The Effect of Workmen's Compensation Awards on Recovery Under MVAIC

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mon law and exploit his work without endangering his exclusivity. Furthermore, the longer period of protection will make the federal statutory protection more appealing to authors.\(^5\)

While the public clearly benefits from the eventual release of all literary works into the public domain, one aspect of such a scheme is subject to severe criticism—the release of private papers and manuscripts. While it is true that after a sufficient period of time following an author's death the importance of privacy may decline, there is definitely a strong interest in the individual's right to protect his private work from the peering eye of the general public. There is a real danger that many documents such as private correspondence and diaries, will be destroyed, although this could be overcome by the retention of such works in libraries or archives, available to scholars, but removed from the grasp of the general public.\(^6\)

One advantageous change which will result from the new system is that all causes of action involving copyright protection under the new law will be within the exclusive jurisdiction of the federal courts,\(^7\) thus minimizing the conflicts between court interpretations of the statute.

It seems, in conclusion, that the benefits to be derived from the proposed scheme of protection greatly outweigh its shortcomings. After too long a wait, the United States seems prepared to equip itself with copyright legislation capable of meeting the needs of our technologically advanced society.

\[X\]

THE EFFECT OF WORKMEN'S COMPENSATION AWARDS ON RECOVERY UNDER MVAIC

The Motor Vehicle Accident Indemnification Corporation Law\(^1\) was enacted in 1958 to remedy the failure of New York's then existing financial responsibility laws\(^2\) to protect the innocent

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\(^5\) Under Proposed Law § 304(a) the time of renewal is extended from 28 to 47 years for those works which are in their first term of copyright protection when the statute becomes effective.

\(^6\) Such a system was urged by the Register. Register's Report 1241.


\(\text{[a]}\) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

\(^1\) N.Y. Ins. Law art. 17-A [hereinafter referred to as MVAIC].

victims of the uninsured and financially irresponsible motorist and the unknown hit-and-run driver. MVAIC is a non-profit corporation4 "designed to afford a person injured [by an uninsured motorist] . . . the same protection as he would have had had he been injured in an accident caused by an identifiable automobile covered by a standard5 automobile liability insurance policy. . . ."6 Under MVAIC, persons injured by uninsured motor vehicles are divided into two categories. The predominant category is that of the "insured" person, who is defined and whose rights are governed by the New York Accident Indemnification Endorsement [hereinafter referred to as the Endorsement] drafted by MVAIC and required by law in every automobile liability insurance policy issued in New York.7 An "insured" person is defined under the Endorsement to include the policy holder, his spouse, relatives of either while residents of his household, and any persons lawfully using or occupying a motor vehicle owned or driven by the policy holder.8

The second category consists of the "qualified" person, that is, anyone not an "insured" person within the scope of the Endorse-

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4 N.Y. Ins. Law § 602.

5 Under N.Y. Vehicle & Traffic Law § 311(4)(a), a standard “owner’s policy of liability insurance” is one which provides, inter alia, insurance against loss from liability for damages because of bodily injury to or death of any person arising out of ownership, use, operation or maintenance of a motor vehicle in New York or elsewhere in the United States or Canada subject to a limit of $10,000 for injury or death of one person, and $20,000 for death or injury of two or more persons in any one accident (footnote supplied).

6 McCarthy v. MVAIC, 16 App. Div. 2d 35, 38, 224 N.Y.S.2d 909, 913 (4th Dep’t 1962), aff’d, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S. 2d 101 (1963). The legislature intended the MVAIC program to operate where an accident is caused by the following categories of motor vehicles: (1) uninsured, (2) unidentified, (3) registered in New York but for which a liability insurance policy was not in effect at the time of the accident, (4) stolen, (5) operated without the permission of the owner, (6) subject to disclaimer or denial of coverage by the insurer, or (7) unregistered. N.Y. Ins. Law § 600 (2).

7 N.Y. Ins. Law § 167-2a. The statute provides that the insurer will pay sums to which the “insured” is entitled “subject to the terms and conditions [in the Endorsement] . . . to be prescribed by the board of directors” of MVAIC and approved by the Superintendent of Insurance. Also, any liability insurance policy failing to contain the Endorsement shall be construed as if it embodied the required uninsured motorist coverage. Ibid.

8 See Endorsement, Definitions.
ment definition who is a resident of New York State (except the owner of an uninsured motor vehicle or a spouse while a passenger in such vehicle) or who is a resident of a state with similar uninsured motorist legislation.\(^9\)

It should be noted that under the original MVAIC statute, both categories of persons were entitled to recover from MVAIC itself. The legislative intent, i.e., that one injured by an uninsured driver receive the same benefits as one injured by a party with minimum insurance coverage and no other assets, initially applied to all persons covered by MVAIC. In 1965, the legislature, seeking to facilitate the administration of claims, amended the statute to allow the “insured” person to proceed directly against his own insurance company in arbitration.\(^10\) This change was merely procedural, there being no intention to create a distinction between coverage available to “insured” or “qualified” persons.\(^11\)

