The Problem of Application of the Fault Principle to Automobile Accidents

S. Prakash Sinha
THE PROBLEM OF APPLICATION OF THE FAULT PRINCIPLE TO AUTOMOBILE ACCIDENTS*

S. PRAKASH SINHA†

THIS ARTICLE is an attempt to study the role of the fault principle in the development of legal thought on civil liability. It examines the operation of the fault system in meeting the current problem of automobile-accident injury and summarizes the alternative solutions suggested to resolve the present difficulties.

I. FAULT PRINCIPLE IN THE DEVELOPMENT OF LEGAL THOUGHT ON CIVIL LIABILITY

The origins of tort liability in Anglo-American jurisprudence are found in the primitive Germanic law. This law corresponded to the characteristics of its culture, and consequently was dominated by superstition and irrationality. Therefore it is no surprise that the ideas of transgression of ceremonial observances, propitiation of deities by gifts and sacrifices, litigation decision by deity or chance as, for example, through engaging in formal combat or pollution by contact of such objects as blood or corpse, became essential elements of the emerging dogma.¹ When a visible source of the evil result appeared, superstition guided an instinctive impulse to visit it with vengeance and liability for the result was accordingly determined. Thus, the doer of a deed was liable because he was the doer even though he did it inadvertently; the owner of a harm-producing instrument was liable because he was its owner even though it had been stolen; the employer was liable for his workman’s death because his business had been the occasion of the evil even though the death was accidental; the oath-helper was liable because he swore in support of a guilty party’s oath even though he did so in good faith; the judge was liable for a wrong judgment even though given in good faith; the owner of an animal was liable because he was the owner; and the master of

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a slave was liable because he was the master. Nothing was an accident. Something or someone was responsible for an evil result, however limited the causal connection might have been. Similarly, no liability attached for an attempt to do an evil since there was no visible evil result, nor was there liability for merely instigating an evil deed since the prime actor was the visible source.²

The principal sources of harm, in this period, were personal deed, animal, inanimate thing, and servant or slave. With respect to harm from personal deed, the primitive form of absolute liability became comparatively obsolete as time passed.³ As superstition declined, a notion of misadventure grew. Consequently, although strict law required punishment, an appeal made to the king or the lord for pardon on the basis of certain facts, could result in release from the death penalty or blood feud.⁴ In the earlier days of this defense a fine nevertheless had to be paid.⁵ Later, the misadventurer was required to give notice of the incident immediately after its occurrence under an exculpatory oath affirming its accidental or self-defensive nature.⁶ A similar line of development occurred with respect to liability for harm from animals. While in the doctrine's early stages of evolution, there were a few instances of absolute liability against the owner,⁷ subsequently, the unintentional nature of the deed removed the privilege of the injured party to carry out a blood feud, although the owner of the animal was still monetarily liable.⁸ In later years the owner came to be absolved completely if he made an exculpatory oath⁹ and either surrendered the animal to the injured party for infliction of vengeance (or as compensation)¹⁰ or turned it loose.¹¹ The development with respect to liability for harm from inanimate things was similar to that of personal deed and animals. From its primitive form of strict liability,¹² the doctrine evolved to a pecuniary liability,¹³ which was

². Wigmore, supra note 1, at 317 & nn.2, 6–8, 318 & nn.1–4.
³. Id. at 321 nn.1–3 (instances drawn from early German, Sicilian, and Anglo-Saxon law), 321 n.3 (illustrations drawn from Greek, Roman, and Hebrew writings).
⁴. Id. at 322 & nn.3–6, 323 & nn.1–6, 324 & n.1 (illustrations drawn from early English, French, and Dutch law).
⁵. Id. at 324 & nn.2–4 (illustrations drawn from English, Dutch, and French law).
⁶. Id. at 324–25 & nn.1–2 (illustrations drawn from Dutch, French, and Swedish law).
⁷. Id. at 325 & n.4.
⁸. The formula for computation of this sum varied. See id. at 325–26 & nn.1–9.
⁹. Id. at 327 & nn.1–2, 328 & n.1 (illustrations from Flemish, French, and Salic writings).
¹⁰. Id. at 326 & nn.10–12.
¹². Id. at 328 & n.2.
¹³. Id. at 328.
sometimes accompanied by the surrender of the thing. 14 Later provision was made for complete freedom from liability through surrender, repudiation, or nonuse of the thing. 15 Such liability was sometimes accompanied by an exculpatory oath, 16 which was often conditioned upon a test similar to that of due care. 17 With respect to harm done by a slave or servant, the master was initially held absolutely liable. 18 Later, he could avoid liability by surrendering the servant to the court, although at first he still paid compensation and thereby avoided the blood feud. 19 In time, however, the value of the surrendered slave was allowed to be set off and, eventually, complete exoneration could be obtained by surrender 20 accompanied by an exculpatory oath. 21 Generally speaking, the master's control over the harm done, or his consent to it, had some effect on his liability, and absence of such control or consent sometimes relieved him of responsibility. 22

The principles of tort liability evolved during the period from the 14th to the middle of the 19th century with fault gradually becoming the central element of liability. 23 While only a crude distinction was made between willful acts and acts of misadventure at the time of the Norman Conquest, by the middle of the 19th century distinctions were made among acts done willfully, done at peril, and done negligently. 24 With respect to personal deed, liability was determined without regard to personal blameworthiness until the end of the 15th century. However, since the early 16th century, the defendant was able to appeal to some standard of blame or fault. Thus, given his voluntary act, he could still excuse himself on the basis of inevitable necessity or non potuit aliter facere (that the act had been without

15. Wigmore, supra note 1, at 328 & nn.5-7, 329 & nn.1-2.
16. Id. at 329 & n.4.
17. Id. at 329 & nn.5-9, 330 & n.1.
18. Id. at 330 & n.3.
19. Id. at 330-31 & nn.1-2.
20. Id. at 331 & nn.3-6.
21. Id. at 331 & n.7, 332 & n.1.
22. Id. at 332-35.
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It was not until the 19th century that in England and the United States it seemed well settled that due care on the part of the defendant might be a good defense. Self-defense earned pardon in the 13th and 14th centuries, and operated as a complete defense since the year 1400. The primitive notions of popular superstitions governed the liability of a lunatic until early in the 17th century when his liability became equivalent to that of an ordinary person. Similarly, the infant was not liable in trespass until 1457, but by the 17th century came to be held responsible on the ground that infancy was immaterial for civil liability.

An examination of legal history from the 14th through the 17th centuries suggests that for the first 100 years the master was held absolutely liable for harm done by his servants or other agents. The command or consent test, noted above, was first used in cases of morally reprehensible acts, and, by the early 16th century, became a general rule in trespass. In the 16th and 17th centuries the test evolved into the doctrine of particular command, which was related to the wrongful act itself. Later, in the 17th and the 18th centuries, the demands of new industry and commerce produced a distinction between servants and agents and, correspondingly, there appeared a gradual modification of the particular command test to the rule of implied command from a general authority.


28. Wigmore, supra note 1, at 445, 446 & n.1.

29. Id. at 446 & n.4.


31. Wigmore, supra note 1, at 447-48 & n.7.

32. Id. at 448 & n.8.


of the 18th and into the 19th century, the command test was replaced by the modern test of scope of employment.\textsuperscript{35} In the area of harm from animals, at the beginning of the 14th century liability for harm from biting or otherwise wounding was based on the owner’s knowledge of the animal’s dangerous propensities, \textit{i.e. scienter}, or on his incitement of the animal to trespass.\textsuperscript{36} This basis prevailed until the beginning of the 18th century,\textsuperscript{37} when it was modified to the effect that \textit{scienter} was not required as to harm done by naturally mischievous animals.\textsuperscript{38} For land trespass of animals, strict liability generally continued to be imposed,\textsuperscript{39} although there was no liability for minor trespasses, as for example, snatching a mouthful of grass\textsuperscript{40} or for wandering when driven along the highway lawfully, provided the driver was free from fault and made a fresh pursuit.\textsuperscript{41} Though the latter immunity first prevailed on the basis of the custom to fence,\textsuperscript{42} when the custom finally disappeared,\textsuperscript{43} the defense continued independently of its basis.\textsuperscript{44} Strict liability was imposed for failure to prevent harm from fire until the early 18th century,\textsuperscript{45} when liability was first abolished for certain accidental fires.\textsuperscript{46} Thus, generally speaking, in the 19th century liability came to be determined by the generic test of fault, while strict liability prevailed only for certain activities performed at the actor’s peril.\textsuperscript{47}


\textsuperscript{36} Wigmore, \textit{supra} note 1, at 449 & n.10, 450 & n.1, 451 & n.1.


