COMPENSATION FOR MEDICAL ACCIDENTS

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The current system for compensating victims of medical accidents is primarily a fault-and-liability-insurance system. Generally this system provides for compensation only when a physician or some other person assisting in the treatment of a patient has been negligent. Ordinarily the physician or assistant, or some legal entity that is vicariously responsible, has medical malpractice coverage—a form of liability insurance. Thus, most payments in compensation for injuries and losses resulting from medical accidents are made by liability insurers.

In its dependence on these key features of fault law and liability insurance, the current system for compensating victims of medical accidents is similar to the matured fault-and-liability-insurance system that had developed for traffic victims by the 1960's, before significant moves toward a loss insurance system—now commonly called “no-fault” or “nonfault”—began to occur. Do changes in methods of compensating traffic victims portend like changes in the system for compensating victims of medical accidents? Are the reasons for change in the first of these areas applicable also to the other? In order to answer these questions, we shall need to examine the two areas more closely than is necessary merely to identify the key features to which we have thus far adverted. As Professor Morris has reminded us, “Reasons for taking money from defendants [in tort actions] differ sharply in various types of cases”¹ And even though in a very general sense “there is a central theme or basis or idea, running through the cases of what are called torts, which, while it is difficult to put into words, does distinguish them in a greater or less degree from other types of cases,”² still the “heterogeneous law of torts did not grow up because it was inspired by any one integrating principle.”³ Not even the principle of basing awards on fault, which in the nineteenth century achieved the status of an axiom in tort law, ever became the unifying

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¹ C. MORRIS, TORTS 10 (1953).

² W. PROSSER, TORTS 2 (4th ed. 1971).

³ James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315 (1959).

theme.⁴ Neither should we expect in the future to find a unifying theme in some other single principle. Law generally, and tort law particularly, must accommodate multiple interests and objectives. No one principle, relentlessly pursued, will achieve an acceptable accommodation. What, then, are the prospects for change in the medical accident compensation system during this period of pending reform of the system for compensating traffic victims?

I. CRITICISMS OF MALPRACTICE LAW AND AUTOMOBILE LAW COMPARED

From the data and polemics advanced in the controversy over automobile insurance reform, massive though the exchange has been, one can glean a finite number of charges and countercharges. The paragraphs that follow include summary statements of the grounds of indictment of the matured fault-and-liability-insurance system for compensating traffic victims.⁵ This Article does not develop the response and countercharges of those who favor retention of that system.⁶ Rather, it considers the extent to which grounds of indictment and proposals for reform of that system are or are not transferable to the field of medical malpractice. In the present section of the Article, a stated ground of indictment of the system for traffic victims is followed by consideration of its applicability to medical accidents.

First. The negligence system [for compensation of traffic victims] is an incomplete system of reparation. It leaves victims themselves to bear much accidental loss that could easily be paid through insurance. It denies recovery altogether to some injured persons, and it underpays others. Moreover, the system would be subject to even more severe condemnation on this ground of incompleteness if it were faithful to its underlying theories of basing liability on negligence and denying recovery because of contributory negli-

⁴ See, e.g., *Fletcher v. Rylands*, L.R. 1 Exch. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

⁵ These summary statements are taken from P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* 458 (1971), *reprinted as* COMPENSATION SYSTEMS—THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW 2 (1971) [hereinafter cited as COMPENSATION SYSTEMS]. Of the eight major criticisms stated in *Compensation Systems*, only the first four are quoted and discussed in this Article.

⁶ For statements of the case for retention of the fault-and-liability-insurance system, see, e.g., ABA SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS, REPORT (1969), recommendations from which are reprinted at 55 A.B.A.J. 970, 972-75 (1969); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS (1971); DEFENSE RESEARCH INSTITUTE, AUTOMOBILE INSURANCE: THE ROCKEFELLER-STEWART PLAN (1970); *The Automobile Insurance Problem*, 6 TRIAL, Oct./Nov., 1970, at 8. A summary of both charges and countercharges appears in INSTITUTE FOR THE FUTURE, THE AUTOMOBILE INSURANCE SYSTEM: CURRENT STATUS AND SOME PROPOSED REVISIONS (rev. Feb. 1972).

gence (or, in a growing number of states, proportionately reducing recovery on this ground).⁷

The charge of incompleteness certainly applies to the medical malpractice system. But the reasons for incompleteness and the nature of the gaps are rather different. Also, a catalog of the gaps and reasons for them in the malpractice system today would differ markedly from a catalog for even a decade earlier, and the more so from a catalog for a half century earlier.

Through the first half of this century the medical malpractice system was so heavily weighted against the victim that it bore more resemblance to the system for employee compensation just before workmen's compensation laws than to the traffic-victim system just before nonfault laws. The percentage of traffic victims actually compensated to some extent was rising from decade to decade of the twentieth century, and by the 1960's many more victims were actually compensated (though sometimes inadequately) than faithful adherence to the theory of the system (including contributory fault as a complete defense) would have permitted.⁸ In contrast, the victims of medical accidents actually compensated were until recent years, and perhaps still are, a small percentage of the total number of victims of medical accidents.⁹ Just how small a percentage remains a matter of speculation. There have been no comprehensive empirical studies of the compensation of malpractice victims comparable to the studies concerning traffic victims. Yet, curiously, current criticisms of the malpractice system are less often directed against gaps of coverage than against sharply rising costs and vulnerability of physicians to malpractice claims.¹⁰ Closing

⁷ COMPENSATION SYSTEMS, *supra* note 5, at 2.

⁸ Concerning the practical performance of the fault-and-liability-insurance system in compensating traffic victims, see COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932); A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964); 1, 2 U.S. DEPT OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES, REPORT OF THE WESTAT RESEARCH CORP. (1970); Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207 (1971); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962). The findings of the empirical studies through 1964 are summarized and compared in R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 34-69 (1965).

⁹ See, e.g., MEDICAL MALPRACTICE 4 (D. McDonald ed. 1971) [hereinafter cited as MALPRACTICE] reporting that the consensus of participants in a conference at The Center for the Study of Democratic Institutions, held at Santa Barbara, California, in September, 1971, "was that most people who sustain medical injuries, either through negligence or unavoidable accident, do not get into the claims system. They receive no compensation."

¹⁰ Potomac Associates commissioned surveys of public opinion by the Gallup Organization in 1971 and 1972 and a survey of opinions of U.S. physicians by Erdos and Morgan, Inc., in 1971. S. STRICKLAND, U.S. HEALTH CARE 16-17 (1972). Physicians ranked the "vulnerability of doctors to malpractice suits" as third among "the most pressing problems for national health," the first two being the "high cost of medical care for most people" and "not enough M.D.'s." *Id.* 41, 121. The suggestive list sub-

these gaps would add to costs. The additions to cost resulting from gap-closing would be more substantial than they have been in the reforms of the traffic system; thus it would seem doubtful that a viable reform could be devised with sufficient cost-cutting features to produce a net cost reduction comparable to that flowing from some nonfault automobile insurance plans.¹¹

mitted to persons interviewed in the public opinion survey did not include doctors' vulnerability to malpractice suits. However, among the things "likely to be most responsible" for "a national crisis in the health and medical area" about which "[t]here is a lot of talk nowadays," the list used in the public opinion survey did include the suggestion that "[m]ost health insurance plans are too complicated and too expensive." *Id.* 112-13. Persons interviewed ranked this item, identified in a table as "costly and complicated insurance," second only to the shortage of doctors as likely to be most responsible for the crisis. *Id.* 37. This table reporting results of the public opinion survey also shows "high cost of medical treatment" ranking seventh, in contrast with the physicians' ranking "high cost of medical treatment" first. The contrast tempts one to infer that the public would rather blame insurers than physicians for high costs. But a close examination of the suggestive list used in the public opinion survey weakens this inference. The item in the suggestive list that corresponds with "high cost of medical treatment" in the chart was phrased in a materially different way—"[o]nly those who can afford it get the good medical treatment." *Id.* 113. In view of these and other differences in survey methods, inferences that public and physician attitudes differ in particular ways are necessarily very speculative.