Where a person who happens to be acting in the course of his employment is injured by an uninsured motorist, a situation arises wherein the injured party may be entitled to recover under the Workmen’s Compensation Law.\(^12\) In addition, he may be entitled to recover from his insurer as an “insured” under an Endorsement or from MVAIC itself as a “qualified” person. However, MVAIC, in drafting the Endorsement, has provided that any amount payable by the insurer thereunder to an “insured” “shall be reduced by . . . (4) the amount paid and present value of all amounts payable on account of such bodily injury under any workmen’s compensation law, exclusive of non-occupational disability benefits.”\(^13\) Nowhere in the statute is MVAIC expressly

\(^9\) N.Y. Ins. Law §601 (b). The “qualified” person’s remedy is to notify MVAIC of the accident and bring an action against the uninsured. After obtaining a judgment which remains unsatisfied, he seeks payment from MVAIC through filing a petition in the court which granted judgment. N.Y. Ins. Law §§608, 610.

\(^10\) An “insured” person’s remedy under the Endorsement where the insurer and “insured” fail to agree on the amount of recovery is an arbitration proceeding upon the issues of fault and damages. See Note, MVAIC Six Years Later—A Practical Appraisal, supra note 3, at 335-37.

\(^11\) 1965 Insurance Legislation, N.Y. Legis. Annual 381 (1965). “We would emphasize that this bill takes nothing away and does not reduce any coverage.” Id. at 382.

\(^12\) Ordinarily, where an employee is injured or killed by one in the same employ, his exclusive remedy is the right to workmen’s compensation benefits. N.Y. Workmen’s Comp. Law §29 (6). However, where the employee is injured by one not in the same employ, he may take his compensation benefits and also sue the tort-feasor. N.Y. Workmen’s Comp. Law §29 (1).

\(^13\) Endorsement, Condition 5, limits of liability. Also deducted are: (1) the amounts paid by an owner or operator of an uninsured motor vehicle and (2) amounts received under any similar uninsured motorist insurance.
empowered to provide for deduction of a workmen's compensation award from the "insured" person's MVAIC recovery. Furthermore, workmen's compensation benefits are not deducted from an MVAIC award received by a "qualified" person under the statute.4

It is the purpose of this note to investigate the apparent inequality of treatment by MVAIC of "insured" and "qualified" persons with respect to workmen's compensation benefits and to determine whether the deduction contained in the Endorsement is (1) a valid exercise of administrative power and (2) an appropriate method for the effectuation of the legislative intent underlying MVAIC.

The New York Controversy

The lack of specific statutory authorization for the deduction of a workmen's compensation award from an "insured" person's recovery, the absence of such reduction in the case of a "qualified" person, coupled with the fact that where one is injured by an insured motorist, the defendant's insurer may not reduce the judgment by workmen's compensation received by the plaintiff, has led to a questioning of MVAIC's power to write such an Endorsement.

In Matter of Durant v. MVAIC, the appellate division refused to reduce an "insured" person's award by the amount of benefits received under workmen's compensation for the same accident.15 Emphasizing the apparently unequal treatment afforded the "insured," the court stated that the power delegated to MVAIC [is] . . . confined to the drafting of an endorsement which carries out the spirit and intent of the statute. That power cannot be enlarged unilaterally by MVAIC arrogating to itself the prerogative to debase the insured person's right of recovery in contrast to the same right granted to a qualified person. Any such enlargement would frustrate the uniformity of treatment of injured persons intended by the Legislature and would perpetrate an inequity. . . .16

Thus, it was stated that if a workmen's compensation award were to be deducted from the recovery, specific authority should have been provided in the statute.17 Furthermore, the court felt...
that such a deduction would frustrate the statutory scheme of the workmen's compensation law by removing the right of the compensation insurance carrier to its statutory lien. The argument that the workman would be allowed a double recovery was rejected by the court for two reasons: first, the compensation carrier had a lien for reimbursement of the amount of workmen's compensation benefits received and, second, the workman's actual damage had been found to be greater than the combined amounts of his MVAIC Endorsement and workmen's compensation awards. It was thus concluded that the deduction provision was unenforceable.

The New York Court of Appeals modified the appellate division's decision, reasoning that MVAIC was authorized by statute to draft the Endorsement while dismissing as immaterial the fact that a "qualified" person would not have had an award reduced by compensation payments. Thus, under the decision in Durant, MVAIC can authorize the insurer to reduce its awards under the Endorsement by any amounts the "insured" receives as workmen's compensation benefits.