\textsuperscript{39} Wigmore, \textit{supra} note 1, at 450, 451 & nn.1&2.

\textsuperscript{40} \textit{Id.} at 451 & n.4.

\textsuperscript{41} \textit{Id.} at 451 & n.5.

\textsuperscript{42} See, e.g., Dovaston v. Payne, 126 Eng. Rep. 684 (C.P. 1795), \textit{cited in} Wigmore, \textit{supra} note 1, at 451 & n.6 in addition to other examples.


\textsuperscript{44} Along the lines expressed earlier in Mitten v. Fandrye, 79 Eng. Rep. 1259 (K.B. 1605), \textit{cited in} Wigmore, \textit{supra} note 1, at 452 & n.1.

\textsuperscript{45} Wigmore, \textit{supra} note 1, at 448 & nn.5-7.


\textsuperscript{47} See, e.g., Fletcher v. Rylands, [1866] L.R. 1 Ex. 265, 282.
The original source of the fault principle is probably the principle of *culpa* in the Roman *Lex Acquilia*. Before the Anglo-American law embraced it in the 19th century, it had been accepted as a basis of liability in the uncodified civil law of France, which was restated by Pothier in the 18th century and embodied in the Code of Napoleon in 1804. In England, Austin adopted it in his writings in 1832, in pursuance of the reforms suggested by Bentham. The principle is also linked with the Hegelian philosophy of the concept of man as a morally responsible being. In the common law, the fault principle was applied in trespass on the case and extended to actions in trespass *vi et armis*. Its growth was facilitated by the abolition of the old forms of action in response to the needs of a developing industrial economy, whose growth could not be obstructed by allowing extensive liability to financially hinder entrepreneurs. Thus, the social and economic demands of the industrial revolution generated not only the growth of industry and commerce, but also crystallized the principle of fault for legal liability.

As the 20th century progresses, it is becoming increasingly evident that the social misfortunes of loss, left uncompensated because of the fault principle, exceed the amount of the loss itself. There-
fore, a trend away from the fault system has begun (a) with respect to certain harms for which liability is imposed without reference to fault and (b) in the workings of the fault system itself.

(a) For certain harms, the issue of liability is decided without reference to the fault principle. The most notable example is injury from an object or activity which is unduly dangerous and inappropriate. This principle of strict liability was first enunciated in Rylands v. Fletcher with respect to the "non-natural" use of land. The rationale for the rule has been stated as being either (1) the assurance that the social consequences of uncompensated loss are distributed among the beneficiaries of the loss-causing activity, or (2) the finding that the defendant's conduct contains fault aspects although the unreasonable nature of the risk has been determined by the court instead of a jury, or (3) the belief that the conduct represents a conditional fault in the sense that society will permit the conduct only if the actor will compensate the victims of its consequences.

In jurisdictions where the courts have pretended to reject Rylands v. Fletcher, the same objective is achieved under the rubric of either nuisance or absolute nuisance. Similarly, recovery by an injured workman against his employer is generally based upon a compensation scheme without reference to fault because ordinary negligence law has been recognized as inadequate to meet the "social obligations of modern industry." However, proof of the employer's negligence is still required under the Federal Employers' Liability Act and the Merchant Marine Act (Jones Act).

59. The Restatement of Torts refers to this as the principle of liability for ultra-hazardous activities. Restatement of Torts § 519 (1934).
61. 2 F. Harper & F. James, supra note 56, at 794-95.
64. W. Prosser, supra note 62, at 170.
65. The last two states to accept workmen's compensation were Arkansas and Mississippi in 1940 and 1948, respectively. S. Riesenfeld & R. Maxwell, Modern Social Legislation 135-36 (1950).
68. 46 U.S.C. §§ 861-89 (1964). Both the Jones Act and the Federal Employers' Liability Act are regarded as obsolete and uncivilized by a significant segment of judicial sentiment. See, e.g., McAllister v. United States, 348 U.S. 19, 23-24 (1954) (dissenting opinion). With respect to the Federal Employers' Liability Act, there has been a debate as to whether the Supreme Court has turned it into a system in which liability is only nominally based on fault. See, e.g., Denver & Rio Grande W.R.R. v. United States, 379 U.S. 208, 211 (1965) (Douglas & Harlan, J.J., dissenting);
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By contrast, liability for harm from defective products was originally limited to parties in privity of contract, probably because it was thought that the entrepreneur must be protected from the burden of risk incident to the activities of the Industrial Revolution. However, this privity limitation has gradually disappeared during this century and it is now sufficient that the harm was foreseeable. While proof of the manufacturer's negligence is still required, there seems to be a general tendency among courts to find liability even where the fault principle would not truly apply, although failure of such proof has, in certain cases, resulted in escaping all liability. The objective of fixing responsibility to reduce the hazards of the defective products has also been most effectively attained through contract by extending the scope of the warranty to the ultimate consumer, and not merely to the buyer. Liability for defective products has also been extended to the retailer because he, like the manufacturer, occupies an integral part in the overall producing and marketing structure and should therefore bear a like portion of the liability.

(b) The erosion of the fault system is also evident in the workings of the system itself and is observable by independent analysis of the requirements of a standard of care, scope of duty, the proof of its breach, and causation. With respect to the standard of care, it would appear that allowing a jury determination of a defendant's standard of care tends to improve the chances of plaintiff's recovery. Whereas a specific standard of conduct, worked out in detail by law, tends to restrict liability either by reason of being applied as a maximum standard, rendering someone who has taken the defined pre-

Wilkerson v. McCarthy, 366 U.S. 53, 68 (1949) (Douglas, J., concurring); id. at 74 (Jackson, J., dissenting). As to the practice of the Supreme Court of allowing jury verdicts granting high awards to those protected by the federal statute to stand upon a minimal showing of employer's fault, see De Parcq, The Supreme Court and the Federal Employers' Liability Act, 1956-57 Term, 36 Texas L. Rev. 145 (1957), commented upon in Gee, A Dissenting Postscript or, Notes from Underground, 36 Texas L. Rev. 157 (1957).


70. 2 F. Harper & F. James, supra note 56, at 1535.


73. See, e.g., Ash v. Childs Dining Hall, 231 Mass. 86, 120 N.E. 396 (1918).


cautions beyond negligence, or by being applied as a minimum standard
of plaintiff's conduct and taking the issue of contributory negligence
away from the jury and rendering him negligent for not taking the
defined precautions. 77 The trend away from the application of the
judge-made specific standards has been particularly evident since the
overruling of Baltimore & O.R.R. v. Goodman. 78 Although once
widely sanctioned, 79 a similar trend may be observed with respect to
the use as a defense of specific standards established by customs and
usages of an industry. 80 The plaintiff, however, is still allowed to sug-
gest such customs and usages as an additional source of evidence of
negligence to increase his chances of getting to the jury. 81 Similarly,
a majority of the courts take the position that an unexcused violation
of any applicable statutory standard is negligence per se, while a minor-
ity hold that the violation is only evidence of negligence which the
jury may accept or reject as it sees fit. 82

There has also been an extension of the scope of duty as a result
of a fuller application of the test of foreseeability of harm. An example
of this is seen in requiring the defendant to acquire a special knowl-
dge of implements or techniques he uses in his trade. 83 Further, a
defendant, by putting himself in peril through his negligence, is held
to breach his duty to his rescuer who is injured in doing what is
reasonable to save the defendant, 84 and one is held under a duty to
rescue another in certain circumstances even in absence of his ante-

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77. James, supra note 76, at 375.
(1934). See Hart v. Stence, 219 Iowa 55, 257 N.W. 434 (1934); Hogue v. Akin
Truck Line, 16 So. 2d 66 (La. App. 1944); Moss v. Christensen-Gardner, Inc., 98
Utah 253, 98 P.2d 366 (1940); Morehouse v. City of Everett, 141 Wash. 399, 252 P.
157 (1926); Annot., 97 A.L.R. 546 (1935); Annot., 87 A.L.R. 900, 901 (1933);
Annot., 58 A.L.R. 1493 (1929).
79. See, e.g., Kilbride v. Carbon Dioxide & Magnesia Co., 201 Pa. 552, 51 A. 347
(1902); Lehigh Coal Co. v. Hayes, 128 Pa. 294, 18 A. 387 (1889); Schell v. Miller
80. See Polk v. Los Angeles, 26 Cal. 2d 519, 159 P.2d 931 (1945); Cassanova v.
Paramount-Richards Theatres, 204 La. 813, 16 So. 2d 444 (1943); Lavelle v. Grace,
42 A.2d 329 (1945). See also Zesch v. Abrasive Co., 353 Mo. 558, 183 S.W.2d 140
(1944). This view is of little significance where Workmen's Compensation statutes
have been enacted.
81. Higgins v. Conn. Light & Power Co., 129 Conn. 606, 30 A.2d 388 (1943);
Smith v. Thompson, 349 Mo. 396, 161 S.W.2d 232 (1942); cases cited note 80 supra.
See also Morris, Custom and Negligence, 42 COLUM. L. REV. 1147 (1942).
(1940); Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944),
aff'd per curiam, 294 N.Y. 680, 60 N.E.2d 839 (1945).
cedent negligence. Since an actor is held to anticipate all that is reasonably foreseeable, including negligent or criminal acts of third persons, the last wrongdoer is not the only one held responsible. The defendant may also have a duty to protect the plaintiff from foreseeable acts of third persons for whose conduct the defendant is not otherwise responsible.