¹¹ Concerning predictions of cost reductions from adoption of nonfault automobile insurance, see, e.g., AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPAIRATIONS 13-16 (1968); F. HARWAYNE, AUTOMOBILE BASIC PROTECTION COSTS EVALUATED (1968) (multilithed, with Foreword of December, 1968, comparing findings of Harwayne's earlier studies with those of the AIA report); NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 143-46 (1970) [hereinafter cited as N.Y. INS. DEP'T REPORT]; Harwayne, *Insurance Costs of Basic Protection Plan in Michigan*, 1967 U. ILL. L. FORUM 479, reprinted in CRISIS IN CAR INSURANCE 119 (R. Keeton, J. O'Connell & J. McCord eds. 1968). For a contrasting view, see AMERICAN MUTUAL INSURANCE ALLIANCE ACTUARIAL COMMITTEE, ACTUARIAL REPORT ON THE ADEQUACY OF THE COSTING OF THE AMERICAN INSURANCE ASSOCIATION'S "COMPLETE PERSONAL PROTECTION AUTOMOBILE INSURANCE PLAN" (1969). As this Article goes to press, Massachusetts is the only state from which substantial data on the actual performance of a nonfault plan are available, since it was the only state having such a plan in operation before January 1, 1972. Its nonfault law became effective January 1, 1971. Although it was generally agreed that rates would have to be increased 20% to 30% in 1971 in the absence of a change in the law (the size of the increase being due in part to a four-year rate freeze), rate reductions achieved under the Massachusetts nonfault law have been substantial. For example, the 1970 rate for compulsory bodily injury coverage (liability insurance with limits of \$5,000 per person and \$10,000 per accident) for under-25 male car owners in Boston, without driver training, was \$374. For this class of persons, the 1971 rate for compulsory bodily injury coverage (including liability insurance with limits of \$5,000 per person and \$10,000 per accident and nonfault insurance with a limit of \$2,000 per person) was reduced to \$318. For the same coverage, the rate established for 1972 was \$237. Boston Globe, Dec. 15, 1971, at 1, col. 1, at 11, col. 1. In October, 1972, a long controversy over rebates for 1971 terminated in an order requiring a rebate of \$82.46 of the \$318 paid by the class of Boston drivers identified above, which is the class paying the highest rate in the state. The Standard: The Northeast's Insurance Weekly, Oct. 20, 1972, at 28. Thus, costs of compulsory bodily injury coverage to Massachusetts motorists in 1971 and 1972 were about half what they would have been if the law had not been changed. Note, however, that these figures concern compulsory *bodily injury* coverage only. Costs of property damage coverages continued to rise. Speaking of the combined costs the Commissioner of Insurance in Massachusetts stated in December, 1971, that savings in bodily injury costs would more than offset expected increases in rates for property damage coverages, with the result that, despite continuing trends of higher costs from other factors not affected by the enactment of nonfault legislation, the average motorist's total automobile insurance bill for 1972 would be 10% lower than in 1971. Boston Globe Dec. 15, 1971, at 1, col. 1.

In great part this contrast between the systems for medical and traffic victims can be traced to different reasons for the gaps between losses and available compensation. First, the negligence issue in traffic cases ordinarily depends upon lay testimony, and the victim can present evidence that makes a case for the jury in most instances. In contrast, the negligence issue in malpractice cases usually depends on expert testimony, which even today is difficult to obtain, despite great changes in this respect during the last decade or two. Second, the causation issue is far more complex and troublesome in malpractice cases than in traffic cases. Only occasionally do traffic injury cases present difficult issues of medical causation. In malpractice cases, on the other hand, a difficult causation issue is par for the course.¹² The patient seeks treatment because he has some condition that troubles him. Is the condition of which he later complains one arising not solely from that earlier condition but in part at least from negligent medical treatment? If so, for what part of the later condition is the defendant in the malpractice action accountable? In several ways, these difficult questions of "cause in fact" and "legal cause" present very different issues in relation to reform of the malpractice compensation system from those confronted in relation to the traffic accident system. One difference, already suggested, is that these causation issues have contributed to gaps between losses caused and compensation paid because even some victims who deserve compensation under the substantive law standards are unable to meet their burden of proof. Another difference bears on the framing of any reform proposal. Though a reform can easily eliminate the negligence issue by adopting a nonfault principle, what can it do about the causation issue? Does the causation problem make nonfault insurance a less viable alternative here than in relation to traffic injuries? Can one devise a satisfactory way of dealing with the issue in a nonfault system? Unless this last question can be answered affirmatively, the causation problem exerts a strong push toward a more comprehensive system of compensation—a social security system—in which a broader criterion for entitlement to compensation would bypass the causation issue.

Second. The negligence system [for compensation of traffic victims] is inequitable. It heavily overpays some claimants while underpaying others who are equally or more deserving. It is especially unfair in overpaying those with trivial injuries and underpaying those who are most severely

¹² See D. LOUISELL & H. WILLIAMS, 1 MEDICAL MALPRACTICE ¶ 8.07 (1970, Supp. 1972). The 1972 Supplement cites 37 recent cases, reaching appellate courts from 1960 to 1972 inclusive, in which proximate cause was in issue. These appellate opinions are, of course, only the tip of the iceberg. See also MALPRACTICE, *supra* note 9, at 18.

injured. Moreover, the unfairness of the system extends also to the way it allocates the burden of paying for the costs of the system.¹³

These criticisms of the system for compensating traffic victims have been thoroughly documented in a long series of empirical studies commencing with the Columbia Study published in 1932¹⁴ and extending most recently to studies under the auspices of the United States Department of Transportation.¹⁵ One cannot speak with comparable assurance about the extent to which they are or are not applicable to the medical malpractice system. I would speculate that these specific charges are not applicable to the malpractice system, though that system may be more inequitable in other ways than the traffic system has been.

There has been great inequity in the malpractice system as between physicians and victims because, as suggested earlier, the system has been heavily weighted against the victim's being able to meet his burden of proof on the negligence and causation issues. In this respect the malpractice system has been harsher than the traffic compensation system in its treatment of victims. The recent dramatic increases in costs of malpractice insurance¹⁶ surely reflect some change in this respect. Whether the malpractice system is still subject to criticism on this ground of failing in practice to measure up to its own theory of substantive rights is open to question.

The most forceful and most thoroughly documented criticisms of inequity in the system applying to traffic accidents, referred to in the quotation above, do not concern inequity between victims as a class and motorists as a class—a kind of inequity that would be comparable to inequity between patients as a class and physicians as a class.¹⁷ In-

¹³ COMPENSATION SYSTEMS, *supra* note 5, at 2.

¹⁴ COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, *supra* note 8.

¹⁵ U.S. DEPT OF TRANSPORTATION, *supra* note 8.

¹⁶ Speaking at a seminar of doctors on March 3, 1972, an insurance executive reported:

Coverage that would have cost New York surgeons \$1,000 in 1966 costs more than \$4,000 now. The Los Angeles Medical Association reported several years ago that the average premium for its physicians and surgeons was \$5,000 annually. Some in high-risk specialties pay \$12,000 and more a year. The AMA reports that some physicians who have lost lawsuits must pay as much as \$28,000 on renewal, with a \$5,000 deductible clause.

Address by Ellsworth Calhoun, Malpractice Seminar for Doctors, Miami Beach, Mar. 3, 1972, at 3.

¹⁷ Some of the identified inequities, however, are comparable to inequity between patients and physicians. An example occurs when the fault-and-liability-insurance system fails to compensate the innocent pedestrian who is struck by a car that is out of control because the driver lost consciousness without negligence. One may see this as favoring motorists over pedestrians—or failing to require that "motoring pay its way." See R. KEETON & J. O'CONNELL, *supra* note 8, at 257-60.

stead, they concern inequity *among victims* and inequity *among premium-paying motorists*. We have no documentation for inequity of these types in the malpractice system. The nuisance increment to the value of a trivial claim by a traffic victim is a major factor in the inequities of the traffic system. In contrast, physicians have good reason to exert much more pressure against nuisance settlements than do motorists. Moreover, the expense of preparation and presentation of the claim is much higher for the malpractice claimant than for the traffic claimant.¹⁸ These factors would tend to deny nuisance value to claims for trivial loss.