The Experience of Other Jurisdictions

A survey of uninsured motorist statutes in jurisdictions other than New York reveals that legislatures generally have merely formulated broad guidelines for administrative agencies and have not set out precisely what the uninsured motorist endorsement should contain. Only two states were found to have statutes expressly treating workmen's compensation recovery in a manner similar to New York's MVAIC Endorsement. In New Jersey, to state a cause of action under the Unsatisfied Claim and Judgment Fund Law, a person must prove that he is not covered by workmen's compensation with respect to the accident. Closest

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18 The compensation carrier has either a lien, to the extent it has paid the injured party, on the proceeds of any third-party action after reasonable attorney's fees, or an assignment of the right to bring a third-party action, if none has been brought. N.Y. WORKMEN'S COMP. LAW § 29 (1)-(2).
21 See, e.g., FLA. STAT. § 627.0851 (Supp. 1966); ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd 1965); S.C. CODE ANN. §§ 46-750.14 (1962).
to New York in its treatment of workers' compensation benefits under uninsured motorist coverage is California. Under the California statute, recovery is reduced by the amount the claimant is entitled to receive as workers' compensation.  

Although, prior to a 1961 amendment, no provision for such a deduction appeared in the statute, the Attorney General of California nevertheless upheld the validity of such a provision, commonly used by California liability insurers.

Other jurisdictions with statutes similar to those of New York and California (prior to the 1961 amendment), where there is no express statutory authority, have not allowed the deduction. In *Standard Accident Ins. Co. v. Gavin*, a Florida appellate court was faced with the question of whether an insurer could provide for a workers' compensation deduction in an uninsured motorist endorsement required by statute. There was no Florida precedent available and when confronted with the New York Court of Appeals' decision in *Durant*, the court expressly rejected the New York position and stated that because of the established public policy of the state that every insured be entitled to recover as if the offending motorist had maintained a policy of liability insurance, "insurance companies are without power to insert provisions in the policy which would restrict the coverage . . . in a manner contrary to the intent of the statute."

Maryland similarly rejected an attempt to reduce an uninsured motorist claim by the sum recovered as workers' compensation in *Unsatisfied Claim & Judgment Fund Bd. v. Salvo*. The court found that recovery of workers' compensation was not included within the express statutory deductions for amounts received in payment of a judgment, nor was it based on a cause of action for damages arising out of the same accident. It was concluded that, absent express statutory authority, no deduction could be made.

In the absence of express statutory language authorizing reduction of uninsured motorist insurance awards by the amount

follows: "'[B]ut no provision or application of this section shall be construed to limit the liability of the insurance company, insuring motor vehicles, to an employee or other insured under this section who is injured by an uninsured motor vehicle.' It has been said that the amendment "denies the insurer the right to reduce amounts payable under the policy by amounts which its insured can collect from a compensation carrier . . . ." *Note, Uninsured Motorist Coverage in Virginia*, 47 VA. L. REV. 145, 171-72 (1961).

23 *CAL. INS. CODE* § 11580.2 (g) (1).


26 Id. at 232.

of workmen's compensation benefits an injured party receives, conflicting inferences have been drawn as to the power of an administrative agency to order such a reduction. It is submitted that the crux of the problem of whether such a deduction is consistent with, and in furtherance of, uninsured motorist protection depends less upon the cash award obtained from the MVAIC type agency alone than it does upon the equality of the ultimate recovery available to all classes of persons injured by uninsured motorists. Equality of recovery, where workmen's compensation is present, in turn seems largely to depend upon the extent to which the compensation carrier can assert its customary statutory lien upon the injured party's recovery from third parties, and it is to this problem that the inquiry must now turn.

Subrogation Rights of the Workmen's Compensation Carrier Against MVAIC

Where an employee is injured by an insured tort-feasor, the tort-feasor's liability insurer must respect the compensation carrier's subrogation rights, and the final recovery of the employee from the tort-feasor's insurer will be reduced by the amount the compensation carrier has paid him, less reasonable attorney's fees, if such were incurred. But, where the employee is the victim of an uninsured motorist and seeks recovery from the insurer under an MVAIC Endorsement, a question arises as to the right of the compensation carrier to assert its statutory lien on the MVAIC award. In fact, the MVAIC Endorsement contains a provision purporting to prevent any recovery from inuring to the benefit of the workmen's compensation carrier. However, in Durant, the appellate division ignored this provision and assumed the existence of such a lien upon the proceeds of an "insured" person's recovery. Unfortunately, this issue was not discussed by the Court of Appeals. No case has been found in New York since the enactment of MVAIC deciding the precise question of whether a workmen's compensation carrier can assert a statutory lien on recovery under an Endorsement. The case of Commissioners of State Insurance Fund v. Miller, decided before the enactment of the MVAIC law, held that the workmen's compensation carrier has no statutory lien upon the recovery of an employee

28 N.Y. WORKMEN'S COMP. LAW § 29 (1).
29 Endorsement, Exclusions, provides: "This endorsement does not apply . . . (c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any . . . organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law."
30 4 App. Div. 2d 481, 166 N.Y.S.2d 777 (1st Dep't 1957).
under his own bargained-for uninsured motorist endorsement. In that case, the employee had claimed against his own liability insurer under the uninsured driver provision of his own policy for which he had paid an additional premium. The insurance company paid the award and the workmen's compensation carrier asserted a lien on the proceeds under Section 29 of the New York Workmen's Compensation Law. Rejecting the carrier's contention that the lien could not be affected by the provisions of the insurance contract, the court found that recovery under an uninsured motorist endorsement was not a source contemplated by the workmen's compensation law as subject to the statutory lien. Although the statute provided that an employee injured by the negligence of another may pursue his remedies against the tort-feasor, with the compensation carrier being afforded a lien on the proceeds, here the employee had not pursued his remedy. Rather, the payment he had received was from his own insurer.

