whatever their national origin, seek to relieve or mitigate the inner tensions of the tort liability system which both fails to deter and fails to compensate. Liability insurance insulates the party at fault from the very liability which the system was designed to enforce, and yet pays out benefits only upon proof of fault. The system cannot fulfill the social objective of restoring the injured physically and economically as self-sustaining and productive members of society. On these grounds, the present mechanism must be replaced by a true compensation scheme. This is the essence of Professor Tunc's proposal and of the plan recently put forth by the New York State Department of Insurance.

THE NEW YORK PLAN

Experience in New York underscores the poor performance of automobile liability insurance as a compensatory scheme for traffic injuries. Not only is the prevailing pattern of overpayment of small

²² *Id.* at 3.

²³ *Id.* at 17.

claims, underpayment of serious injuries and nonpayment in other cases repeated in this state,²⁴ but the system is patently inefficient as well as inequitable. It is estimated that New Yorkers paid 950 million dollars for automobile liability insurance in 1970. Of this amount, almost 700 million dollars represents premiums for bodily injury liability coverage.²⁵ But only an estimated 100 million dollars was paid out as reimbursement for *net economic loss*.²⁶ Out of each insurance premium dollar, 44 cents is available for accident claims payments; the remaining 56 cents is allocated for operating expenses incident to the fault system, *i.e.*, insurance company costs, paying agents, lawyers and claims investigators. Of the 44 cents for benefits, 21.5 cents go to pain and suffering awards, 8 cents for economic loss which has already been reimbursed from other sources. This leaves 14.5 cents for net economic loss,²⁷ the most basic and essential compensation to victims. This residual amount cannot assuage the economic consequences of motor vehicle accidents for the multitudes injured each year.

The profligacy, illogic and imbalance of automobile liability insurance, prompted the Insurance Department of New York to reject palliatives and piecemeal revision. Instead, a new program is recommended, built on two synergetic principles: compensation (a) for net economic loss (b) without regard to fault.²⁸ Under the plan, each motor vehicle owner would be required to purchase minimum automobile insurance covering personal injury and property damage (excluding the vehicles involved in the accident) arising from the operation of the vehicle. The driver, passengers, pedestrians and property owners could claim under the vehicle owner's policy. Personal injury benefits would cover all hospital and medical costs, net economic loss without any limits, rehabilitation, and out-of-pocket expense. Where property damage results, each vehicle owner would bear the loss to his own car (optional collision insurance could, however, be purchased) but the compulsory insurance would cover other property damage.

The glaring omission from the benefits scheme is pain and suffering damages. As a strict economic loss system, it excludes reparation for the psychic sequelae of accidents, real or imagined. Coverage for noneconomic loss may be purchased if insurers offer it, but it is not a component of the basic, compulsory insurance. Its exclusion should have a salutary effect upon premium charges and reduce the dishonesty

²⁴ N.Y. PLAN at 27-29.

²⁵ *Id.* at 4.

²⁶ *Id.* at 36.

²⁷ *Id.* at 34-36.

²⁸ *Id.* at 83-100.

and fabrication which have unfortunately become associated with personal injury claims.

The second essential element of the New York Plan is the abrogation of the proof of fault in the negligence action. The benefits described above are available to the injured without regard to the reasonableness of the conduct of the parties involved. Since in New York, the plaintiff bears the burden of proof not only as to the defendant's negligence but also as to his own freedom from contributory negligence, more victims will be able to recover under the no-fault system than under present rules. It should be noted, however, that the drunken or drugged driver, or one committing a crime, would be held strictly liable.

The authors of the New York Plan anticipate substantial savings to policyholders if their scheme is adopted. They project that 57 cents of the premium dollar would be available to pay net economic loss.²⁹ The savings are predicated on reduced transaction costs (*e.g.*, operating expenses, claims adjustment expenses), elimination of psychic loss payments and making the compulsory insurance benefits excess insurance after exhausting other sources of compensation for economic impairment.

In addition, the proponents claim that by eliminating contests over fault, payments can be made much more promptly than at present. Families will not be devastated by long periods without income; early and comprehensive medical care and rehabilitation will speed the injured on the road to recovery. Finally, courts will be relieved of the crushing burden of motor vehicle accident cases which have relentlessly clogged the dockets in metropolitan areas for several decades. With so much promise, how can the New York Plan fail to gain acceptance?³⁰ Some of the countervailing forces and arguments will be examined below.