With respect to the proof necessary to establish negligence, the trend away from fault can be observed in the way courts administer the requirements of such proof, particularly through the doctrine of

85. Szabo v. Pennsylvania R.R., 132 N.J.L. 331, 40 A.2d 562 (1945). In L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942), it was stated that there may be a legal obligation to take positive or affirmative steps to effect the rescue of a person who is helpless and in a situation of peril, when the one proceeded against is a master or an invitor or when the injury resulted from use of an instrumentality under the control of the defendant. Such an obligation may exist although the accident or original injury was caused by the negligence of the plaintiff or through that of a third person and without any fault on the part of the defendant. Other relationships may impose a like obligation.

Id. at 95, 40 N.E.2d at 337. This type of special relationship is found in the duty of a ship's captain to make all reasonable efforts to rescue a seaman who falls overboard. See Harris v. Pennsylvania R.R., 50 F.2d 866 (4th Cir. 1931). With respect to employers where employees suffer an injury during the course of employment, see Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821 (1948); Carey v. Davis, 190 Iowa 720, 180 N.W. 889 (1921); Rival v. Atchison, T. & S.F. Ry., 62 N.M. 159, 306 P.2d 648 (1957). Between carrier and passenger, see Yu v. New York, N.H. & H.R.R., 145 Conn. 451, 144 A.2d 56 (1958); Middleton v. Whitrudge, 213 N.Y. 499, 108 N.E. 192 (1915). Where one has taken custody of another, or otherwise becomes responsible for his safety, see Farmer v. State, 224 Miss. 96, 79 So. 2d 528 (1955) (a jailor is responsible for the safety of his prisoner). Between husband and wife and parent and child, a duty to aid has been recognized by the criminal law. See State v. Zobel, 81 S.D. 260, 134 N.W.2d 101, cert. denied, 382 U.S. 853 (1965).


87. See In re Sabbatino & Co., 150 F.2d 101 (2d Cir. 1945); Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943); Rose v. City of Chicago, 317 Ill. App. 1, 45 N.E.2d 717 (1942); Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943). The duty to control the conduct of a third person may arise (i) where, due to their special relationship, the defendant is required to take reasonable care to protect the plaintiff from the conduct of third persons, e.g., the duty of a common carrier to its passengers, Kinsey v. Hudson & Manhattan R.R., 130 N.J.L. 285, 32 A.2d 497 (1943); or innkeeper to his guest; or owners of premises who hold them open to invitees, Peck v. Gerber, 154 Or. 126, 59 P.2d 675 (1936); or employers to their employees in the course of employment, or those who have custody of prisoners, or children; (ii) where due to the defendant's special relationship with the third person, he has a power of control over that person's actions, as in the relation of parent and child, Linder v. Bidner, 50 Misc. 2d 320, 270 N.Y.S.2d 427 (Sup. Ct. 1966); or the duty of an employer to prevent his employees from throwing objects from his factory windows, Hogle v. H.H. Franklin Mfg. Co., 199 N.Y. 388, 92 N.E. 794 (1910); or the duty of the owner of an automobile who is riding in it to control the conduct of the driver; or the duty of those who have taken charge of dangerous lunatics, persons with contagious diseases, and even criminals; or even the duty of the owner of land to use reasonable care to prevent trespassers upon it from engaging in conduct dangerous to those outside of it, De Ryss v. New York Cent. R.R., 275 N.Y. 85, 9 N.E.2d 788 (1937); (iii) where the presence establishes a duty to control, e.g., parents responsible for their children. In this regard, see Freer, Parental Liability for Torts of Children, 53 Ky. L.J. 254 (1965); Note, The New Jersey Parental Liability Statute, 39 Temp. L.Q. 177 (1966).
res ipsa loquitur.  

The doctrine is invoked where an accident would not ordinarily occur without someone's negligence. Although not always strictly applied, the requirement that the injury-producing agency or instrumentality be under the exclusive control of the defendant is a rational basis for finding that the negligence is that of the defendant and not of someone else. Sometimes, however, the matter of probability has been overlooked or glossed over in the application of the doctrine.

Likewise, with respect to causation, much latitude is granted in evaluating the sufficiency of the evidence where the proof is circumstantial. Several states have solved the problem by adopting comparative negligence statutes. In addition, contributory negligence, itself a bar to recovery under the fault principle, is often treated by juries as a form of comparative negligence, despite the court's instructions. In the absence of comparative negligence statutes, the defense of contributory negligence is often made unavailable in certain situations, such as willful and wanton misconduct or absolute nuisance created intentionally, but with no intent to cause injury. Furthermore, the defense of contributory negligence is often circumvented in a similar manner by the doctrine of the last clear chance, or it may be unavailable under guest statutes. Moreover, in keeping with the increased recognition of the social problems created by the uncompensated loss, there has also been an attempt to place liability

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93. James, supra note 76, at 393.
96. See, e.g., Hoffman v. City of Bristol, 113 Conn. 386, 155 A. 499 (1931).
97. See generally James, supra note 94.
on financially responsible parties via such principles as vicarious responsibility or respondeat superior.\textsuperscript{99}

Thus, while the 19th century marked the development of the fault principle, the emerging trend seems to be toward its erosion in assessing tort liability. While liability still rests largely upon the existence of negligence or fault, other bases have been established in special circumstances. Liability has become contingent upon whether a person ought to be responsible for the harm produced by his acts and, in addition, a variety of principles have emerged to assign liability in situations where it is believed that liability ought to be imposed even where the fault principle would not permit it. The bases of liability have been expanded and new rules of liability have been created.\textsuperscript{100}

\section*{II. Shortcomings of the Fault System with Particular Reference to Automobile-Accident Injury}

The existing system of fault liability suffers from certain shortcomings which bring the system in question when it attempts to meet the current problem of automobile accident injury. These shortcomings include:

\begin{itemize}
    \item 1. The limited use made of the tort system
    \item 2. The inadequacy of compensation
    \item 3. The maldistribution of compensation
    \item 4. The inefficacy of deterrence
    \item 5. The fault principle is a psychologically irrational concept
    \item 6. The fallacy of satisfying the community's moral standards
    \item 7. The inequities of the doctrine of contributory negligence
    \item 8. The problem of the financially irresponsible or immune defendant
    \item 9. The delay in settlement
    \item 10. The unsatisfactory evidentiary requirements
    \item 11. The expense of litigation
\end{itemize}


1. The limited use made of the tort system

The tort liability system yields only 6 percent of the direct benefits received from all principal reparation systems in the United States. In comparison, workmen's compensation accounts for 5 percent, private loss insurance 37 percent, formal sick leave 5 percent, social insurance 19 percent, public aid programs 24 percent, and miscellaneous sources 4 percent.\textsuperscript{101} With respect to automobile injury reparation, the findings of certain recent studies may be summarized as below:

\begin{table}
\centering
\begin{tabular}{lcc}
\hline
\textbf{SOURCE} & \textbf{MICHIGAN STUDY\textsuperscript{102} (1958) (PERCENT)} & \textbf{NEW JERSEY STUDY\textsuperscript{103} (1955) (PERCENT)} \\
\hline
Tort liability (insured and uninsured) & 32.42 & Other party's insurance \\
& & Other party personally \\
& & 2.88 \\
& & Respondent personally \\
& & 24.42 \\
Injured person's own insurance (hospital, medical, burial, automobile, other) & 38 & & 37.07 \\
Miscellaneous (workmen's compensation, social security) & 7 & & 3.21 \\
Total & 100 & & 100.00 \\
\hline
\end{tabular}
\end{table}

These studies indicate that tort liability accounts for only a little more than half of all sources of automobile injury reparation. Only about half of the injured persons receiving compensation receive recovery from tort liability settlements, as is evident from the following table:

\begin{table}
\centering
\begin{tabular}{lcc}
\hline
\textbf{SOURCE} & \textbf{MICHIGAN STUDY\textsuperscript{102} (1958) (PERCENT)} & \textbf{NEW JERSEY STUDY\textsuperscript{103} (1955) (PERCENT)} \\
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Total & 100 & & 100.00 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{101} Conard, Morgan, Pratt, Voltz & Bombaugh, Automobile Accident Costs and Payments 59 (1964) [hereinafter cited as AACP].