The court also discarded the argument that the employee's insurer had agreed to stand in place of the tort-feasor, maintaining that the insurer "cannot be deemed the alter ego of the tort-feasor. It does not insure the tort-feasor against liability; it insures its policyholder against the risk of inadequate compensation . . . ." The insurer's liability to the employee is contractual, based on the contingency of a third party's tort liability, and was not meant to supplement the compensation carrier's statutory lien. Nor was the compensation carrier intended to become a third-party beneficiary of the contract.

Since Miller was decided prior to the enactment of the MVAIC program, the factual context there might well be distinguished from a proceeding under today's Endorsement. There is some indication that the legislature intended that MVAIC stand in the shoes of the uninsured tort-feasor. Furthermore, the contractual nature of the insurance coverage in the Miller case is not quite paralleled under the Endorsement. There, the insured was free to choose whether to provide his own uninsured motorist protection by negotiating a contract with his insurer and paying an extra premium. Today, although the "insured" pays for his Endorsement, the payment is not voluntary, but rather part of a compulsory scheme. "The endorsement is not a private contract, fully negotiated by carrier and insured. . . ."

31 Id. at 482, 166 N.Y.S.2d at 779.
Thus, the *Miller* rationale need not prevent the imposition of a workmen's compensation lien upon Endorsement recovery.

However, the *Miller* position was applied by the high court of Virginia in *Horne v. Superior Life Ins. Co.*, a decision under the Virginia uninsured motorist statute. There, the court held that the right of subrogation against "any other party" provided by the workmen's compensation statute did not include rights against the insurer under a required uninsured motorist endorsement. It should be noted that the insurance policies in both *Miller* and *Horne* contained a clause identical to the one found in the MVAIC Endorsement providing that an award should not inure to the benefit of a workmen's compensation carrier. In California, such a provision appears in the uninsured motorist statute and in all uninsured motorist endorsements. It has been suggested that, even absent the language in the statute and insurance policies, uninsured motorist recovery would never inure to the benefit of the workmen's compensation carrier. The validity of this viewpoint has never been tested because of the express statutory language.

In New York, the presence in the MVAIC Endorsement of a clause stating that any recovery thereunder shall not inure to the benefit of any workmen's compensation carrier would seem to preclude the imposition of a lien on an "insured" person's award, unless the administrative determination to include such a clause could be shown to be unreasonable. Moreover, although this issue was not squarely decided by the Court of Appeals, its holding in *Durant* allowing the deduction of workmen's compensation from Endorsement awards tends to establish that, at present, a lien could not be placed upon an "insured's" recovery. Not only would the deduction render the lien of little actual value, but imposing the lien in conjunction with the deduction would frustrate the public policy behind the act, i.e., to give the "insured" person the same protection as one injured by an automobile covered by a standard liability policy. The "insured" person's

35 *Id.* at 286, 123 S.E.2d at 404. It should be noted that the plaintiff in *Horne* had already collected under his uninsured motorist endorsement and was claiming workmen's compensation benefits, half of which he had agreed to remit to his endorsement insurer. Rejecting the argument of double recovery made by defendant carrier, the court stated: "[plaintiff's] settlement was with his own insurance carrier, who had contracted to pay him for injuries under the uninsured motorist provision. . . . Under these circumstances, a prosecution of his claim for compensation benefits would not amount to a double recovery. . . ." *Id.* at 288, 123 S.E.2d at 405.
36 *Cal. Ins. Code* § 11580.2 (c) (4).
37 See *supra* note 24.
award would first be reduced by the amount of the compensation award, and would further be subject to the carrier's lien, whereas the recovery of a person injured by an insured motor vehicle could only be reduced by the lien of the compensation carrier.

Also, the Durant holding does not touch upon the question of whether the recovery of a workman as a "qualified" person under the MVAIC law is subject to a compensation carrier's lien. It may be argued that, since Miller emphasized the contractual nature of the "insured" person's recovery under an endorsement, the rationale for granting immunity from a statutory lien is not applicable in the case of a "qualified" person whose right to recovery depends solely upon statute. The availability of a statutory lien would seem to depend upon whether an MVAIC award to a "qualified" person is a recovery from a third party within the contemplation of Section 29 of the New York Workmen's Compensation Law.