It may be that there are other kinds of inequities among victims or inequities among physicians in the malpractice system, but if so they remain to be documented. One suggestion is that there is an inequity among victims of medical accidents exactly the reverse of that among traffic victims. A victim of medical malpractice who sustains only a minor or moderate injury, rather than being overpaid in comparison with one severely injured, receives nothing at all. Attorneys are reluctant to take these cases "because the malpractice insurance carriers will not settle, and it just costs too much money for the plaintiff's attorney to try them."¹⁹ Traffic victims face a different problem:

Third. The system [for compensating traffic victims] is too slow in delivering the payments it makes. Such delay adversely affects rehabilitation of injured persons and increases the overall social costs of accidents. . . . The burden of these negligence cases on the courts also adversely affects court dockets and the administration of justice in other cases as well.²⁰

Here again the criticisms of the system for compensating traffic victims are thoroughly supported by empirical data,²¹ but no similar documentation is available with respect to malpractice claims. Although delays in reaching lump-sum settlements or adjudications in malpractice cases are probably as great as or greater than those in traffic cases, it does not necessarily follow that the delays have the same adverse effect on rehabilitation. It may well be, for example, that victims of malpractice are more likely to have the benefit of needed medical attention, though it seems doubtful that many of them would be offered the kind of rehabilitative treatment that involves a substan-

¹⁸ Concerning the high cost of preparing a malpractice claim for trial, see, e.g., the comment of David Rubsamen, M.D., LL.B., quoted in *MALPRACTICE*, *supra* note 9, at 4.

¹⁹ *Id.*

²⁰ *COMPENSATION SYSTEMS*, *supra* note 5, at 2.

²¹ See generally the studies cited in note 8 *supra*.

tial outlay of expenses—for example, spending a period of weeks or months at a specialized rehabilitation center.

With respect to the burden of claims on the court system, individual malpractice cases tend to involve even more lengthy and expensive trials than do traffic cases, but malpractice claims have been so few in number compared with claims of traffic victims that they have not taken a substantial percentage of court time and resources. Will their number increase so dramatically that they become a significant burden in the future?

Fourth. The negligence system [for compensation of traffic victims] is wastefully expensive. Administrative cost is high because of the nature of the two principal criteria for compensation—requiring, first, case-by-case determinations of fault and second, lump-sum findings of damages under indeterminate guidelines. The net amount that victims receive is less than half of the liability insurance premium dollar. A large part of the premium dollar—approximately a fourth—is expended in claims administration cost. The disproportionately high expense of administration is especially severe in cases of small claims, which constitute a heavy majority of all claims filed.²²

Individual malpractice cases are on average surely more expensive to try—both for the parties and for taxpayers—than individual traffic accident cases. And the proportion of the malpractice insurance premium dollar expended to meet the administrative costs of the system is probably higher than the proportion of the automobile liability insurance premium dollar so expended.²³ But the conclusion that this expense is as wasteful in the malpractice as in the automobile insurance area does not follow. Nor does it follow that the expense could be reduced as dramatically in the malpractice area as in the automobile insurance area by a shift to nonfault insurance. As noted earlier, although a shift to nonfault insurance would eliminate the negligence issue from claims based upon medical accidents, a serious causation issue might remain in a high percentage of cases. Dealing with that issue would be administratively expensive. This factor would be an influence toward a broader, social-security type of system, rather than nonfault insurance. The net benefits paid to traffic victims under nonfault private insurance are likely to be a considerably higher percent-

²² COMPENSATION SYSTEMS, *supra* note 5, at 2.

²³ See MALPRACTICE, *supra* note 9, at 4-5; SENATE SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91ST CONG., 1ST SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 10 (Comm. Print 1969) [hereinafter cited as RIBICOFF REPORT].

age of premiums than the 44 percent²⁴ delivered by automobile bodily injury liability insurance. The percentage delivered in net benefits will still be lower, no doubt, than under a social security system. But a decisionmaker may see the difference as a reasonable price to pay for what he judges to be a wiser and fairer distribution of burdens and benefits than can be achieved under social security. That judgment of the balance of costs and benefits will be more difficult to reach in relation to victims of medical accidents because the difference in administrative costs of nonfault insurance and social security is likely to be greater.

This judgment is likely to be affected, also, by the development of a national health insurance plan to which coverage for medical accidents might be attached. Any such plan would cover much—and might even cover all—of the medical-expense portion of losses resulting from malpractice. It is less likely, however, that it would extend to compensation either for income loss or for general damages (for such things as “pain and suffering”).

In each of the foregoing comparisons we have begun with a statement in criticism of the system for compensating traffic victims, then inquiring whether it, or a somewhat similar criticism, applies to the area of medical malpractice. Are there other criticisms of the medical malpractice system with no counterparts in the familiar grounds of indictment of the system for compensating traffic victims?²⁵ An affirmative answer seems justified.

A major criticism of the medical malpractice system is that it is adversely affecting the patient-physician relationship and causing physicians to practice medicine conservatively and defensively (that is, in a way that guards against malpractice liability) rather than in ways that might better serve their patients.²⁶

²⁴ For the sources of data and method of calculation of this figure of 44%, see COMPENSATION SYSTEMS, *supra* note 5, at 57-63. After initial publication, this calculation was independently confirmed in N.Y. INS. DEP'T REPORT, *supra* note 11, at 34-37.

²⁵ For a summary of criticisms of current medical malpractice adjudication “as a means of arriving at objective, factual, and legal determinations of professional negligence,” and a proposal for loss insurance as an alternative, see, e.g., Note, *Medical Malpractice Litigation: Some Suggested Improvements and a Possible Alternative*, 18 U. FLA. L. REV. 623, 629 (1966). With respect to criticism of the system from the broad perspective of social goals, see M. FRANKLIN, INJURIES AND REMEDIES 624-26 (1971); Ehrenzweig, *Compulsory “Hospital-Accident” Insurance: A Needed First Step Toward the Displacement of Liability for “Medical Malpractice,”* 31 U. CHI. L. REV. 279 (1964). See also McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959); Morris, *Response to Ribicoff: Malpractice Suits vs. Patient Care*, 37 INS. COUNSEL J. 206 (1970); Uhthoff, *Medical Malpractice—the Insurance Scene*, 43 ST. JOHN'S L. REV. 578 (1969); Note, *Malpractice and Medical Testimony*, 77 HARV. L. REV. 333 (1963); Note, *Overcoming the “Conspiracy of Silence”: Statutory and Common-Law Innovations*, 45 MINN. L. REV. 1019 (1961).

²⁶ Note, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L.J. 939. Varied views concerning this charge appear in MALPRACTICE, *supra*

This criticism is related to the deterrent effect of liability, which in the context of traffic cases is urged as a desirable feature of liability systems. Here the argument is that the deterrent effect is excessive and antisocial. What is deterred is not only carelessness but also the socially desirable risk-taking involved in courses of treatment offering increased chances of cure or improvement that more than counterbalance the increased risks they involve. No similar charge of antisocial deterrence has been leveled at the fault-and-liability-insurance system for compensating traffic victims. In this respect, then, there is a factor weighing in favor of reform of the malpractice system that has not been present in the controversy over automobile insurance reform.

Closely related to this last argument against the malpractice system is the charge that the heavy incentive toward defensive or conservative medical practice causes needless medical expense. Thus, it is asserted, "We read reports of cases where the verdict has turned on whether or not a certain test or X-ray was done when we *know*, beyond a shadow of a doubt, that it would not have helped one iota."²⁷ Regardless of the extent to which these reports are or are not well-founded in fact, the physician who believes them has a strong inducement to recommend more and more tests, at more and more expense to the patient and to the medical-services system.

A further consequence alleged to follow from physicians' increasing concern about malpractice claims is that despite the general shortage of medical personnel, a significant number of physicians are declining to undertake services in particular circumstances (especially in emergency situations in which they would be treating persons with whom they did not have the ordinary physician-patient rapport), withdrawing from the performance of procedures they are fully qualified to perform, or even withdrawing from practice entirely by retiring much earlier than they otherwise would have chosen to do.