\textsuperscript{102} Id. at 63.

TABLE 2
INJURED PERSONS RECEIVING COMPENSATION

<table>
<thead>
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<th>Source</th>
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<th>New Jersey Study(^{105}) (1955) (Percent)</th>
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Thus, only about half of the injured persons receiving compensation resort to tort law, and only slightly more than half of all compensation received by them comes from tort law. Actually, the financial contribution of the non-tort sources may reasonably be surmised as more than half, as is indicated in the studies included above, because the growth has been more rapid in the total social security and health programs than in the tort liability programs, and because future benefits are not fully included in the above studies.\(^{107}\)

Furthermore, of all persons suffering losses, 14 percent hire attorneys, 0.6 percent commence trial, and 0.1 percent appeal to a higher

\(^{104}\) AACP, \textit{supra} note 101, table 4-8 at 146.


\(^{106}\) The total exceeds 100 percent because many persons reported more than one source of reparation.

Even in instances where the victim suffers serious injury, only 49 percent hire attorneys, only 5 percent commence trial, and only 0.5 percent appeal to a higher court. Thus, it is apparent that less than half of them come in contact with the legal system, less than a tenth with the trial process, and less than a hundredth with the appellate process.

2. The inadequacy of compensation

Compensation of the injured person is one of the goals of tort law. However, all significant studies of automobile accident injuries point out the inadequacy of the tort law system in compensating the injured. The Columbia-sponsored Committee to Study Compensation for Automobile Accidents, for example, found in 1932 that an injured person had only about one chance in four of receiving any compensation where there was no insurance. Where payment was received in most cases it usually covered neither the present nor the future economic loss. Less than one-third of the registered automobiles were insured against liability and although some compensation was received in 85 percent of the cases where the injuring party was insured, the payment matched the present economic loss only in three-fourths of the temporary disability cases and often failed to cover the loss in cases resulting in permanent disability or death. This inadequacy of compensation would appear even more glaring if the study had computed and reflected future losses.

A study made by the University of Wisconsin Law School in 1935 found that the injured person had little chance of recovery where the automobile operator was uninsured; and where the operator was insured, the recovery was adequate for slight injuries, but

108. AACP, supra note 101, fig. 4-3 at 155, fig. 7-2 at 241.
109. The injury is considered serious where the victim has either medical expenses in excess of $500, is hospitalized for at least two weeks, suffers a permanent impairment, or dies.
110. AACP, supra note 101, at 184, 241.
111. For an historical discussion on the use of monetary compensation, see W.S. Holdsworth, A History of English Law 51-52 (3d ed. 1923). It has been suggested that there should be a shift in emphasis from compensation to rehabilitation of accident victims. See M. Schulzinger, The Accident Syndrome: The Genesis of Accidental Injury 218 (1956).
113. COLUMBIA STUDY, supra note 112, at 203.
114. Id. at 204.
115. Id.
inadequate for serious injuries.116 Similar findings were obtained in a study conducted by the Yale Law School in 1951 in which it was shown that 70 percent of the victims who had to rely on the uninsured operator for recovery received no compensation, while in 80 percent of the cases involving an insured operator the payment covered the losses.117 A study made by the University of Pennsylvania in 1959-60 found that tort law compensated for only one-half of the victim's tangible loss in 52 percent of the cases, while 35 to 45 percent of the victims remained uncompensated.118 The Columbia University Project for Effective Justice in 1960 studied the problem of compensation for all accidents in New York City, including automobile accidents, and found that approximately 84 percent of all claimants received some payment, but the majority of recoveries were $1,000 or less. Moreover, attorney's fees reduced the amount recovered by 36 percent.119

Finally, the latest quantitative study of the problem at the time of this writing, conducted by the Law School and the Survey Research Center of the University of Michigan and published in 1964, reinforced the earlier research by reporting that only 49 percent of those who sustained injury received some reparation through the tort law process.120 More than half of the serious injury victims received substantially less than their economic loss, or nothing at all;121 and two-thirds of the persons with severe economic losses recovered less than one-fourth of such losses.122 Thus, it would appear that the tort law process has failed to provide adequate compensation for injuries to automobile accident victims.

3. The maldistribution of compensation

Compensation has not only been inadequate, but has also been erratically distributed. Injured persons with small losses tend to recover in full or in excess, while those with large or staggering losses tend to receive either less than their loss or nothing at all. The Columbia Study of 1932 confirmed this observation. Those who suffered the most trivial injuries and needed compensation the least usually received it in full since it was cheaper for the insurance companies

120. AACP, supra note 101, at 139, 147.
121. Id., fig. 5-12 at 178.
122. Id., fig. 5-13 at 179.
to settle than fight small claims, whereas compensation was usually inadequate for larger claims.\textsuperscript{123} The Pennsylvania study of 1959-60 found that the awards were more than double the tangible losses in 33 percent of the cases, more than five times in 18 percent of the cases, and in only 7.3 percent of the cases did they coincide with the actual loss. Again, the payment exceeded the loss where the loss was trivial. For example, in cases of persons suffering a tangible loss of less than $100, 57.3 percent received nothing, 33.1 percent recovered five times their loss or better, 6.4 percent received between two and five times their loss, and 3.2 percent received an award which was less than double the loss. On the other hand, in 13.7 percent of the fatal cases, the survivors received neither award nor benefit from other sources, and in 17.8 percent of such cases the total of award and benefit left the survivor with unreimbursed losses of more than $800.\textsuperscript{124} The Michigan study also found that persons with the least significant losses recovered the largest multiple of offsetting claims, while the recipients of serious losses received the smallest fraction. Thus, 32 percent of the persons in the lowest group of losses (under $1,000) received more than $1\frac{1}{2}$ times their economic loss, whereas only 5 percent of the persons with the highest losses (over $25,000) had such a high ratio.\textsuperscript{125} In the former group, about half of the victims were fully compensated for their economic losses and a third of them recovered substantially more than their losses; while in the latter group virtually no one received full compensation and nearly three-fourths failed to recover even one-fourth of their losses.\textsuperscript{126}

4. The inefficacy of deterrence

It is claimed that tort law offers deterrence to socially undesirable conduct by imposing the burden of liability on those at fault, by depriving them of the right to collect from anyone, and by conferring compensation on those free from fault. Liability is imposed as a sanction to discourage harmful behavior;\textsuperscript{127} but the deterrent poten-
tial of such liability in automobile accident cases is doubtful for three principal reasons.

First, automobile accidents are not usually caused by moral blameworthiness, conscious indifference, or deliberate carelessness.\footnote{128. Bristol, \textit{Medical Aspects of Accident Control}, 107 J.A.M.A. 653, 654 (1936).} If this conclusion is accurate, the threat of liability, aimed at making the driver more careful, would not have the effect of deterring accidents. In fact, a threat of liability may have an opposite effect by increasing excessive nervousness or panic where these are the dominating causes of accidents.\footnote{129. AACP, \textit{supra} note 101, at 89.} Second, in nearly half the cases in which reparation was received by the victims of automobile accidents, lack of fault has not been a pre-requisite to receiving benefits. These benefits have been received from such sources as collision, health, life, and social insurance.\footnote{130. \textit{Id.} at 138–39, 151.} Third, the tortfeasor in an automobile accident is generally insulated from liability through the existence of liability insurance,\footnote{131. Certain writers have argued that the protection which the insured receives through insurance may remove the financial deterrence against negligent acts. McNeely, \textit{Illegality as a Factor in Liability Insurance}, 41 Colum. L. Rev. 26, 31 (1941).} the absence of assets or, if the tortfeasor is a wage-earner, by the ability to file a petition in bankruptcy on the day after an action in negligence is filed.\footnote{132. Bankruptcy Act §§ 17a, 63a(7), 11 U.S.C. §§ 35a, 103a(7) (1964).} Nearly 85 percent of the automobile owners in the United States carry liability insurance;\footnote{133. AACP, \textit{supra} note 101, at 90.} and as the Michigan study indicates, only 3 percent of the defendants pay any part of the settlement from their own pockets.\footnote{134. \textit{Id.}, table 8-17 at 297.} In a third of the cases where a suit is filed and settled, the defendant does not even know whether anything has been paid to the victim or the claimant.\footnote{135. \textit{Id.}, at 302.}
These three factors strongly suggest that tort liability cannot be relied upon as a deterrent to automobile accidents; and the problem ought to be approached with this in mind.