Although it may be contended that the insurer under the MVAIC Endorsement insures the injured party, not the tortfeasor, and therefore is not the alter ego of the wrongdoer, this argument has less force in the case of a "qualified" person. Since the "qualified" person's remedy is against MVAIC directly under statute and not against the insurer under the Endorsement, his rights are clearly not contractual in nature. The State, through MVAIC, gratuitously provides the "qualified" person with minimum insurance protection where none would ordinarily exist. Hence, MVAIC seems to have been placed in the position of the third-party tort-feasor. In fact, as previously noted, there is language in the legislative history of the original statute to the effect that MVAIC stands in the shoes of the uninsured party. No workmen's compensation lien was provided for in the statute which governs the rights of the "qualified" person, but the legislature might well have assumed the existence of such a lien and deemed it unnecessary to include it in the statute. Thus, it appears that, if confronted with the question of whether a "qualified" person's recovery under the MVAIC statute is subject to the statutory workmen's compensation lien, a court in New York could well be justified in imposing such a lien after payment of attorney's fees, thus treating the "qualified" person as if he had been injured by and recovered from an insured driver. The "qualified" person's ultimate recovery would be reduced and the compensation carrier allowed to recoup most of its loss. However, whether this conclusion will be reached remains an open question.

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39 Supra note 32.
Equality of Recovery?

While it is clear that a workmen's compensation lien is applicable to recovery by an employee from an insured tort-feasor, it appears that such a lien cannot, at present, apply to an "insured" employee's recovery under the Endorsement. In contrast, there appears to be a sound basis for imposing such a lien where the employee recovers from MVAIC as a "qualified" person. Even more force is given to the argument in favor of imposing a lien on the "qualified" person's recovery when it is seen that, assuming the absence of attorney's fees from the picture, such a lien under the existing statutory framework would promote a basic equality of ultimate recovery. The initially larger recovery of the victim

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40 All statements made in the text are illustrated in the charts. Chart A assumes the following: (1) the compensation carrier has paid the injured party $4,000; (2) the most the claimant can recover from parties who are liable, or who have assumed liability for the injury, is $10,000; (3) no attorney's fees are incurred in pursuing the remedy against the insured tort-feasor, the MVAIC Endorsement insurer or MVAIC under the statute. Although assumption (2) will not be valid in many cases where the tort-feasor is insured since other assets may be available, the $10,000 limitation will exist in each case where an "insured" or "qualified" person seeks recovery. Thus, since it is within the $10,000 limitation that the legislature intended MVAIC to operate, equality of recovery must be measured with that limitation present. Also, it is assumed that for a given injury, the workmen's compensation award will be a constant, and that since the compensation board sets attorney's fees under Section 24 of the New York Workmen's Compensation Law, the attorney's fee incurred in obtaining a given award will also be a constant. Thus, the effect of attorney's fees on the compensation award need not be considered for purposes of measuring equality of ultimate recovery for the claimant's injury.

**CHART A**

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(1) Award collectible from insured tort-feasor, under MVAIC Endorsement, or under MVAIC statute before exclusion or limitation.

(2) Amount deducted under Endorsement exclusion of workmen's compensation benefits.
of the driver insured by a standard liability policy and the "qualified" person under MVAIC, as compared to the "insured" person's recovery under the Endorsement, is offset by the statutory lien of the workmen's compensation carrier, while the absence of that lien on the "insured's" award counterbalances the initial reduction of his award, placing him in an equal position with the other two classes of claimants. However, were the carrier's lien imposed upon the "insured's" recovery at the same time it is subject to a workmen's compensation deduction, the "insured" person's retained cash award would be substantially smaller than he would receive were the tort-feasor insured by a standard liability policy. At this point, it is obvious that if the workmen's compensation lien were held inapplicable to the "qualified" person's recovery, he would be in a far superior position, receiving both the MVAIC and workmen's compensation awards without any offsetting of one by the other.

To the extent that the MVAIC Endorsement provision authorizing reduction of all awards by the amounts of workmen's compensation paid the "insured" offsets the lack of a workmen's compensation lien on Endorsement recovery under existing law, it promotes the legislative purpose of placing a person injured by an uninsured motorist in as good a position as a person injured by a motorist insured by a standard liability insurance policy. Thus, it may be concluded that the deduction has "a rational basis" and is a valid exercise of administrative power by MVAIC, even absent express legislative authorization for it. However, it is submitted that the deduction of workmen's compensation benefits as a means of equalizing recovery among "uninsured" persons, "qualified" persons and persons injured by insured motorists is an imperfect device at best, and fails to solve several problems.

The first of these problems is raised by the effect of attorney's fees upon ultimate recovery by the injured party. It is assumed that a one-third contingent fee will be deemed a reasonable fee for pursuing the remedy against either the insured tort-feasor,

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(3) Initial cash award from insured tort-feasor, under MVAIC Endorsement, or under MVAIC statute.
(4) Amount subject to statutory workmen's compensation carrier's lien. N.Y. WORKMEN'S COMP. LAW § 29 (1).
(5) Incremental recovery obtained (after imposition of carrier's lien where applicable).
(6) Workmen's compensation award.
(7) Recovery retained by claimant as compensation for his injuries after all deductions and limitations.