It is also charged that the inducement toward withdrawal from practice is accentuated in some areas of the country by such dramatic increases in malpractice insurance premium rates, and even in unavailability of malpractice insurance, that some physicians find the choice of continuing in practice economically as well as psychologically unattractive.

note 9, at 1, 3-4; RIBICOFF REPORT, *supra* note 23, at 2. See also Gorney, *A Doctor's Plea for Intelligent Compromise*, 7 TRIAL, May/June, 1971, at 53:

It is stated that the deleterious effects of the malpractice crisis on the quality of medicine are a 'blatant falsehood.' Do the learned members of the Bar really believe that? Can it honestly be said that if one out of four lawyers were threatened with a suit in the next five years, it would have no effect on their attitudes and relations with their clientele? Might they not tend to be a little more conservative in their approach? I think they would.

²⁷ Gorney, *supra* note 26, at 53 (emphasis in original).

The extent to which these several charges of adverse impact on the practice of medicine will be borne out by empirical data remains to be seen, but it is already clear that they are affecting the attitudes and conduct of some percentage of the medical profession.

II. PRINCIPLES AND OBJECTIVES OF COMPENSATION SYSTEMS

The foregoing comparison of grounds of criticism of fault-and-liability-insurance systems in the two contexts of traffic accidents and medical accidents has led to occasional references to alternatives. It may be useful, now, to consider alternative systems more directly, and to examine also the objectives a good compensation system might serve.

In the contexts of both traffic accidents and medical accidents, proposed remedies for deficiencies in the existing system fall into three major groups. One group would preserve the fault-and-liability-insurance system and continue to use it as the principal source of compensation for accident victims.²⁸ A second group of proposals would replace the fault system with a nonfault (or no-fault or loss insurance) system as the principal source of compensation.²⁹ The third group would use a social security system as the primary source of compensation for these injured victims and for other needy persons as well.³⁰ A distinctive set of principles underlies the varied proposals within each of these three groups.

Two principles underlying a fault-and-liability-insurance system are suggested by the name itself. The principle of basing awards on fault became firmly established in Anglo-American tort law some time in the nineteenth century.³¹ The blend with liability insurance was under way before that century closed, and was fully consummated by the middle of the twentieth century. Every American state legislature had chosen to impose some degree of coercion on motorists to encourage, if not to compel, the purchase of motor vehicle liability insur-

²⁸ In relation to claims of traffic victims, see, e.g., the publications cited in note 6 *supra*. In relation to malpractice claims, see, e.g., *MALPRACTICE*, *supra* note 9, at 2-8.

²⁹ In relation to claims of traffic victims, see, e.g., the proposals summarized in *COMPENSATION SYSTEMS*, *supra* note 5, at 20-44. In relation to claims of victims of medical accidents, see, e.g., *MALPRACTICE*, *supra* note 9, at 13-21.

³⁰ See, e.g., T. ISON, *THE FORENSIC LOTTERY* (1967); ROYAL COMMISSION OF INQUIRY, *COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND* (1967) (commonly referred to as the Woodhouse Report, Mr. Justice Owen Woodhouse having served as Chairman of the Commission); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

³¹ See, e.g., 2 F. HARPER & F. JAMES, *TORTS* §§ 12.1-12.3 (1956); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 316-17 (1959).

ance.³² A third underlying principle has commonly been an assumed premise rarely adverted to in discussions of reform—the principle of providing the liability insurance through private-enterprise insurers.

In contrast, “nonfault” does not so clearly suggest the principles that became associated with that term during the controversy over automobile insurance reform in the 1960’s. In one sense any compensation system that uses criteria other than fault to determine entitlement to benefits might be called nonfault in character. In that broad sense, social security systems are nonfault in character, and so are life insurance, fire insurance, and indeed all other forms of insurance except liability insurance. But in the context of the automobile accident reparations controversy “nonfault” came to be used generally to signify a system with these underlying principles: first, the principle of paying benefits without regard to fault; second, the principle of paying these benefits through private-enterprise insurers; and, third, using these nonfault, private-enterprise payments as the principal source of compensation for victims who sustain injuries within the scope of the insurance contracts. A very significant corollary of the third principle is that there be a partial or total exemption from liability based on negligence. This corollary is inherently more closely identified with any notion of a “nonfault system” than might appear superficially. A restriction upon liability for negligence, either total or at least very substantial, is a necessary condition if a system is to be *primarily* nonfault in character—if the principal source of compensation is to be insurance benefits paid without regard to fault. Absent such a restriction, damages based on negligence, awarded either to victims or to subrogated insurers, might have a more significant role in the system than the insurance benefits paid without regard to fault.

The two principles underlying a social security system, as that phrase will be used here, are, first, government management and funding and, second, the use of criteria for compensation that not only dispense with fault but also, ordinarily, are more closely related to the need for benefits than to causes of the need.

This three-fold grouping of proposals, like many other systems of classification, draws bright lines in gray areas. One can easily imagine, for example, a system that pays substantial insurance benefits to victims without regard to fault and restricts awards of damages based upon negligence but allows claims by victims and subrogated insurers, based upon negligence, that are about equal in significance to the non-fault benefits. In such a case it may be debatable whether the system should be classified as belonging to the first or instead to the second

³² See R. KEETON & J. O’CONNELL, *supra* note 8, at 102-09 & Appendix C.

of the three groups identified here. Similarly, a system might so combine benefits from a government fund with further rights of recovery—either from fault or nonfault private insurance—that it would be debatable whether the system should be classified in the third category, or instead in the first or second. This classification system can nevertheless be a useful tool in comparing varied proposals and identifying their main tendencies and emphases.

It is also significant that the characteristics of different systems identified by these three sets of principles are fundamentally related to the objectives a good compensation system might serve. In one sense—a very particularized sense—we cannot fully define our objectives until we have assessed and evaluated even the most intricate details of a system and of the criteria we use to judge it. To answer fully an inquiry about objectives in this particularized sense would be to prescribe in greater detail than any legislature has ever done. It would be to prescribe explicitly, and with stated purpose, for all those interstitial problems one must resolve in applying a system to cases at hand. The impossibility of attaining such completeness of statement is no reason for abandoning efforts to achieve a relatively particularized answer to an inquiry about objectives. But it is also useful, and perhaps appropriately an earlier order of business, to approach the inquiry about objectives in a relatively generalized way. One consequence of doing so is to identify consensus. Although formulating objectives with only that degree of generality that produces consensus conceals real differences, so too formulating objectives with only that degree of particularity that provokes dissent conceals whatever measure of consensus may exist. It also obscures the boundaries of an area, between consensus and disabling dissension, within which reform is a realistic possibility. It may be instructive, then, to consider how far we can move toward the particular from the most general statement of aims—for example, that the compensation system be equitable, fair, and just—before consensus disappears. Ordinarily it will be impossible to support speculations about consensus empirically, but it nevertheless seems likely that on several points there will be wide agreement. Some or all of the later points suggested here may be seen as no more than corollaries of the first two, but perhaps they merit the attention of separate statement.³³

³³ I gratefully acknowledge that in this section I have drawn heavily on ideas developed in the study of compensation of traffic victims in which Professor Jeffrey O'Connell was my colleague; see particularly R. KEETON & J. O'CONNELL, *supra* note 8, at 241-72. Also, more expanded treatments of some of the ideas invoked here appear in COMPENSATION SYSTEMS, *supra* note 5, at 63-66; R. KEETON, VENTURING TO DO JUSTICE 126-66 (1969). I gratefully acknowledge that I have drawn also upon G. CALABRESI, THE COSTS OF ACCIDENTS 24-33 (1970); NEW YORK INS. DEP'T REPORT, *supra* note 11, at 57-79.

First, a good system of compensation will be equitable, and it will be so from each of three different perspectives—between those who receive its benefits and those who bear the burden of its costs, among different beneficiaries, and among different cost-bearers.