5. The fault principle is a psychologically irrational concept

According to certain observers, the fault principle of tort liability reflects the need for aggressive satisfaction, and is not designed to be a rational allocation of losses. While, as noted earlier, primitive law imposed liability for causation rather than fault, the law in the 19th century moved away from causation to fault as a basis for liability. Some observers view this as a shift from the irrational to the rational, while others find the development devoid of rationality.

Primitive law was unwilling to accept a harm as unintentional, for the primitive animistic mind was concerned with intention and was not disposed to accept the harmful impact of either nature or man as a blameless occurrence, even though the harm was accidental. There was a subconscious guilt for which revenge, feud, and other legal sanctions were imposed without proof of wrongful intent. When fault became the basis of liability, the primitive urge to find a will behind causation still remained, and the actor was presumed guilty until he "be judged utterly without his fault." Since it was apparent that not all causation of harm was another man's wrongful intent, a new basis of liability emerged under the rubric of negligence. This negligence, in psychological terms, suggests at least the actor's subconscious intent, that he should have known the harmfulness of his conduct. Thus, although the standard of conduct was to be conceived objectively, the new negligence retained the implication of blame for subconscious fault. When in the 19th century the courts were faced with the need to encourage enterprise in the wake of the industrial revolution, they resorted to the principle of fault liability; and when a need arose for broadening the bases of liability, it was largely met by insistence upon the fault principle and not by devising non-fault means of loss allocation. Therefore, even where there was no fault in the moral

136. See, e.g., Ehrenzweig, supra note 24.
137. See, e.g., Wigmore, supra note 1.
138. See, e.g., Ehrenzweig, supra note 24, at 859.
140. See, e.g., C. Calisse, A History of Italian Law 227 (1928).
141. Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1618). As Ehrenzweig points out: True, the law came to believe the killer who swore that the deadly blow had been unintentional. But it insisted at least on the payment of a fine. And in cases of "misadventure" though the king waived his wife, and the killer had a "pardon of course," the bot remained payable to the injured. In Chinese law accidental parricide is, or was until recently, a capital crime; and even the Church with her early stress on the actor's motive, while later permitting complete exculpation by the plea of accident, long continued to impose punishment for homicidium casuale.
sense, fictions and presumptions were indulged in to find fault, sometimes called pseudo-fault.142

Such insistence on fault seems to reflect, in psychological terms, the need of the punishing aggressor for satisfaction in aggression against the wrongdoer, and not a rational basis of allocation of losses from the injury. Thus plaintiff’s vindictiveness is served, and since coercion produces feelings of guilt, the guilt of the defendant makes these feelings bearable and legitimizes the plaintiff’s pleasure at his own aggression. The fault concept thus appears to be based on an irrational desire for relief from guilt feelings arising from plaintiff’s coercive aggression; and it is therefore suggested that the consequent chaos of law is only tolerated because of a masochistic tendency of self-punishment.143

6. The fallacy of satisfying the community’s moral standards

The fault system is supposedly designed to satisfy the community’s moral standards by imposing liability on one for his personal moral shortcoming and by protecting those who have been free from it. Consequently, when there is no one at fault it is deemed only fair that the loss lie where it falls.144 This moral argument for the fault system is subject to erosion when applied to automobile accidents in at least three ways.

First, legal fault does not entirely coincide with moral fault. It is not the actor’s personal equation, but an external standard of conduct which determines his fault in law. While it is sometimes contended that by and large the two coincide,145 when the scope of personal blameworthiness is slight in comparison with other accident-causing factors, the two faults would not seem to coincide even remotely.146

Second, liability is imposed under the negligence principle when the actor’s conduct falls below the standard of the reasonable man, irrespective of whether he may have performed to the best of his own abilities. His shortcoming due to awkwardness, low intelligence, poor judgment etc., may explain why his conduct fell below the community standards; but he is still held liable.147 If the negligent actor has

142. For some examples, see A. Ehrenzweig, NEGLIGENCE WITHOUT FAULT (1951).
143. Ehrenzweig, supra note 24, at 869.
144. O.W. Holmes, THE COMMON LAW 94 (M. Howe ed. 1963); Ames, supra note 57, at 100; Smith, TORT AND ABSOLUTE LIABILITY — SUGGESTED CHANGES IN CLASSIFICATION, 30 Harv. L. Rev. 241, 259 (1917); Smith, Lilly & Dowling, Compensation for Automobile Accidents: A Symposium, 32 Colum. L. Rev. 803, 805 (1932).
145. P. Landom, POLLACK’S LAW OF TORTS 8 (14th ed. 1939); Smith, supra note 144, at 254-55.
147. O.W. Holmes, supra note 144, at 107-09; James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1 (1951).
used the best judgment of which he is capable, it would seem that he would not be morally at fault; he may, nevertheless, be at fault in the eyes of the law.

Third, the moral argument also seems to lack merit under the existing system because of the ineffectiveness of the chastisement of the tortfeasor. There are at least two reasons for this ineffectiveness: (1) he may not have any assets which can be reached, or they may otherwise be protected, and (2) he is generally insulated from liability by virtue of liability insurance, which is carried by nearly 85 percent of the automobile owners. The consequences of this insulation are that the supposed moral chastisement of the tortfeasor is rendered ineffective and the burden of loss falls on the "right-doers" and not the wrongdoers.

7. The inequities of the doctrine of contributory negligence

Under the existing system, the injured victim is completely foreclosed from compensation when he has been contributorily negligent. It should, however, be noted that some states have attempted to rectify this situation by adopting comparative negligence statutes which are similar in effect to the civil law doctrine of dividing the loss. Where such statutes have not been enacted juries have generally tended to discount the defense of contributory negligence.

The argument for retaining contributory negligence as a defense to recovery for automobile accident injuries consists of the deterrent rationale and the moral rationale. The deterrent rationale theorizes that the denial of compensation to the contributorily negligent victim will promote highway safety by making the potential victim take greater care for his own safety. However, since the person charged with contributory negligence takes risks with his own safety, and not with the safety of others, it would appear that if he is not deterred by fear for his own safety, then he will not be so deterred by the fear.

148. E.g., if he is a wage earner, he may protect his wages by filing a petition in bankruptcy after an action for negligence is filed. Bankruptcy Act §§ 17a, 63a(7), 11 U.S.C. §§ 35a, 103a(7) (1964).
149. AACP, supra note 101, at 90.
152. See Prosser, Comparative Negligence, 41 Calif. L. Rev. 1 (1953); Snow, Comparative Negligence, 1953 Ins. L.J. 235.
of losing damages otherwise recoverable from a potential defendant. In fact, some observers suggest that the defense of contributory negligence actually reduces the effect of deterrence on potential defendants. Moreover, even if the doctrine had a deterrent effect the lesson learned from litigation would come too late to be effective. Also, the years of delay before judgment would tend to shield the mind of the injured party from any deterrent effect the court's decision might have. The moral rationale of the argument for retaining contributory negligence is that a contributorily negligent victim should not be allowed to recover because he himself has been at fault. Considerable doubt is cast on this theory because, as mentioned previously, moral blameworthiness in the occurrence of an accident is relatively insignificant.

8. The problem of the financially irresponsible or immune defendant

Under the existing system the personal injury suit becomes a worthless remedy, even where the defendant's fault is proven if he is financially irresponsible due to inadequate insurance and insufficient assets subject to seizure. The accident victim is also left without a remedy if the tortfeasor enjoys immunity from suit such as exist for government agencies, or charitable institutions, although the latter immunity is being questioned with respect to business charities. A similar immunity often exists for certain close relatives, although some courts have permitted recovery to children or wives upon their fathers' and husbands' liability policy.

9. The delay in settlement

The time lag which prevails under the existing legal machinery between the time of the injury and the time the victim secures com-

156. See pp. 405–06 supra.
158. See Green, supra note 151, at 760. See also Malloy v. Fong, 37 Cal. 2d 241 (1951); Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954).
pensation is another weakness of the system. The effects of this delay are at least threefold. First, financial difficulties may bring frustration and misery to the victim or his family because between the time of injury and financial recovery, the victim's income ceases but his expenses most often continue and sometimes increase because of additional medical treatment. The delay thus exacts a heavy toll in terms of frustration and financial difficulties, vitiating the relief which is finally obtained, especially where compensation is urgently needed and the recovery sought is virtually the only source of funds. An additional repercussion of this period of delay is that the victim may hesitate to obtain the fullest desirable medical treatment, fearing the inability to pay his bills when they come due. Second, the delay and the consequent financial pressures often coerce the victim into accepting a quick, and sometimes inadequate, settlement from the insurance carrier, rather than looking for a larger recovery at trial. The need for subsistence and the need to escape the continued anxiety of litigation thus combine to make the victim accept a settlement for less than his economic loss. Third, the delay in litigation tends to promote perjury and innocent misrepresentation of parties and witnesses who are asked to recall the details of an accident years after its occurrence.