41 Chart A, supra note 40. Compare cols. (A), (B) & (D).
42 Id. Compare cols. (A) & (C).
43 Id. Col. (E).
the Endorsement insurer, or MVAIC under the statute. It is submitted that the existence of this fee and its varied effect on recoveries from a tort-feasor's liability insurer, under MVAIC as an "insured" person or as a "qualified" person, effectively eliminates the equality of ultimate recovery among the several classes of claimants.44

44 Chart B assumes facts similar to Chart A, i.e., a workmen's compensation award of $4,000 and a $10,000 limitation on other recovery for the injury. However, it is here assumed that an attorney's services are required to pursue the claimant's remedy against the insured tort-feasor, the MVAIC Endorsement insurer or MVAIC under statute. For purposes of measuring equality of ultimate recovery under the present MVAIC program it is assumed that a reasonable attorney's fee will be set at one-third of the proceeds received from the insured tort-feasor, the MVAIC Endorsement insurer, or MVAIC itself. As in Chart A, supra note 40, it will be unnecessary to consider the effect of the attorney's fee incurred in obtaining the compensation award.

**CHART B**

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<th>(C) &quot;insured&quot; person w/ lien &amp; deduction</th>
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* Rounded to the nearest dollar.

(1) Award collectible from insured tort-feasor, under MVAIC Endorsement, or under MVAIC statute before exclusion or limitation.
(2) Amount deducted under Endorsement exclusion of workmen's compensation benefits.
(3) Initial cash award from insured tort-feasor, under MVAIC Endorsement, or under MVAIC statute.
(4) Attorney's one-third contingent fee—deducted from (3).
(5) Initial recovery after attorney's fee.
(6) Amount subject to statutory workmen's compensation carrier's lien. N.Y. Workmen's Comp. Law § 29 (1).
(7) Incremental recovery obtained from insured tort-feasor; MVAIC insurer; or under MVAIC statute (after imposition of carrier's lien where applicable).
(8) Workmen's compensation award.
(9) Recovery retained by claimant as compensation for his injuries after all deductions and limitations.
Here, the fact that the workmen's compensation lien is asserted only after a deduction of attorney's fees proves an advantage to the lawyer whose client is either the victim of an insured motorist or a "qualified" person under the MVAIC statute. Where the claimant is an "insured" person, the initial recovery under the Endorsement is first reduced by the amounts paid or payable under workmen's compensation insurance, thus leaving a much smaller sum from which the attorney can deduct his one-third fee. Interestingly, this ultimately allows the "insured" person to retain a substantially greater cash amount than the other two classes of claimants. However, were the carrier's lien imposed upon the "insured" person's award in conjunction with the Endorsement deduction, that class would recover substantially less than the other two classes of claimants, it being economically unfeasible for the "insured" to pursue his Endorsement remedy. If the "qualified" person's recovery were held not subject to the workmen's compensation lien, that class of persons would still retain a far greater recovery than would the victim of a motorist insured by a standard automobile liability insurance policy or an "insured" person under the Endorsement.

It should be noted that a point will be reached where it becomes unprofitable for a claimant to pursue his remedy against an insured tort-feasor, the Endorsement insurer, or under the MVAIC statute. As the award of compensation benefits approaches equality with the recovery received from the tort-feasor, the Endorsement insurer, or MVAIC, after deduction of the attorney's fee, the incremental income the claimant would receive

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46 N.Y. Workmen's Comp. Law § 29 (1).
46 Id. supra note 44. Compare cols. (A), (B) & (D).
47 Id. Compare cols. (A), (C) & (D).
48 Id. Compare cols. (A), (B) & (E).
49 The columns and lines in Chart C signify the same categories as in Chart B, supra note 44. This chart compares the differences in incremental recovery where attorney's fees are incurred as the workmen's compensation award approaches equality with the sums recovered from the tort-feasor, the Endorsement insurer, or from MVAIC, after deduction of reasonable attorney's fees. The examples used are workmen's compensation awards of five, six and eight thousand dollars.
However, given the present MVAIC practice of deducting workmen's compensation benefits and prohibiting the

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<th>(A) victim of insured motorist</th>
<th>(B) &quot;insured&quot; person w/o lien</th>
<th>(C) &quot;insured&quot; person w/lien &amp; deduction</th>
<th>(D) &quot;qualified&quot; person w/lien</th>
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*Rounded to the nearest dollar.

50 Chart C, supra note 49. Compare cols. (A), (B), (C) & (D), line 7.
carrier's lien, the incremental income of the "insured" person diminishes at a much lower rate than it does for the two classes of claimants.52 This is because the attorney takes his fee from the smaller initial recovery by the "insured" as compared to a victim of an insured motorist or a "qualified" person whose MVAIC recovery is subject to the carrier's lien.53 Thus, the "insured" is able to secure a greater incremental recovery than the other classes of claimants, and his remedy under the Endorsement remains profitable at higher rates of workmen's compensation awards, where the remedy of the victim of an insured motorist or "qualified" person has ceased to be profitable.54 Also, it can be seen that were the "insured" person's recovery subjected to the carrier's lien at the same time the compensation deduction is made, that person's remedy would become unprofitable long before that of the other classes of claimants.55 Finally, if the "qualified" person's MVAIC award were held not subject to the statutory lien, the incremental income received would not diminish, resulting in greater ultimate recovery as the workmen's compensation award increases.56