But the need for procedural reforms, whether as a consequence of the New York or some other proposed insurance plan cannot be glossed over if the total picture is to be accurately presented. While advances in the mechanism of litigation can never take precedence over the enhancement of substantive rights, it is a well-learned lesson of the common law that the two are inextricably related. The severity of the problem of court delay in New York adds urgency to the search for a new system of compensation which presages not only a greater measure of justice but also speedier justice for all accident victims.

²⁹ *Id.* at 107.

³⁰ For an evaluation of the plan, see King, *Accident Reparation: Reappraisal and Reform*, 3 CONN. L. REV. 283-92 (1971); see also N.Y. PLAN at 103-29.

THE PROCEDURAL POSTURE OF TORT CASES IN NEW YORK

A unified court system was established in the state of New York in 1962. By constitutional provision, responsibility for administrative supervision of the courts is vested in the Administrative Board of the Judicial Conference.³¹ The Board issues annual reports containing much statistical data and supporting commentary concerning the nature and volume of the business of the various courts. Since the First Annual Report in 1956, the Board has monitored delay in state and city tribunals. Delay is considered to exist for tort actions if the period between filing of the note of issue and trial exceeds six months.³² As of December 1969, delay in tort jury cases in the supreme court, within the five counties of New York City, ranged from fourteen to forty-seven months,³³ and in the Civil Court of the City of New York from twelve to fifty months;³⁴ however, by January 31, 1971, the delay in the civil court had been sharply reduced to a period of from one to twenty-four months.³⁵

The supreme court has original jurisdiction in law and equity, but as a matter of practice will hear civil claims only if the amount in controversy is at least 10,000 dollars. Statewide, the supreme court has an annual intake of more than 60,000 civil cases³⁶ and over 70,000 pending cases.³⁷ By comparison, the supreme court in New York City has a civil intake of 24,000 cases of which 13,000 involve negligence causes of action.³⁸ The Civil Court of the City of New York, serving a population of more than eight million, has jurisdiction over actions at law where the recovery sought or the value of property involved does not exceed 10,000 dollars.³⁹ Approximately 100,000 tort and contract cases are noticed for trial each year in the civil court. Of this number, almost half are tort jury cases. The current backlog is 80,000 actions.⁴⁰

For a quarter of a century, court administrators and judges in New York have struggled to combat lagging tort calendars.⁴¹ They have tightened procedures at calendar call and made extensive use of pretrial

³¹ N.Y. CONST. art. VI, § 28.

³² N.Y. JUD. CONF., FOURTEENTH ANNUAL REPORT 213 (1969).

³³ N.Y. JUD. CONF., STATISTICAL REPORT JULY 1—DEC. 31, 1969, at 14 (1970).

³⁴ *Id.* at 16.

³⁵ Report of the Honorable Edward Thompson, Administrative Judge of the N.Y.C. Civil Court, Jan. 31, 1971.

³⁶ FOURTEENTH ANNUAL REPORT, *supra* note 32, at A 114.

³⁷ *Id.* at 217.

³⁸ *Id.* at A 114.

³⁹ N.Y.C. CIV. CT. ACT § 202 (McKinney 1963).

⁴⁰ See Report, *supra* note 35.

⁴¹ For a review of procedures implemented in the New York courts to reduce the number of negligence trials, see King, *Accelerating Personal Injury Litigation: The Offer to Compromise and Other Procedures*, in N.Y. JUD. CONF., SIXTEENTH ANNUAL REPORT 213 (1971).

conferences. Such conferences, designed to help the parties reach a settlement, have disposed of many claims; but, since they are usually held well before the trial date, numerous cases survive. In some courts, "blockbuster" parts are regularly conducted. Under this technique, a number of trial judges are assigned the task of clearing cases which have aged on the calendar. Success in bringing the parties to agreement lies in the fact that cases failing to settle may be assigned to trial. The conference and assignment procedure recently initiated in the civil court maximizes the psychological effect of imminent trial by immediately assigning the cases which do not settle at conference to a trial judge. Similarly, the readiness rule requiring certification that all necessary preparation for trial was completed prior to placement of a case on trial calendar succeeded for a few years in reducing the pending caseload. But some relaxation of the rule and some adjustments on the part of attorneys neutralized its effectiveness. Additionally, some courts have established medical offices which will suggest names of impartial medical experts who, upon court request, will examine and report upon a plaintiff's injuries. As a result, a high proportion of medical cases which would otherwise produce protracted litigation are settled without trial.