Many studies have noted this delay. As early as 1925 it was observed that an inevitable delay of 1 to 5 years existed where a legal action was brought for recovery, and if the plaintiff won the suit there was likely to be an additional delay of 2½ years before receiving satisfaction. The delay did not result from the sluggishness of the courts, but from the system itself, which involves a period of waiting before filing suit, followed by pleadings, trials, and appellate reviews before final judgment is reached. The Columbia study of 1932 found the delay to be from 1 to 3 years, while a 1962 Connecticut study found that nearly half the cases involving an injured wage-earner and an insured defendant were still being litigated after


161. AACP, supra note 101, at 221; Conard & Jacobs, New Hope for Consensus in the Automobile Injury Impasse, 52 A.B.A.J. 533, 537 (1966); Franklin, Chaim & Mark, supra note 119, at 3; Marx, supra note 157, at 174; Morris & Paul, supra note 118, at 924.

162. AACP, supra note 101, at 221; Corstvet, The Uncompensated Accident and Its Consequences, 3 LAW & CONTEMP. PROB. 466, 468-69; Ehrenzweig, supra note 157, at 7-8; Franklin, Chaim & Mark, supra note 119, at 3; McNiece & Thornton, Automobile Accident Prevention and Compensation, 27 N.Y.U.L. REV. 585, 590 (1952).

163. Ehrenzweig, supra note 157, at 8; Green, supra note 151, at 763.

164. See Marx, supra note 157, at 174.

165. See Columbia Study, supra note 112, at 205, 278-80.
2½ years. It was likewise observed in New York in 1952 that, depending on the county involved, delay in the trial of tort jury cases ranged from 1 to 4 years. Additionally, substantial delays were also found in many federal courts. A 1959 study observed that personal injury suits accounted for nearly 60 percent of all new issues filed in the New York Supreme Court, for more than half of the cases brought in the law divisions of the New Jersey Superior and County courts, and for 49 percent of all private civil cases in the federal courts. This mass of litigation involving thousands of people caused a delay of 2 or more years in recovery with no one knowing how many victims had accepted a lesser settlement in order to shorten the waiting period for payment. Similarly, according to a study published in 1961, 64 percent of the attorney-handled cases were closed within 1 year, and 82 per cent within 2 years. If the non-attorney cases are included in the statistics, 71 percent of all cases would be closed within 1 year, and 86 percent within 2 years. The Pennsylvania study of 1962 showed that it took more than a year to reach a result in a majority of cases where there was an award at all and that it took more than 3 years in a substantial number of cases, particularly in those cases which involved plaintiffs in the lowest income group. The Michigan study of 1964 found that 31 percent of serious injury cases were settled in up to 6 months, 27 percent were settled in 6 to 12 months, 20 percent were settled in 1 to 2 years and 22 percent were settled in 2 years or more. In cases where a law suit

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<th>High</th>
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<tr>
<td>Under 6 months</td>
<td>29%</td>
<td>36%</td>
<td>34%</td>
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<tr>
<td>6 months to 1 year</td>
<td>17%</td>
<td>16%</td>
<td>5%</td>
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<tr>
<td>1 year to 3 years</td>
<td>28%</td>
<td>36%</td>
<td>44%</td>
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<tr>
<td>3 years or more</td>
<td>26%</td>
<td>12%</td>
<td>17%</td>
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was involved the majority took from 1 to 3 years to settle, though more promptness was evident in smaller settlements. The proportion of cases with a longer delay was higher among those which went to trial than among all cases.

A closer examination of the factor of delay reveals certain interesting correlations. For example, sometimes delay depended upon the court in which the attorney filed suit. There is slightly less delay when a specialist attorney handles the case than when a non-specialist is involved, while delay increases with the presence of extra attorneys. A correlation is also found between delay and the stage of disposition — i.e., it takes longer to close the suits than the claims and the proportion of cases with longer delay is higher among cases which go to trial than among the total of all of them. An important correlation is also found to exist between delay and the extent of economic loss caused by the injury from the automobile accident. Generally speaking, the greater the loss, the greater is the delay. Thus, as the Michigan study reveals, when the economic loss is under $1,000, the case is most promptly settled. One-fourth of the cases in this category are settled within a year, and nearly three-fourths of them within 2 years. However, when the economic loss grows to between $1,000 and $5,000 only one-fifth of the cases are settled within a year and only about one-half within 2 years; and when the loss is between $5,000 and $25,000, less than one-tenth of the cases are settled within

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173. According to AACP, the time from injury to settlement in cases which came to trial compared with all cases in which a settlement was obtained, was as follows:

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<th>Up to 1 year</th>
<th>1–2 years</th>
<th>2–3 years</th>
<th>3 years or more</th>
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<tr>
<td>All Cases</td>
<td>20%</td>
<td>34%</td>
<td>31%</td>
<td>15%</td>
</tr>
<tr>
<td>Cases which came to trial</td>
<td>16%</td>
<td>17%</td>
<td>42%</td>
<td>25%</td>
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Id., fig. 7–4 at 243. Trial was found, however, not to be always and inevitably a delaying factor. Id. at 243.


175. Franklin, Chanin, and Mark found in their study that in the $1,000 and under group, 69 percent of the specialist-handled cases closed within 1 year and 87 percent within 2 years, whereas these percentages were 68 and 84, respectively, for the cases handled by non-specialists. In the $1,001–$3,000 group, 67 percent of the specialist-handled cases closed within 1 year and 85 percent within 2 years, whereas these percentages were 61 and 69, respectively, for the cases handled by non-specialists. Franklin, Chanin & Mark, supra note 119, at 32 n.156.

176. Id. at 31 n.155. In the $1,000 or under group, 39 percent of the cases involving an extra attorney closed within 1 year, compared to 49 percent of the cases involving a single attorney which closed during that period. In the $1,001–$3,000 group, the respective percentages were 34 and 48. Id.

177. E.g., after 1 year 90 percent of the claims, but only 43 percent of suits, closed. After 2 years, 97 percent of all claims and 71 percent of all suits had closed. Id. at 31 n.152.

178. See note 173 supra.
a year, and only one-third within 2 years. A similar correlation exists between delay and the amount of settlement. Thus, in settlements for less than $1,000, 58 percent are made within 6 months and 86 percent within a year; but in settlements for $1,000 to $2,000, only 28 percent are made within 6 months and 58 percent within a year. Similar results were obtained in another study where it was found that 68 percent of those cases involving $1,000 or less were closed within 1 year and 85 percent within 2 years, whereas of those cases with recovery of more than $3,000 only 20 percent were closed within 1 year and 40 percent within 2 years. Thus, all the studies would appear to indicate that the larger the economic loss or amount of settlement, the greater the delay in recovery.

10. The unsatisfactory evidentiary requirements

Certain observers have found it ironic that the fault system has been abolished with respect to injuries to workmen even though the injured workman is at least sure of a financially responsible defendant and easily obtainable witnesses; at the same time, there is no guaranty of financial responsibility for injuries from an automobile accident and the injured victim is not so easily able to secure witnesses.

The average developmental time of an automobile accident is estimated at less than ten seconds, yet a witness is often asked to recall the event after more than a year has passed. The accuracy of this recall tends to be vitiates by several factors. There may have been dis-
tortion in initial perception, due to the conditioning of this perception by the witnesses' personality or the tendency to associate himself with his subjectively determined "good side" in an adversary proceeding. This objectivity may be further vitiated by the witnesses' commitment to his version of the story developed by having to repeat it several times before and during the trial, and by his anxiety not to contradict himself.184

Moreover, the evidence which the jury is permitted to receive on one hand allows their vindictive emotions to be manipulated,185 while on the other hand keeps their knowledge of pertinent factors less than replete by virtue of rules which forbid the defendant's counsel to tell them that the plaintiff's damages would be tax exempt,186 that the defendant is wealthy187 or that he carries insurance.188 These objections are separate and distinct from the question of how much, if at all, these rules take into account the psychology of the jury.189

Certain writers have attempted to apologize for these shortcomings in the evidentiary requirements of the existing system with respect to automobile injury litigation by pointing out that all adjudication is vulnerable to such deficiencies.190 However, true as this may be, it would not appear to mitigate these criticisms.