Another significant reason why the present solution to the problem of equality of recovery under the MVAIC program is unsatisfactory is that the system places the burden of reimbursing the employee injured by an uninsured motorist largely on the workmen's compensation carrier while it relieves the insurer under the Endorsement of much of the burden of protecting the "insured" employee who is the victim of an uninsured driver. "Insured" persons undoubtedly comprise the largest class of persons injured by uninsured motorists. In each case involving an "insured" person, the insurer is allowed by the Endorsement to reduce its loss by the amount of workmen's compensation payments that an "insured" party receives. In contrast, the compensation carrier is, due to the absence of its statutory lien, unable to recoup its loss as it would have where the employee was injured by an insured motorist and probably where he recovers as a "qualified" person.

Is the burden of compulsory uninsured motorist protection falling on the proper party? The MVAIC program seems to have been designed to bear the risk of the losses caused by uninsured motorists. That the workmen's compensation carrier comes to

52 Id. Compare line 7 of col. (A) with line 7 of cols. (B) & (D).
53 Id. Compare lines 3 & 4 of cols. (A), (B) & (D).
54 Id. Compare lines 7 & 9 of cols. (A), (B) & (D) at the $8,000 level.
55 Id. Compare col. (C), line 7 with cols. (A) & (D), line 7. See also Chart B, supra note 44, col. (C).
56 Id. Compare line 9 of cols. (A), (B) & (E).
bear this risk seems inconsistent with the legislative scheme of MVAIC. The New York automobile liability insurers, as compulsory members of MVAIC,⁵⁶ are part of the legislative attempt to protect the innocent victims of the uninsured motorist, and it is they who are paid a premium for assuming the risk of the "insured" person's injury by an uninsured driver. Payment of that premium is far more reflective of the risk of injury by an uninsured driver than is payment of the premium by the employer to the workmen's compensation carrier. Also, it is to the insurer's advantage to participate in the MVAIC program, since a highly possible alternative to this program would be public financing of all uninsured automobile negligence insurance. Therefore, it would seem that the present system has given rise to a basic inequity by virtue of the fact that the burden of protecting victims of uninsured motorists has, whenever workmen's compensation covers the accident, been shifted from the insurance companies who are members of MVAIC to the workmen's compensation carriers.

**Toward an Equitable Solution**

It might be contended that the adverse effect of the attorney's contingent fee upon equality of recovery under the MVAIC program can be eliminated by a statutory adjustment of attorneys' fees. This proposal, however, is subject to severe criticism since it would deprive the attorney of what has been considered reasonable compensation for his services. Also, it would do nothing to eliminate the inequitable burden presently placed on the workmen's compensation carrier. An alternative solution is to graduate the level of attorneys' fees where the client is an "insured." Although this would remove the discrepancy between his recovery and that of the other two classes of claimants, such a remedy is even more objectionable than the first. It would mean a reduction of the injured person's recovery without alleviating the burden placed on the compensation carrier by the lack of its statutory lien. The only parties who would benefit from this proposal would be the attorneys whose clients are "insured" persons.

It is urged that the means of achieving basic equality of recovery, eliminating the adverse effect of attorneys' fees and placing the burden of uninsured motorist protection where the legislature intended it to fall are: (1) eliminating those provisions of the Endorsement which authorize deduction of workmen's compensation benefits and prohibit an Endorsement award from being subject to a statutory workmen's compensation lien, and (2) imposing the workmen's compensation lien on the MVAIC

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⁵⁶ N.Y. Ins. Law § 602.
awards to both "insured" and "qualified" persons.\textsuperscript{57} Eliminating the deduction and anti-lien provisions of the Endorsement and imposing the statutory lien on the "insured" person's recovery would place the "insured" in exactly the same position he would have been in had he been injured by an insured motorist. No deduction for workmen's compensation payments would be made. Thus, the attorney would take his fee out of the standard recovery, as is the case where his client is a "qualified" person or the victim of an insured motorist covered by a standard automobile liability insurance policy. The insurer, under the

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
& \textbf{(A)} & \textbf{(B)} & \textbf{(C)} \\
\hline
\textit{victim of} & \textit{"insured"} & \textit{"qualified"} & \\
\textit{insured} & \textit{person} & \textit{person} & \\
\textit{motorist} & & & \\
\hline
(1) & 10,000 & 10,000 & 10,000 \\
(2) & none & none & none \\
(3) & 10,000 & 10,000 & 10,000 \\
(4) & (3,333)* & (3,333)* & (3,333)* \\
(5) & 6,667 & 6,667 & 6,667 \\
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(7) & 2,667 & 2,667 & 2,667 \\
(8) & 4,000 & 4,000 & 4,000 \\
(9) & 6,667 & 6,667 & 6,667 \\
(10) & 10,000 & 10,000 & 10,000 \\
\hline
\end{tabular}
\caption{CHART D}
\end{table}

* Rounded to the nearest dollar.