Second, the system will contribute to the protection, enhancement, and wise allocation of society's human and economic resources.³⁴

Third, the system will compensate promptly. It will meet economic burdens as they occur, and it will provide for medical and other rehabilitative services as they are needed.

Fourth, the system will be reliable. It will give assurance of financial responsibility for the payment of compensation determined to be due, and the determinations of entitlement to benefits and responsibility for costs will be predictable.

Fifth, the system will distribute losses rather than impose or leave crushing burdens on individuals.

Sixth, the system will be efficient, minimizing waste and overhead.

Seventh, the system will avoid inducements and, if feasible, provide affirmative deterrents to antisocially risky conduct.

Eighth, the system will minimize inducements to exaggeration and fraud and opportunities for profit from such conduct. This is essential to the integrity and equity of the system and to cost control as well.

On the substance of this very general statement of objectives consensus seems likely, regardless of varied preferences for form of statement. What kinds of differences emerge, however, as we move from such a general statement to some degree of specification? And how are these differences related to the three sets of principles—fault, non-

³⁴ Professor Calabresi identifies "the principal goals of any system of accident law" as just two: "First, it must be just or fair; second, it must reduce the costs of accidents." G. CALABRESI, *supra* note 33, at 24. He adds:

More important, claims that particular systems are just, like those that justice is in some sense a goal concurrent with accident cost reduction, fail to ring true. They seem to suggest that a 'rather unjust' system may be worthwhile because it diminishes accident costs effectively; or, conversely, that there is one system that can be termed just to the exclusion of all others, i.e. that is supported by justice in the same sense that economic efficiency may prefer one system to all others. But the words just and unjust do not sound right to me in either of the statements. They ring true in rather different contexts, as when we say that we reject a particular system or parts of it as unjust, or that a system taken as a whole does not violate our sense of justice. This suggests that justice is a totally different order of goal from accident cost reduction. Indeed, it suggests that it is not a goal but rather a constraint that can impose a veto on systems or on the use of particular devices or structures within a given system (e.g. administrative tribunals under the fault system) even though those same structures might not be unjust in another system (e.g. administrative tribunals under workmen's compensation).

Id. 25.

Will this framework of analysis tend to assign somewhat greater weight to economic factors and less to intangible values than they deserve? Perhaps concerns on this ground will be assuaged for most readers by Professor Calabresi's assurances that he does not intend to disparage values implicit in the goal of compensating victims. *See id.* 26-28.

fault, and social security—that compete for dominance in compensation systems?

No doubt partisans of any social security system would be as quick as the partisans of either of the other two types of systems to claim for it an objective of equity. But the consensus disappears quickly as criteria of equity are stated. To serve the goal of fairness, the broadest of social security systems would aim at compensating every person in need. In contrast, a nonfault system limits its aim to compensating for fortuitous losses within the scope of a defined insurance coverage. And a fault-and-liability-insurance system tailors its criteria for compensation to a concept of equity concerned with fault.

Not all social security systems have an aim as broad as need, however. Some systems that are commonly referred to as social security apply to limited types of need. The Puerto Rican automobile compensation system is an example. It is closely similar in some ways to non-fault automobile insurance systems adopted in several states, though it sharply differs in its method of financing and operation.³⁵ In Puerto Rico, each motor vehicle owner pays a fee to a government agency when he registers his car, and another government agency administers the claims for compensation. If the system is fully funded from fees properly tailored to the costs of compensation arising from accidents within the period for which the fees are paid, the system is in essence one of insurance, though social insurance rather than private insurance.

A key distinction between a social security system designed to serve a limited class of victims and one designed to serve broadly those members of the society who are in need is that the latter is founded on a welfare objective. The aim is not to distinguish between the "deserving" and "undeserving" victims of misfortune, as a fault-and-liability-insurance system seeks to do,³⁶ but rather to compensate the victims of accidents or illness or other misfortunes simply because they are needy.

³⁵ The acts of Puerto Rico, Connecticut, Florida, Massachusetts, Michigan, and New Jersey are alike in having a partial tort exemption. That is, in order to receive damages for pain and suffering, based on negligence, the claimant must establish that his case is of a type beyond a threshold of severity as defined in the act. There is a contrast, on the other hand, in that the nonfault benefits are paid from a state fund in Puerto Rico but from private insurance companies under the other acts. For a description of the Puerto Rican Plan, see Aponte & Denenberg, *The Automobile Problem in Puerto Rico: Dimensions and Proposed Solution*, 35 J. RISK & INS. 227 (1968) (also published with updating amendments in 1968 INS. L.J. 884); *An Addendum*, 35 J. RISK & INS. 637 (1968). The other acts are as follows: Pub. Act No. 273, [1972] Conn. Leg. Serv. 567; FLA. STAT. ANN. §§ 627.730-41 (1972); Mass. Acts 1970, ch. 670 (codified in scattered sections of MASS. GEN. LAWS ANN. ch. 90, 175, 231 (Supp. 1972)); Pub. Act No. 294, 1972 West's Mich. Leg. Serv. 707; N.J. Laws 1972, ch. 70, [1972] N.J. Sess. L. Serv. 180.

³⁶ Cf. W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS 34 (1965), also published in 31 U. CHI. L. REV. 641, 672 (1964). For a criticism of the Blum & Kalven thesis, see R. KEETON & J. O'CONNELL, *supra* note 8, at 224-25.

As we translate the demand for equity into more specific demands, one dispute that emerges quickly concerns the choice between selective and comprehensive criteria for determining who shall receive benefits. Increasingly there is support for using a very comprehensive criterion at least in relation to a subsistence level of benefits. Under this view, a good system of compensation will provide at least a subsistence level of compensation for all the victims of fortuitous loss of the type with which the system is concerned, rather than denying compensation altogether in some instances.³⁷ Negligence law, on the other hand, is founded on the premise that it is equitable that fault be the basis for shifting loss. The objective is not to compensate all accidental losses, but to compensate when and only when it is fair and just to do so. The best justification for the negligence principle is an appeal not to reason but to an assertion of commonly shared values³⁸—even though it is an assertion increasingly challenged in recent decades.³⁹

The technique for achieving equity in a pure negligence system (unadulterated by liability insurance) is the shifting of loss from individual to individual—from the careful to the careless. It is also implicit that some losses will not be shifted. This includes not only all⁴⁰ or part⁴¹ of the loss a person suffers as a result of his own negligence but also any loss resulting from a so-called unavoidable accident—one occurring without negligence.

If we had no choice but to place the burden of a loss on an innocent person who suffered it or a careless person who caused it, we would be hard pressed to find any cogent basis for challenging negligence law. No doubt courts in which negligence principles were initially fashioned saw the choice as being that limited. The invention of liability insurance revealed a wider range of possibilities.

In one respect, liability insurance supplements and reinforces negligence law in fulfilling the objective of compensating the innocent victim of a negligent actor. Absent liability insurance, compensation legally owing would often be unavailable in fact because of the financial irresponsibility of the wrongdoer. Every state has adopted laws imposing some degree of coercion on motorists to obtain liability in-

³⁷ Cf. N.Y. INS. DEP'T REPORT, *supra* note 11, at 62-63, proposing far more than merely subsistence-level benefits for all traffic victims.

³⁸ For a more extended development of this point, see R. KEETON, *VENTURING TO DO JUSTICE* 151-56 (1969).

³⁹ *Id.* 156-66.

⁴⁰ This will occur when contributory negligence is a full defense (the rule that has prevailed in the past).

⁴¹ This will occur when contributory negligence is a partial defense, as will soon be the case in most American states if current trends continue.

surance up to minimum limits, thus improving the victim's chances of receiving compensation for his injuries.⁴² In this way liability insurance has been used to serve the objective of assuring payment of benefits determined to be due. The element of liability insurance has also made it possible for the fault-and-liability-insurance system to serve the additional objective of minimizing total loss by distributing a loss nominally imposed on an individual wrongdoer so as to avoid the secondary harm that might otherwise result from its crushing impact on that single individual.