11. The expense of litigation

Many studies reveal the expensive nature of the existing system. For example, the Columbia study of 1932 found that a plaintiff without means, who must of necessity employ counsel on a contingent fee basis, received only one-half or three-fourths of the amount recovered.191

185. Ehrenzweig, supra note 157, at 6-7.
189. See generally Baer, The Relative Roles of Legal Rules and Non-Legal Factors in Accident Litigation, 31 N.C.L. Rev. 46 (1952); Broeder, The Functions of the Jury: Facts or Fictions, 21 U. Chi. L. Rev. 386 (1954); Green, supra note 130; James, Functions of Judge and Jury in Negligence Cases, 58 Yale L.J. 667 (1949).
191. Columbia Study, supra note 112, at 205-06.
A similar conclusion can be drawn from a Wisconsin study of 1935. And a Pennsylvania study of 1953 also pointed out the high collection expenses involved in recovery. According to an Illinois study of 1962, more money was spent on the legal expenses arising from automobile accidents than for medical treatment. A study made in 1961 of the economics of personal injury litigation in New York showed that attorney's fees took 36 percent of the amount recovered. A New Jersey study of 1955 also indicated high collection expenses. The Michigan study of 1964 found that the collection expenses, including attorney's fees, amounted to nearly one-fourth (24.6 percent) of the reparation received.

The operating costs of the tort system, which would include the costs of selling and administering insurance, the costs of keeping courts open for automobile injury cases, and the costs of attorneys' fees, stood at 120 percent of the net amount of benefits received by the injured persons. In contrast, the costs of private loss insurance systems (primarily life and health insurance) amounted to about 22 percent of the net benefits, the costs of some Blue Cross systems 5 percent, and the costs of social security programs only about 2 percent.

III. Alternatives Suggested Within the Fault System

Several alternatives have been suggested as ways to minimize the deficiencies of the existing system in meeting the problem of automobile accident injuries, while retaining the fault principle for loss allocation. These include:

1. Comparative negligence legislation
2. Compulsory automobile liability insurance
3. Financial responsibility laws

195. Franklin, Chanin & Mark, supra note 119, at 21. For a full breakdown, see id., chart III at 25.
196. Bureau of Economic & Business Research, supra note 103, table 34 at 55.
197. AACP, supra note 101, table 4-1 at 138.
198. See AACP, supra note 101, table 1-4 at 59.
199. Id., fig. 1-1 at 61.
200. 2 W. McNeerney, Hospital and Medical Economics: A Study of Population, Services, Costs, Methods of Payment, and Controls 1072 (1962); Conard & Jacobs, supra note 161, at 536.
4. Compulsory uninsured motorist coverage
5. Compulsory unsatisfied judgment funds
6. Industry-organized unsatisfied judgment funds
7. Repeal of the guest statute
8. Impounding acts

The alternatives mentioned above merely address themselves to certain particular problems arising from the existing system. They do not provide an over-all solution to the problem of automobile accident injury, and are based on the acceptance of fault as the essential principle of loss distribution. Non-fault alternatives are therefore not discussed herein. 201

1. Comparative negligence legislation

The problem of contributory negligence has been discussed in the preceding section. It has been suggested that contributory negligence be replaced by a principle of comparative negligence, 202 under which a division of responsibility for the negligent act is made between plaintiff and defendant on the basis of their respective share of negligence in causing the accident. Under this system the plaintiff’s negligent action only causes him to lose that proportionate part of the recovery that his share of negligence bears to the total accident, rather than defeating recovery in its entirety as in contributory negligence.

2. Compulsory automobile liability insurance

Compulsory insurance laws have been enacted with respect to commercial vehicles in practically all states. 203 However, contrary to the European experience, they have not been widely adopted to non-commercial vehicles. 204 Under these laws, liability insurance coverage is required as a condition precedent to owning or operating an automobile. In 1927, Massachusetts became the first state in the United

201. Non-fault alternatives have been discussed in detail by the author in a soon to be published article presently on file in Villanova Law Review Library.
States to adopt such a law.\textsuperscript{205} It requires an applicant for motor vehicle registration to present evidence that he carries liability insurance, and cancellation of the insurance calls for the cancellation of the registration. No other state had adopted a similar law until New York did in 1956.\textsuperscript{206} A study done in 1932 praised the Massachusetts law as the most advanced step taken to meet the problem of uncompensated accident victims, and concluded that the law had largely eliminated the incidence of financial irresponsibility in that state.\textsuperscript{207}

Various criticisms have been levelled against compulsory automobile liability insurance. For example, it is alleged, largely by spokesmen for the insurance industry,\textsuperscript{208} that forcing such insurance imposes an undesirable tax on driving and tampers with the basic nature of insurance; that it invites state intervention in the insurance enterprise; and that it increases claims consciousness and the costs for the insurance companies while political pressures force them to keep their rates low.\textsuperscript{209} Compulsory insurance is also alleged to promote social irresponsibility,\textsuperscript{210} carelessness or recklessness of drivers,\textsuperscript{211} increased danger of insolvency of insurers,\textsuperscript{212} tendency toward state insurance service,\textsuperscript{213} and to increase accident litigation and consequent court congestion.\textsuperscript{214} Actually, however, the fear of state insurance has not materialized,\textsuperscript{215} nor has the accident rate noticeably risen as a
result of the compulsory insurance.\textsuperscript{216} Furthermore, proper calculations would avoid rate problems, as in any insurance.\textsuperscript{217}

3. Financial responsibility laws

The first financial responsibility law in the United States was the Financial and Safety Responsibility Law of Connecticut, adopted in 1925 and made effective on January 1, 1926.\textsuperscript{218} It requires the reporting of any automobile accident which involved personal injuries or property damage exceeding $100. A later administrative finding of fault results in suspension of the registration of all motor vehicles owned both by the driver or the owner of the automobile at fault. The suspension continues until the offenders establish proof of future financial responsibility, which is generally satisfied by the procurement of liability insurance for a certain amount. Most states have since enacted financial responsibility legislation, largely as a halfway measure to compulsory liability insurance, owing to the opposition to the latter by various insurance organizations and other interested groups.\textsuperscript{219} These laws generally allow a driver to operate an automobile without liability insurance unless he causes or is involved in an accident resulting in damage to person or property above a certain minimum amount. If he does so cause, or is involved in an accident, he must then prove that he is financially able to pay future judgments up to a certain amount for future accidents in order to retain his license. The usual proof procured is liability insurance; but failure to provide proof or, in many jurisdictions, failure to pay the judgment arising from the first accident results in revocation of the drivers license, motor vehicle registration, or both.

Based on the experience gained from its adoption, it appears that this type of law has many weaknesses. First, it does not provide adequate protection to the victim since (1) it does not affect judgment-proof offenders, (2) it does not operate against a driver not sued, and (3) it does not protect the victim of the uninsured offender's first accident. An attempt to meet these deficiencies has been made by some states. New Hampshire, in 1937,\textsuperscript{220} passed a law which required all

parties involved in an accident to post security immediately, regardless of fault. Some pressure for financial responsibility is thus brought upon the driver by forcing him to provide security for his first accident. Additionally, such legislation seems to have been effective in inducing motorists to secure liability insurance before their first accidents. However, this still presents no solution to the problem of the insolvent or the judgment-proof offender, or the uninsured offender who has not yet had an accident. This type of law is further criticized as being inconsistent with the fault rationale, since it compels the posting of security by anyone involved in an accident, without regard to fault. Also, while financial responsibility laws utilize the threat of losing licenses for failure to produce proof of financial responsibility upon the occurrence of an accident to promote safety by making motorists more careful, no relationship has been found between the number of suspensions or revocations of licenses and the number of accidents, and no decrease in accidents has resulted as a consequence of these laws. Finally, these laws assume the existence of an habitually careless class of drivers who can be isolated after their first accidents. However, this does not seem to have occurred since there is no evidence that these laws have compelled careless drivers to secure insurance. The newer type of law, however, seems to have been more effective in persuading all drivers to become insured.

4. Compulsory uninsured motorist coverage

Under this approach, the insurer is required by statute to provide coverage which protects the insured from the owners and operators of uninsured vehicles if the insured is legally entitled to recover damages from such owners and operators. This coverage is presently required by statute in a number of states, while other states often offer the coverage on a voluntary basis.