Other attempts to curtail delay include the implementation of the six member jury in the civil and other city courts and court rules limiting overscheduling by trial attorneys who have undertaken the prosecution or defense of personal injury cases which may be simultaneously called for trial in various courts within the metropolitan area. There is, however, a disinclination to regiment or penalize the limited number of skilled trial lawyers who are in demand. There is some sentiment for encouraging the use of split trials, where the liability issue is disposed of first, but courts have not imposed this procedure upon the parties.⁴²

As further inducements to settle personal injury claims without the time and expense of a courtroom contest, proposals have frequently been introduced in the state legislatures to permit interest charges to run from the date of the injury or the date the action is commenced, or to impose the opponent's attorney's fees upon a party who has refused a settlement offer which, upon trial proves to be more favorable than the actual award. The first suggestion, *i.e.*, prejudgment interest, has been adopted in a few jurisdictions but without convincing evidence that it

⁴² Cf. REPORT OF THE COMMITTEE ON PERSONAL INJURY LITIGATION IN SOUTH AUSTRALIA, CMD. 3691 (1968) [the Winn Report]. For a discussion of the split trial system in Australia, see Fleming, *Damages: Capital or Rent?*, 19 U. TORONTO L.J. 295, 306 (1969).

has ameliorated the prospect of pretrial settlement.⁴³ Imposition of attorney's fees has not been attempted.⁴⁴

The New York legislature has, however, recently enacted a procedure designed to keep many small claims out of the courts entirely. An experimental system of compulsory arbitration of claims not exceeding 3,000 dollars will be tried for three years in selected areas of the state.⁴⁵ The information available indicates that the pilot program will not be introduced, at least initially, in the New York City metropolitan area. The appeal from the arbitral award is actually a trial de novo. Therefore, if the rate of appeals is high, there may be no net saving of court time. It should also be noted that personal injury claims are very likely to exceed 3,000 dollars.⁴⁶ Unless the plaintiff's valuation of his injuries is scaled down by some court-supervised screening procedure, accident claims will evade arbitration. The effect of the new law can only be fairly determined after several years of experience are accumulated.

All of the procedures described above have helped in some measure to reduce the number of court trials in personal injury actions. But nothing short of mandatory assignment to a simpler tribunal will eliminate the demands upon the judges and other court employees which every claim noticed for trial makes. This is so even though the attorney filing the suit never intends to prove his case before a judge and jury. Since there has been no demonstrated enthusiasm in New York or any other American state for establishing a separate forum for personal injury claims, the only viable alternative is the implementation of a compensation system which obviates the usual issues between plaintiffs and alleged tortfeasors and leaves only a small residual of controversies between first parties and their insurers to the courts. The logical solution to court delay lies in the restructuring of substantive law to abrogate tort actions for traffic injuries.

SUMMATION

Nations whose economic, legal and social systems afford a ready comparison with the United States reflect a common disenchantment

⁴³ See McLaughlin, *Interest on Personal Injury Claims*, 1966 N.Y. LEG. DOC. NO. 65 [I], at 415; Law Revision Commission, *Award of Interest on Causes of Action for Personal Injury*, 1966 N.Y. LEG. DOC. NO. 65 [I], at 409.

⁴⁴ See King, *supra* note 41, at 224-25, 237-38.

⁴⁵ N.Y. JUDICIARY L. § 213 (McKinney 1968), as amended, ch. 1004, [1970] N.Y. LAWS (eff. Sept. 1, 1970). For commentary upon the New York compulsory small claims arbitration plan, see King, *Arbitration Plus: A Procedural Duo*, 25 RECORD OF N.Y.C.B.A. 588 (1970). For a discussion of the third-party claims tribunal in Western Australia, see Braybrooke, *The Motor Vehicle (Third-Party Insurance) Act Amendment Act, 1966—A Nonprincipled Development in Western Australian Law*, 8 U. WESTERN AUSTRALIA L. REV. 204 (1967).

⁴⁶ At least the demand is apt to exceed 3,000 dollars. Information released by the

with current methods of compensating traffic injuries. We are all struggling to fulfill a valid social need through the vagaries and contradictions of negligence law and liability insurance. The principle of liability based on fault developed in a period of industrialization and laissez-faire economics;⁴⁷ paradoxically, it is in the very sphere of industrial accidents that we have discarded proof of fault as the key to compensation.