In another respect, liability insurance tends to contradict and impede fulfillment of an objective of negligence law—the objective of deterring antisocially dangerous conduct. Whatever deterrent effect inheres in individual liability for damages is weakened when all or part of the judgment, as well as costs of defense against the claim, are borne for the wrongdoer by his liability insurer.⁴³ If the objective of deterrence is still to be served as well as it might be if individual wrongdoers were required to pay judgments, other means than the threat of liability must be used.

The assertion that negligence law deters antisocially dangerous conduct⁴⁴ is one of the principal arguments advanced by proponents of fault-and-liability-insurance systems. This claim has long been doubted,⁴⁵ and it has been increasingly challenged in recent years.⁴⁶ But one who challenges the claim that negligence law is an effective deterrent may nevertheless support deterrence as an important objective of a system. He may support deterrents that operate through moral or legal sanctions (including criminal sanctions) against defined behavior. And he may support deterrents that operate through market choices made in the light of the allocation of legal responsibility for costs flowing from injuries. That is, he may support, as serving a deterrent function, a system placing legal responsibility upon identified persons (or other legal entities) for hazards to which their activities or enterprises contribute.⁴⁷ This goal can be accomplished either

⁴² See, e.g., R. KEETON & J. O'CONNELL, *supra* note 8, Appendix C.

⁴³ See, e.g., N.Y. INS. DEPT. REPORT, *supra* note 11, at 12-14. See also sources cited in note 46 *infra*.

⁴⁴ See, e.g., J. Kircher, *Responsible Reform of the Present System: The Answer!* in *FAULT OR NO-FAULT?* 21, 30 (proceedings of Nat'l Conf. on Auto. Ins. Reform, 1970, Univ. of Minn., E. Maynes & C. Williams eds.), citing findings of a study commissioned by The Defense Research Institute.

⁴⁵ 2 F. HARPER & F. JAMES, *TORTS* § 12.4 (1956).

⁴⁶ See, e.g., O. KLEIN & J. WALLER, *CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES* (U.S. Dep't of Transp. Auto Ins. & Comp. Study, July 1970); Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421 (1969).

⁴⁷ The distinction between deterrents that operate through assigned legal responsi-

by a system of strict liability or by a system of nonfault insurance.⁴⁸ The point is that imposing liability for an identifiable injury-causing activity is a potential deterrent of that type of activity because of the added expense liability attaches to it. The effectiveness of such a deterrent depends more on the economic consequences of liability than on the question whether the theory is nonfault (that is, either compulsory nonfault insurance or strict liability) or fault (that is, liability based on negligence). Indeed, it may even be the case that either compulsory nonfault insurance or strict liability, though imposed in a way not implying moral censure, carries more force as a deterrent than liability based on negligence. One reason this is so is that a nonfault system may be more effective at "internalizing" costs. Typically a fault system allows some of the costs of a risky activity to be externalized. For example, the costs of so-called "unavoidable" accidents—those in which no one can be proved to have been negligent—are borne by individual victims under a negligence system, rather than being treated as a part of the cost of the risky activity or activities that contributed to the accident.

Through internalization of costs, then, legal responsibility and its economic consequences, regardless of whether moral censure is implied, may serve as a useful tool for society's discrimination between socially useful activities, worth continuing even when the full cost of injuries they cause is taken into account, and socially undesirable activities persons will choose not to continue once they are forced to pay for resulting injuries as well as other costs. Thus, both fault and nonfault systems contain a potential cost-control mechanism ordinarily not present in a social security system. This kind of cost control exists in a social security system only if and to the extent that costs are allocated to loss-causing or risky activities rather than being paid out of general tax revenues. Thus, nonfault and social security systems differ in the extent to which they aim at imposing costs of the system on

bilities and those that operate through moral or legal sanctions against persons is parallel, perhaps, with Professor Calabresi's distinction between the "general deterrence" or market method and the 'specific deterrence' or collective method." See G. CALABRESI, *supra* note 33, at 27.

⁴⁸ A system of strict liability supplemented by full liability insurance coverage produces the result of distributing losses among the whole group of persons paying premiums for that type of coverage. Except for possible differences in administrative costs, the same result could be accomplished if the same persons paid the same premiums for nonfault insurance covering the same losses. Thus, the choice between compulsory nonfault insurance and strict liability supplemented by compulsory liability insurance is essentially formal and does not compel different distributions of cost either among insureds or among insurers. Nor does it compel different practical consequences in other respects. It is possible, nevertheless, to attach different consequences to the different theories of liability, as by specifying different periods of time before a claim is barred depending on whether it is a "contract" claim against one's own insurer or instead a "tort" claim of strict liability.

particular activities, enterprises, or segments of society (making them "pay their way") rather than meeting all or part of the costs out of general tax revenues.⁴⁹ This point is closely related to another contrast between social security and nonfault systems, already noted. That is, social security systems tend to have broad application, paying benefits to a large class of persons in society rather than to those who are victims of a defined type of misfortune characteristic of any given type of private insurance.

These last points of difference are only contrasts of tendency. That is, one can devise a social security system paying benefits only to the victims of a defined type of misfortune—as Puerto Rico has done in relation to the compensation of traffic victims. And it can also be a system that depends entirely on special charges for defined activities, enterprises, or persons rather than depending even in part on general tax revenues. But experience suggests that the pressures for resort to general tax revenues for meeting some portion of the costs of operating the system are well nigh irresistible under a government-operated system, and when such general public financing occurs, it lends weight to other pressures for expanding the types of misfortunes for which the system will pay benefits. Thus, to the extent that it is thought desirable to maintain a cost accounting system for distinctive enterprises and activities in society, a nonfault insurance system offers practical advantages over a social security system.

Problems concerning equity and cost have emerged repeatedly in this consideration of objectives that might be served by the various types of compensation systems. Perhaps differences about how to achieve equity at an acceptable cost are the main sources of controversy over the choices to be made.

Benefit costs—that is, the burden of supplying sums paid net to victims—depend of course on the level and scope of benefits. As they run higher, so do benefits, and vice versa. But there are other costs that are not mirrored in benefits. Any system will have its leakage—its costs of paying some "benefits" improperly claimed. Any system, too, will have its administrative costs, to which we shall return shortly. In addition, a system may incur increased or reduced costs according to its tendency to affect loss-causing behavior. Thus, if a liability system (whether based on fault, strict liability, or an obligation to provide nonfault insurance) is an effective deterrent of loss-causing behavior, it reduces costs by reducing losses.

⁴⁹ Cf. 2 F. HARPER & F. JAMES, *TORTS* §§ 13.1-13.2 (1956, Supp. 1968). Harper and James appear to use "social insurance" in a sense broad enough to encompass both of the categories referred to in the present Article as nonfault insurance systems and social security systems.

Administrative costs also must be taken into account when one is comparing cost control features of different systems. Administrative costs run highest in a fault-and-liability-insurance system. This type of system incurs heavy costs in determining fault case by case, as well as determining that a particular act or course of conduct caused the loss in question. A nonfault system escapes the first of these sources of administrative cost but not the second. A broad social security system escapes both these kinds of administrative costs.

Individualizing benefits is, from one perspective, another source of significant administrative cost. From another perspective it is an additional facet of the dispute over implementing the objective of equity.⁵⁰ Individualized compensation is tailored to the distinctive losses of the victim and takes account of his particular circumstances. It restores him to the economic status he would have occupied had the compensable event not occurred. And even though in some instances no kind of award will restore him physically and socially, an individualized system may provide a money award to "compensate" for irreparable physical and social consequences. There is no inevitable link between individualization of benefits and the criteria for determining who is to receive benefits, but the historical fact is that Anglo-American fault-and-liability-insurance systems (including the systems for automobile accidents and medical accidents) have provided for individualized compensation. They have been criticized for failing in fact to fulfill this promise,⁵¹ but in theory the promise is clearly made.