222. E.g., the percentage of insured cars increased in New Hampshire from 36 percent before the enactment of the security law to about 85 percent after its enactment, in New York from 30 to 75 percent, in Indiana from 33 to 74 percent, in Maine from 36 to 60 percent, and in Minnesota 80 percent of the cars were insured within eight months of the enactment of the law. Wagner, supra note 220, at 168.


225. Grad, supra note 204, at 306.


5. **Compulsory unsatisfied judgment funds**

Generally speaking, this approach calls for the creation of a fund through payments by both insured and uninsured automobile registrants. Unpaid judgments which then arise from automobile accidents are satisfied from the fund. Such funds exist in many countries abroad, and have been established in North Dakota, New Jersey, and Maryland. Uninsured motorists are usually excluded from the benefits of the fund in the hope of inducing further recourse to liability insurance by all motorists. If the fund is supported by payments from all motorists, insured and uninsured, it tends to put an extra burden on those already carrying insurance; but if it is made up of payments from only the uninsured motorists, it makes their payment equivalent to the cost of a liability insurance and essentially amounts to insurance provided by the state. Such an unsatisfied judgment fund may be either (1) supplementary to a compulsory liability insurance scheme as a means of facilitating recovery in cases not covered by compulsory insurance — i.e., the cases of hit-and-run driver, the stolen car driver, or the out-of-state uninsured driver, (2) independent of an existing compulsory liability insurance plan while still providing for these cases, or (3) alternative to such insurance by providing recovery against the uninsured driver.

Many criticisms have been made of the fund approach. One such criticism is that the fund is in an unsatisfactory position to defend against fraudulent claims because of the length of time that must elapse before the fund is called upon to defend, and because it may be defrauded by collusion between the plaintiff and defendant. Further, critics state that its costs are high because of the lack of opportunity for an out-of-court settlement, and that citizens do not appreciate the fact that the fund does not relieve them of their own liability. The insurance industry has alleged that the procedures for securing payment from the funds are cumbersome, and that the insured motorist is forced to pay the cost of the fund either directly or indirectly through hidden costs placed upon the insurance companies.

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6. Industry-organized unpaid judgment fund

This suggestion would require that, in order to protect the public against the risk of insurance carriers becoming insolvent, the insurance industry contribute to a fund which would meet unpaid judgments left outstanding because an insurance carrier has become insolvent.\textsuperscript{234}

7. Repeal of the guest statute

The guest statute defeats recovery if the negligence of the host driver has not been more than failure to exercise ordinary due care.\textsuperscript{235} It is suggested that greater protection to the victim of an automobile accident would result from a repeal of such statutes. The contention that it is unfair for a guest to sue his host is no longer valid since most motorists now carry liability insurance and the loss consequently falls on the insurer rather than the host. It is also pointed out that there has been no evidence that fraudulent claims against liability insurers pose a serious problem in those states where there are no guest statutes, and therefore the fear of fraudulent claims against the insurance companies in the absence of the guest statute is unfounded.\textsuperscript{236}

8. Impounding acts

It has been suggested that impounding acts, which provide for on-the-spot seizure by police of an uninsured automobile involved in an accident, would help reduce the number of uninsured motorists and would protect their victims. It is claimed that even though the value of the automobile seized is seldom sufficient to satisfy a claim for any severe injury, the inconvenience caused by the seizure might induce the securing of liability insurance.\textsuperscript{237} The Highway Traffic Act of Manitoba is an example of such an impounding statute.\textsuperscript{238} Not surprisingly, insurance interests seem to support the idea of impounding acts.\textsuperscript{239}

IV. Conclusion

In Anglo-American jurisprudence, the issues of tort liability were originally resolved by means dictated by superstition. From the 14th
to the middle of the 19th centuries, fault developed as a central element in deciding liability, although strict liability, imposed without reference to fault, prevailed for certain activities performed at the actor's peril. In the 20th century, liability still largely rests on fault, but there appears to be a trend away from the fault principle. This trend is seen both with respect to certain harms for which liability is imposed without reference to fault and in the workings of the fault system itself. This trend seems to have been engendered by the social problems created by the uncompensated loss. Assignment of liability is increasingly becoming a matter of whether liability ought to be imposed, even though the fault principle would not yield it. The performance of the fault system for the past few decades in meeting the problem of automobile-accident injury has demonstrated the failure of this system in this regard, both in providing prompt and adequate compensation for the injury and in achieving effective deterrence of the negligent conduct, these two being commonly considered the professed goals of this system.

This failure of the fault system can be analyzed both in conceptual terms as a principle and in functional terms as a system. Certain conceptual deficiencies of fault as a principle for meeting the problem of automobile-accident injury may be pointed out. Thus, the use of automobiles, in the nature as prevails today, is a consequence of the society's permissiveness of an activity which would produce accidents. The reason for this permissiveness is found in the usefulness of the activity to the society. If this is so, it seems both unfair and illogical to individualize the fault upon the particular actor involved in the accident and make him bear the burden of the loss. The conceptual unsuitability of the fault principle in meeting the problem is further underscored by a psychological inquiry into its aspects. Fault, in the sense of morally irresponsible behavior, does not appear among the psychological and physiological causes of accident-proneness which have been identified through the studies of the human component of the accident potential unit. In this light, an insistence on the fault principle of liability would result in two alternative consequences. Either recovery would be possible only in those very few cases where personal fault can in fact be found, leaving most of the victims uncompensated, or the law would continue to find fault artificially where it in fact does not exist. Either alternative would appear to be un-

240. Thus, the Restatement (Second) of Torts (1965), adopts the theory that liability for a tort will arise simply on the basis that (1) "the principles of the law of Torts" will impose it (§6) or (2) the conduct in question is a "legal cause" of the injury, and therefore is of such a character that "the law regards it just to hold the actor responsible for such harm." (§§ 5, 9). See Carlson, supra note 100, at 49.

241. The other component of the unit is non-human.
satisfactory. Furthermore, the professed potential of the fault system in achieving deterrence of automobile accident seems to be based on a conceptually deficient framework. It addresses itself to the behavior of the motorists, but behavior of motorists is not the sole constituent of the accident potential unit and, therefore, not exhaustive of the avenues for achieving deterrence of accidents. Even there, since these accidents do not usually result from a morally reprehensible conduct, a threat of liability addressed to such moral situation of the mind would not have any effect for the deterrence of the accidents. Moreover, the tortfeasor in an automobile accident is generally insulated from liability by insurance or other reasons, which minimizes the threat’s potential, if any, to operate as deterrent.

An examination of the functioning of the fault system with respect to the problem of automobile-accident injury reveals many serious shortcomings. For example, tort liability accounts for only a little more than half of all sources of reparation for automobile-accident injuries, and only about half of the injured persons receiving compensation receive it from tort liability settlements. The compensation which is yielded by the tort law system is inadequate. It is also erratically distributed, so that injured persons with small losses tend to recover in full, or more, while those with large or staggering losses tend to receive less than their loss, or nothing at all. The delay in receiving compensation is usually considerable, with the result that it brings misery and frustration to the victim or his family and it tends to coerce the victim in accepting a quick settlement. The delay in litigation promotes perjury and innocent misrepresentation. The system has failed to provide an effective deterrence of automobile accidents and suffers from the inequities of the defense of contributory negligence. The personal injury suit becomes a worthless remedy if the defendant is either financially irresponsible or immune. Certain of the evidentiary aspects of the fault system are unsatisfactory. To attempt a recovery under this system entails high expense to the victim, which ranges from one-fourth to one-half of the amount recovered. In addition, the operating costs of the system to the society are fantastically high. These stand at about 120 per cent of the net amount of benefits received by the injured persons, whereas the comparable costs of, say, the social security programs are only about 2 percent.

What is the solution? The purpose here is not to propose a particular plan. Instead, a clarification of the approach to the problem is attempted. Upon that clarification, specific proposals can be formulated. The myopia of fault perspective obscures imaginative solutions to the problem. Once that is overcome, a satisfactory approach to
the problem would call for a separation of its two aspects, namely, minimization of automobile accidents and provision of prompt and adequate compensation to the victims of these accidents. Independent solutions can be devised for these two separate aspects of the problem. Thus, in order to minimize the accidents the accident-producing factors in both the human and non-human components of the accident potential unit can be identified, and these identified causes can be dealt with on their own terms. Attention can be paid to eliminating or minimizing each of these causes by whatever means appropriate. In order to achieve prompt and adequate compensation for the injury, with the least amount of expense to the injured person and to the society, a plan of compensation can be developed in the nature of a social security fund, created for all accidental harm or for harm from automobile accidents. A clarification of the approach to the problem is essential to developing a sound solution or plan.