A less comprehensive social security system makes the problem more severe in the United States than it appears to be abroad although studies reveal that 57 percent of accident victims in the Toronto area received no tort recovery,⁴⁸ 24 percent received nothing and 26 percent about half their damages in France,⁴⁹ and only 42 percent secured compensation in the city of Oxford.⁵⁰ In all of the jurisdictions whose experiences have been briefly discussed above, there is a complex network of compensation sources sorely in need of rational integration. The broad scheme suggested in the *Woodhouse Report*⁵¹ seems well conceived to meet that problem. Yet, there are few champions of an expanded governmental role in the United States. The New York Plan relies on private industry to provide the coverage it proposes.

Political philosophy and powerful economic interests influence the prospects for achieving substantive reform. Some opponents are sincerely committed to the ethical foundations of the liability system and conceive of no-fault compensation as enrichment of the guilty. This view focuses upon the conduct of the tortfeasor and the objectives of punishment and deterrence. However, by continuing—despite the countervailing effect of liability insurance—to assign these functions to tort law we are “overloading” that branch of law. Egregious fault—conduct of a criminal or quasi-criminal character—cannot be adequately dealt with in a civil suit between private parties. A satisfactory compensation system cannot be constructed on the premise that tort law must serve as a substitute for criminal law.

Of the economic stakeholds which will be shaken by institution of

office of the Administrative Judge of the N.Y.C. Civil Court shows that the average verdict was 2,400 dollars and the average settlement (no trial) was 1,100 dollars for cases filed in that court.

⁴⁷ See THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION, COMPENSATION STUDY; Jolowicz, *Liability for Accidents*, 26 CAMBRIDGE L.J. 50 (1968).

⁴⁸ REPORT OF THE OSGOODE HALL STUDY ON COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS ch. IV, at 13 (1961) (concerning motor vehicle accidents in the County of York).

⁴⁹ Tunc, *supra* note 12, at 5.

⁵⁰ Harris, *supra* note 11, at 98.

⁵¹ Anderson, *supra* note 19, at 8-13.

a government-centered compensation scheme or no-fault insurance privately underwritten, carriers who specialize in liability coverage and lawyers who concentrate upon negligence cases will be adversely affected. Yet, parts of the insurance industry in the United States support the New York Plan⁵² although it drew sharp criticism from some organizations of the bar.⁵³ If an attorney evaluates reparation reform solely from his individual income vantage point, he has cause for gloom. Of necessity it will affect his fees. First, the contingent fee arrangement will not survive. Although the practice serves as a useful function in enabling indigent claimants to prosecute negligence claims, the fee has been recorded as reaching 50 percent in some New York cases⁵⁴ and has prompted institution of some controls by the courts.⁵⁵ Secondly, any new benefits scheme, even if it were to limit rather than abolish pain and suffering damages, would also curtail the negligence attorney's income, for general damages are the usual source of his fee. Thirdly, a compensation plan which enlarges the role of, or concentrates wholly upon, first-party benefits eliminates recourse to jury trials in most or almost all cases. Trial lawyers staunchly defend their clients' right to jury trial; statistics reveal that at least in some courts, verdicts tend to be much higher than decisions of a judge sitting without a jury.⁵⁶ Perhaps for all of these reasons, lawyers tend to be much more tolerant of the court delays which characterize negligence cases than are their clients, court administrators and the public at large. Bound up as it is with the fortunes of industrial empires and professional careers, compensation reform is as much a political as a social issue.

Finally, even if New York adopts a far-reaching revision of automobile insurance, we are still faced with the limitations imposed by our federal system. The plan would be applicable only within the state, and traditional third-party liability insurance would be necessary to protect the vehicle owner when his car is driven out of state. Thus,

⁵² The American Insurance Association, a stock company trade group writing about one-third of the automobile insurance in the United States, offered a plan quite similar to the one in New York. See AM. INS. ASS'N, REPORT OF THE SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS (1968).

⁵³ See King, *supra* note 30, at 293.

⁵⁴ See Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 63-64 & n.127 (1967).

⁵⁵ N.Y. COURT RULES, APP. DIV., FIRST & SECOND DEP'TS, pt. 4, R. IV (McKinney 1970).

⁵⁶ See FOURTEENTH ANNUAL REPORT, *supra* note 32, at 221-24, 235. The overall state figures for supreme court cases show that plaintiff recoveries in jury and nonjury trials were virtually the same; however, in New York City, four out of the five counties reported that plaintiffs received much higher awards from juries. Similarly, in the civil court, juries were about four times more generous than judges.

assuming that all the obstacles to enactment of an efficient, logical and equitable system of compensation are overcome, the system will still be of only limited territorial applicability. Recognition of motoring accidents and injuries as not merely local matters, but rather as generating problems of national concern would be a wise, if difficult, political decision.