One objection to individualizing compensation has been its price in higher administrative cost. In addition, inequities may occur in the administration of a system that in theory individualizes compensation because in practice the system's loss adjusters (insurers' representatives in a system funded by insurance) will resort to standardized rules of thumb.⁵² And the goal of individualized compensation may be attacked on what is perhaps a more fundamental, and certainly a more controversial, ground—that it uses the compensation system to preserve and reinforce inequities in the social and economic circumstances that different persons occupied before compensable events occurred.⁵³

⁵⁰ See, e.g., H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 23 (1970) (opposing individualization). But see *COMPENSATION SYSTEMS*, *supra* note 5, at 81-83 (favoring individualization).

⁵¹ Perhaps the most thoroughly documented criticism is that persons sustaining minor injuries generally receive "compensation" for "pain and suffering" that is disproportionately high in comparison with the compensation received for the more severe pain and suffering of more seriously injured victims. See, e.g., the reports of empirical studies cited in notes 14-15 *supra*.

⁵² See, e.g., H. ROSS, *supra* note 50, at 23.

⁵³ An illustration in point arose in a class discussion in which a student argued that compensation for loss arising from disability to work is fairer when awarded on a

From the affirmative perspective, then, proponents of standardized compensation may assert that it is more equitable as well as more efficient in its use of those resources society allocates to the compensation system.

Fault-and-liability-insurance systems, as already noted, have typically emphasized individualization of benefits, depending on case-by-case determinations of what constitutes fair and reasonable compensation for the losses sustained. Even though such a system may depart in practice from its theory—especially by overpaying trivial claims and giving greater weight in negotiated settlements to the so-called “specials” than the theory of the system supports—still the strong tendency toward individualizing damages remains. This tendency is most apparent and its impact is most dramatic in litigated cases of severe injury. Some nonfault systems offer a similar individualization of benefits and others depend more upon standardized (and sometimes scheduled) benefits. Social security systems have typically gone much further toward standardizing benefits and avoiding the costs of individualized determinations. Thus, although it would be possible to have standardized benefits under a fault system or individualized benefits under a social security system, the tendency is strongly the other way. By tendency, then, administrative costs of determining benefits run highest in fault-and-liability-insurance systems, lowest in social security systems, and at an intermediate level for nonfault systems.

One might expect that, in converse, equity among victims would be best served by a fault-and-liability-insurance system because it expends more administrative costs in the effort. In fact, however, the high costs of trial in a fault-and-liability-insurance system have a significant impact on the practical operation of the system. It is significant, also, that the nature of this impact may vary in different fault-and-liability-insurance systems. As noted earlier in this Article,⁵⁴ the practical impact of this factor in medical malpractice litigation is quite different from its practical impact in automobile accident litigation. In the system for compensating traffic victims the high cost of defense confers on every trivial claim a high nuisance value that greatly impairs the effectiveness of the system in doing equity as between those suffering minor injuries and those more seriously injured. Thus, one of the major reasons for shifting from a fault to a nonfault system for

standardized basis of a specified sum per week or month than when based on what the disabled person's respective earnings would have been, because the latter basis reflects social and economic discrimination against women.

⁵⁴ See text accompanying note 18 *supra*.

compensating traffic victims has been to correct the inequity of overcompensation for minor injuries and undercompensation for more serious injuries.

In contrast, in the medical malpractice system, physicians can be and are more insistent on defense, the claimant's chances of overcoming legal barriers to making a case for the jury are much smaller, and insurers are more resistant to settlement. In this context, the high cost of litigation is a formidable barrier to the assertion of claims for minor or moderate injury, and the practical inequity among claimants is that those having minor or moderate injury tend to be denied compensation altogether while those suffering serious injury have at least a substantial, and probably increasing, prospect of adequate to generous compensation.

If a nonfault system undertakes to individualize compensation, it cannot escape the significant administrative cost of doing so. Proponents of individualized compensation—whether under a fault or under a nonfault system—see this cost as a reasonable one to pay for equity among victims. Typically a social security system is more efficient because it is more standardized, usually at a level nearer the minimum than the maximum of losses of all victims receiving the standard level of benefits. If a social security system undertakes to pay more than subsistence-level or minimal benefits and to give more attention to individualizing them, its overhead goes up in two ways. First, it incurs the cost of determining losses case by case. Second, the cost of protecting against fraudulent or exaggerated claims increases as benefits for disability approach what the claimant could make by returning to work.

To a considerable extent, then, equity has its price, whatever the basic character of the system may be. Internalizing costs of risky activities and individualizing benefits to victims increase overhead, regardless of whether the system is a government-operated social security system or a private enterprise insurance system. Particular resolutions of cost-equity problems such as these are not inevitable concomitants of a choice among the three major sets of principles underlying fault, nonfault insurance, and social security systems. By tendency, however, social security systems commonly place a lower value on internalizing costs and individualizing benefits and operate with the lowest overhead in claims administration.

It would seem that marketing costs (or "acquisition" costs as they are called in the insurance industry) are inevitably greater in a private enterprise insurance system, whether fault or nonfault, than any corresponding or analogous costs in a social security system. How-

ever, most published data on the percentages of administrative cost of various systems⁵⁵ tend to exaggerate this difference. The overhead of a social security system is often understated because of the omission of hidden, externalized costs of performing a function for the system analogous to the function performed by the sales agent in a private enterprise insurance system that markets policies through agents. For example, published figures seldom include even an estimate, much less a documented calculation, of the cost to employers of administering the collection system for contributions to the social security fund. In contrast, the percentage of overhead of private enterprise insurance systems that is due to acquisition costs is well documented in general and perhaps moderately well documented in relation to different marketing patterns—for example, marketing through individual policies compared with group marketing, and “independent agency” marketing (through agents each of whom represents many companies and has some choice with respect to where he places the bulk of the policies he sells) compared with “direct writing” (through agents each of whom represents only one insurance company). Also, the contrast between the relatively high overhead of private enterprise insurance and the relatively low overhead of social security systems has been reduced somewhat in recent years with the increase of group insurance not only in nonfault insurance coverages but even in fault insurance coverages. It must be expected, nevertheless, that social security systems will continue to have a cost advantage in this respect.

To be complete, a comparison among systems must also take account of some deep-seated political preferences that may outweigh all but the most compelling cost comparisons. A preference having special impact on choices regarding compensation systems in the United States is the preference for private enterprise over government enterprise.⁵⁶

III. CONCLUSIONS AND SPECULATIONS

In the dim, distant past of the 1960's, when a nonfault automobile insurance system was only a dream for the future, the “bathtub argument” was part of the stock-in-trade of those who opposed nonfault plans.⁵⁷ “If we are to compensate an automobile accident victim with-

⁵⁵ See, e.g., A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 52-66 (1964).

⁵⁶ This preference has been succinctly explained in N.Y. INS. DEP'T REPORT, *supra* note 11, at 77-78.

⁵⁷ An early proponent of loss insurance had observed the use of the “bathtub argument” even before the 1960's. Marx, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 134, 148 (1954).

out regard to fault," they asked rhetorically, "why not also the person who slips and falls in his bathtub?"

One advantage of a rhetorical question is its versatility. Each person who reads or hears it can take it the full limits of its credibility for him. To the cautious, the argument inferred from the bathtub question was that, as a matter of equity, we should not reform our system for compensating traffic victims unless we were prepared to give like treatment to victims of accidents in the home. Daring interpreters, on the other hand, inferred a more sweeping argument; reform no part of the compensation system unless you are prepared to apply the same principles of reform to all of it. The advocates of the status quo thus used the rhetorical question to invoke against any proposal for departing from the fault-and-liability-insurance system in one area not only the opposition to reform in other specific areas but also the formidable opposition that can be marshaled against the most complete and comprehensive departure from fault law—that is, a broadly inclusive social security system.