\textsuperscript{57} Chart D assumes the same facts as did Chart B, \textit{supra} note 44.

Under the proposed solution to equality of recovery under the MVAIC program the results would be the following:

1. Award collectible from insured tort-feasor, under MVAIC Endorsement, or under MVAIC statute before exclusion or limitation.
2. Amount deducted under Endorsement exclusion of workmen's compensation benefits.
3. Initial cash award from insured tort-feasor, MVAIC Endorsement insurer, or MVAIC.
4. Attorney's one-third contingent fee—deducted from (3).
5. Initial recovery after attorney's fees.
6. Amount subject to statutory workmen's compensation carrier's lien. N.Y. WORKMEN'S COMP. LAW § 29 (1).
7. Incremental recovery from insured tort-feasor, MVAIC insurer, or MVAIC.
8. Workmen's compensation award.
9. Recovery retained by claimant as compensation for his injuries after all deductions and limitations.
10. Recovery retained if no attorney's fees incurred.
Endorsement, would not be able to reduce its loss by the amount paid as workmen's compensation, thus bearing the risk the member insurers of MVAIC were intended to bear, and the removal of the anti-lien provision and imposition of the statutory workmen's compensation lien would enable the compensation carrier to recoup its loss to the same extent it would where the employee was injured by an insured motorist. Also, imposition of the lien on the "qualified" person's award would insure treatment of that party as if he had been injured by an insured motorist. Here too, the insurer under the Endorsement, not the compensation carrier, would bear the risk of claims arising out of accidents caused by uninsured motorists. Thus, there would be basic equality of recovery and elimination of the undesirable effect of attorneys' fees while the risk of accidents caused by uninsured motorists in New York would fall squarely upon MVAIC and not upon the workmen's compensation carriers.58

One part of this proposed solution could be implemented by the courts alone. When a New York court is confronted with the question of whether a "qualified" person's MVAIC award is subject to the statutory workmen's compensation lien, an affirmative answer should be given. However, any attempt to judicially implement the rest of the proposed solution would meet with several obstacles. It could be argued that the Miller rationale prevents the compensation carrier's lien from attaching to an "insured" person's award under the Endorsement. As has been pointed out, this obstacle is apparently surmountable since the "contractual immunity" argument appears to be of doubtful validity in the context of the present MVAIC program. A second obstacle which would have to be faced is the Durant decision holding the Endorsement's deduction provision valid. This provision itself is inconsistent with a statutory workmen's compensation lien since it would mean that the lien, if imposed, would only serve to further reduce the "insured" person's ultimate recovery, thus frustrating the purpose of the MVAIC program. Therefore, this decision would discourage a court which desired to impose the

58 It should be noted that both the Miller and Horne courts stated that in case of any action against the uninsured tort-feasor, the subrogation rights of the compensation carrier are superior to those of the insurer under the uninsured motorist endorsement. Assuming that this is true under today's MVAIC program, it does little to relieve the burden placed upon the carrier by the present system. Judgments against uninsured motorists will most often be worthless since the tort-feasor is either financially irresponsible or unknown. Even if the tort-feasor were to have some assets, it is doubtful that the compensation carrier would be able to recoup all its loss. Thus, the MVAIC insurer is in the favored position of recouping nearly all his loss immediately, while the compensation carrier is left to pursue what is likely to be a futile remedy.
lien and eliminate the deduction. Finally, the fact that there is an Endorsement provision purporting to preclude a compensation carrier’s lien would seem to foreclose the possibility of a court fully implementing the suggested solution on its own. However, a court, if confronted with a proper case, could suggest to MVAIC and to the legislature that the needed changes be made. Were MVAIC to change its policy in drafting the Endorsement, the inequities of the present system would be removed. But considering that MVAIC is an insurance-oriented organization and might be reluctant to burden itself any more than it presently is, it may well be that the legislature will have to act to eliminate the workmen’s compensation deduction and anti-lien provisions of the MVAIC Endorsement, and possibly codify lien provisions into the New York Workmen’s Compensation or MVAIC laws.

**Conclusion**

The New York Legislature has chosen MVAIC as the proper vehicle to develop a system to supplement the compulsory insurance laws by protecting the innocent victims of uninsured motorists. The system is supported by payments made to MVAIC member insurance companies by insured New York drivers, but its protection extends to the general citizenry of the State. Alternatively, the legislature could have discharged its obligation to protect its citizens by levying a uniform tax upon the population. However, having established MVAIC, it should be its aim to make its operation as effective and equitable as possible. The MVAIC attempt to equalize recovery has led to inequities with respect to attorneys’ fees and workmen’s compensation insurance carriers. If the MVAIC Endorsement program is to function in an acceptable manner, these inequities must be eliminated. The member-insurers must assume the burdens properly imposed by such a system if MVAIC is to continue as an acceptable vehicle by which New York State seeks to protect its citizens from uninsured motorists.