Today, when nonfault automobile insurance laws have been enacted in several states and are expected soon in others, the bathtub question has different nuances. One might even take it not as a rhetorical argument but as a serious invitation for a reasoned response. To the daring interpreter who takes the question most broadly, it inquires: should we not have a comprehensive social security system to compensate for all accidental injuries, and perhaps as well for other misfortunes such as illness?⁵⁸ There are distinguished advocates for an affirmative answer to this question⁵⁹ and at least one legislative action that may be seen as implementing an affirmative answer for accidental injuries, though not for other misfortunes.⁶⁰ In the long range, along with others,⁶¹ I believe this is an open question. In contrast, it seems

⁵⁸ The claims on society of the victims of illness as well as the victims of accidents are dramatically illustrated by the consequences of catastrophic illness. One of the significant gaps of insurance coverage in our society has been the lack of adequate coverage for the risk that a catastrophic illness will exhaust a family's resources, including savings. Cf. S. STRICKLAND, U.S. HEALTH CARE 14 (1972):

In 1972, the nation will spend an estimated \$72 billion for all health purposes. A central problem, however, is that the recent large additional expenditures have not bought unqualifiedly better health for all the people, but have largely gone to keep pace with price inflation. . . .

There are other evidences of problems with American health care. . . . Another is a phenomenon familiar to many Americans, though fortunately it is a secondhand familiarity to most: the destruction of a family's savings when a catastrophic illness such as cancer strikes.

⁵⁹ See, e.g., sources cited note 30 *supra*. Cf. Blum & Kalven, *A Stopgap Plan for Compensating Auto Accident Victims*, 1968 INS. L.J. 661 (observing that "grand scale developments" of the social-insurance type may be some time away and referring to contemporaneous discussion of plans for compensation of traffic victims as "provincial"); Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964).

⁶⁰ Accident Compensation Act 1972 (New Zealand).

⁶¹ See, e.g., G. CALABRESI, *supra* note 33, at 317-18.

nearly certain that our society will not preserve the fault-and-liability-insurance system as the principal method of compensating accident victims of all types.

In focusing, then, on the question whether the principles of a non-fault insurance system should be extended to the compensation of victims of accidental injuries incurred during medical treatment, we must be concerned not only with the balance of advantages between fault and nonfault systems but also with the balance of advantages between nonfault insurance and social security systems.

Empirical data in abundance have informed and enlightened legislative choices in relation to reform of the automobile accident reparation system. No such data are readily available with regard to the medical malpractice reparation system. Choices made at this point are therefore somewhat more speculative. One response to this circumstance might be to propose postponement of legislative choices on the ground that more information is needed. But this is not necessarily the wisest response. All major legislative choices are made on the basis of incomplete information about what their consequences will be. It may reasonably be argued that there is sufficient information to support immediate legislative choices in this area, even though they will be less fully informed choices than it has been possible to make concerning the automobile accident reparation system.

Perhaps the most troublesome problem facing those who propose to adopt a nonfault insurance system for medical accidents in place of the existing malpractice liability insurance system is the causation issue. In the automobile accident context, nonfault plans commonly employ the phrase "arising out of the maintenance or use" of a motor vehicle,⁶² or some variation on this basic theme, to identify the covered losses. The number of instances in which it may reasonably be disputed whether a particular loss falls within or outside the definition of the requisite causal relation will be few. The administrative cost of resolving disputes in those few instances will be only a minute percentage of the total cost of the system. In contrast, losses "arising from mistake or accident occurring during medical treatment" (or within some alternative definition of the required causal relation)⁶³ would be more difficult to distinguish from losses resulting from the

⁶² *E.g.*, UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 2.

⁶³ Some commentators have suggested a criterion of "deviation" from expected results in lieu of a criterion concerned with whether the condition complained of "arises from" or is "caused" by "mistake," or "accident," or some "deviation" aspect of medical treatment. *E.g.*, MALPRACTICE, *supra* note 9, at 5, 13, 15-24, 28. Application of any of these varied criteria would often involve a clash of expert testimony, but the particular way the criterion is formulated may have some impact on the frequency of cases in which dispute and uncertainty of outcome are likely.

preexisting condition for which medical treatment was given, and this difficult causation issue would be present usually rather than unusually. The resolution of these case-by-case disputes would involve substantial administrative costs in the nonfault system, even though somewhat lower costs than those incurred in a malpractice system (which must resolve not only a causation issue similar to this one but also a negligence issue in each case). Thus, here as in the automobile accident area, a nonfault system falls between a fault-and-liability-insurance system and a social security system in relation to the percentage of the total cost that goes to pay for administration. But the advantage of a social security over a nonfault system in this one particular is more substantial and the advantage of a nonfault over a fault system is less substantial for the area of medical accidents than for the area of automobile accidents.

Proponents of either a nonfault system or a social security system must answer another difficult question regarding the adequacy of their provisions for compensating both economic losses and those kinds of deprivations and disadvantages now compensated under the rubric of "general damages" or "pain and suffering." Until very recently, the medical malpractice system was heavily weighted against any recovery by claimants, and high compensation in the few cases that overcame all the barriers did not add great costs to the system. As the weighting has shifted toward the claimant's side in recent years and more cases have overcome the less formidable barriers to compensation, costs have risen sharply. Much of the impetus for reform at this time thus arises from interests in controlling costs.⁶⁴ This background for proposals of nonfault insurance for medical accidents contrasts in some degree with the background for adopting nonfault automobile insurance. The original impetus for reform in the automobile area was one of concern more for the treatment of victims than for controlling costs. It certainly is the case, however, that the political success of the movement for nonfault automobile insurance has owed much to the probability of reduced insurance costs for motorists. A sharp contrast remains, nevertheless, in another respect. Hopes for overall cost reductions from adopting a nonfault insurance system seem realistic in relation to traffic accidents. But in the absence of severe limitations on benefits—limitations not only against general damages but also against full recovery for economic losses—these hopes seem unrealistic in relation to medical accidents.

It seems highly probable that from the long-term perspective the system for paying health-care costs will cover the costs of added treat-

⁶⁴ See note 10 *supra*.

ment that a patient needs because he is the victim of a medical accident. This policy choice is strongly supported by the advantages of bypassing difficult causation issues encountered in any fault or nonfault system of compensation for medical accidents—advantages that heavily outweigh the costs of paying for those incremental medical services attributable to injuries arising from medical accidents rather than other sources. And it seems appropriate to take action at least to this extent contemporaneously with any action establishing a national health insurance system. That is, whatever the choice may be between public and private funding of a national health plan, its benefits should extend to medical needs attributable to mistakes or accidents in the course of treatment as well as needs arising from other causes. More debatable is the question whether it is feasible and desirable to include in the national health plan some compensation for other economic losses and general damages resulting from medical accidents. On the basis of the limited empirical data now available, costs of including compensation beyond a subsistence level, even for wage losses, are likely to be viewed in the legislative arena as prohibitive. Those costs do not disappear by being omitted from the compensation system, however, and it would seem appropriate to preserve a private remedy for victims who sustain such losses.

It is at this point that the contrast between cost estimates for fault and nonfault systems becomes potentially decisive. Again our data are limited, and estimates may change as we become better informed. For the present, it appears that a shift from fault to nonfault as the basis for the private remedy in the medical accident field, rather than leading to improved efficiency and lower overall costs, would lead to only slight improvement in efficiency and to substantially higher overall costs. Nor can one find in a nonfault proposal such significant advances toward equity as can be claimed for a nonfault system's correction of the inequitable overpayment of claims for minor injuries sustained in automobile accidents. It is true that the incidence of nonpayment for injuries from medical accidents is far greater for minor and moderate injuries than for those that are severe. But, disturbing as this feature of the system is, it is less so than the reverse inequity of the automobile accident system. If our system treats differently injuries of different severity, surely it is better to do disproportionately more than to do disproportionately less for those who are victims of the more severe injuries. This is not to say, however, that the fault remedy should remain unchanged. Here, as in the automobile reparations system, we should avoid the wasteful costs of overlapping remedies, with the associated consequences of either over-

lapping payments to victims or increased administrative costs of second-round loss shifting by subrogation or otherwise. Thus, it would seem that any enactment establishing either social security or non-fault benefits for medical expenses or for subsistence level benefits beyond medical expenses should provide for restrictions to some extent against awards of damages based on fault. And any enactment of this type might appropriately authorize and encourage private contracts for greater restriction of damages based on fault, within regulated limits, in return for greater nonfault benefits than the law requires. These voluntary elements of nonfault coverage would offer limited advantages immediately, and data concerning their practical performance might contribute in the future to better informed decisions about compensation for medical accidents.