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## THE AUTOMOBILE IN COURT

WILLIAM E. KNEPPER\*

*The Problem*

The population explosion of the middle of this twentieth century has brought with it a marked increase in the number of automobiles on our highways. And a great many of these automobiles have found their way into our courts. It has been reported that a summons is issued every thirty seconds for a traffic law violation in New York City, and that in 1959 about one-third of the nation's approximately 90,000,000 motorists were cited to appear in traffic courts for quasi-criminal offenses.<sup>1</sup>

That, however, is only a small part of the total story. In 1959, 41.3 per cent<sup>2</sup> of all those killed in accidents<sup>3</sup> lost their lives in motor vehicle accidents.<sup>4</sup> Disabling injuries from motor vehicle accidents numbered about 1,400,000 in 1959, at an estimated cost of nearly six billion dollars.<sup>5</sup>

It is common knowledge that a very high percentage of automobile accidents resulted in claims for damages and suits thereon, although statistics show that 95 per cent of the actions brought were settled and only about 1.5 per cent of all claims of this nature have gone to judgment after trial.<sup>6</sup> As a result of this litigation, it has been asserted that automobile accident cases clutter up and delay the effective functioning of our judicial system.<sup>7</sup> Discussing the same subject, Governor Brown of California is quoted as saying that the "processes of justice are too slow and public skepticism about the inadequacy of our present court organization and administration is already wide-

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<sup>1</sup>Zeichner, *The Errant Motorist: Public Enemy No. 1*, 46 A.B.A.J. 151 (1960).

<sup>2</sup>37,800.

<sup>3</sup>91,600.

<sup>4</sup>National Safety Council, *Accident Facts* (1960).

<sup>5</sup>*Ibid.*

<sup>6</sup>*Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 46 (1959), cert. denied, 361 U.S. 374 (1960).

<sup>7</sup>Weigel, *Preliminary Report on Plans for Inquiry Into the Wisdom of a California Automobile Accident Commission*, 34 Calif. State B. J. 393, 402 (1959).

spread."<sup>8</sup> "The use of the automobile for every movement—to go to the corner grocery, to take the children to school, to go to business and social affairs, for vacations, for business trips, for every reason under the sun and for no reason at all"—is charged with causing an almost incredible number of personal injury and property damage suits.<sup>9</sup>

Court congestion and delay in the disposition of litigation have become matters of nationwide concern and have resulted in numerous studies. In May, 1956, there was convened, on the invitation of Attorney General Herbert Brownell, Jr., a Conference on Court Congestion and Delay in Litigation, composed of the presidents of the bar associations of the states and larger cities and the heads of other bar, judicial and research organizations. The executive committee of this conference promptly reported that, "Prolonged and unjustified delay is the major weakness of our judicial system today."<sup>10</sup>

However, it has been shown that the principal problems of court congestion and delay exist only in a few metropolitan centers, and that the blame for the conditions there existing cannot be saddled on one type of case—namely, automobile litigation.<sup>11</sup>

The problem of delay in court is not new. Governors of New York complained about it as long ago as 1828.<sup>12</sup> Roscoe Pound, addressing the American Bar Association Annual Meeting in 1906 on "Causes of Popular Dissatisfaction with the Administration of Justice," voiced the belief that the primary cause of such dissatisfaction, then as now, was delay.<sup>13</sup>

But today, in searching for a "whipping boy," numerous persons and organizations are charging that the automobile in court is the cause of most of our problems of court congestion and delay. Writers are asking whether the "negligence law of the nineteenth century," the "horse and buggy doctrines of the 1800's," can "withstand the strains of the highway and skyway of tomorrow."<sup>14</sup>

It cannot be denied that the mere presence of the automobile in

<sup>8</sup>1 For the Defense 2 (1960).

<sup>9</sup>LaBrum, *Congested Trial Calendars: It's About Time To Do Something About Them*, 43 A.B.A.J. 311 (1957).

<sup>10</sup>The Law's Delay: Report of the Attorney General's Conference, 43 A.B.A.J. 242 (1957).

<sup>11</sup>Ghiardi and Morris, *Can Courts, Juries and Cars Coexist*, 24 *Ins. Counsel J.* 346, 353 (1957).

<sup>12</sup>Hart, *Shall the Jury System be Sacrificed on the Altar of Economy*, 27 *N.Y. State B. Bull.* 146 (1956).

<sup>13</sup>Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A.J. 738 (1958).

<sup>14</sup>Green, *Traffic Victims, Tort Law and Insurance*, 63, 68 (1958).

court is an important factor in the creation of the problem with which we are now faced. However, that problem has become one of major consequence as a result of some contributing causes, to which we now turn our attention.

*Some Causal Factors*

We should be less than realistic if we ignored the fact that the driver of a high-powered automobile, as a mere human being, is confronted with a multiplicity of hazards and duties as he spins along our streets and highways. As Green<sup>15</sup> puts it, he "must observe the operation of other vehicles, front and rear and to the sides . . . must observe road signs, stop signs, cautions, traffic lines, light signals and those of traffic officers . . . must observe his speed and that of others . . . must watch for signals of other motorists and give proper signals himself . . . must know the operating mechanisms of his machine, check their operations as he travels, and maintain his rapidly moving and complex machine under control at all times."

Confronted with these and further heavy responsibilities as a motorist, the "law-abiding citizen in a moment may turn into a traffic violator almost without intending to be such and may find the step to manslaughter on the highway even shorter than he imagines."<sup>16</sup>

If such a driver is a stable, reasonably mature individual with an adequate control of his emotions, he may be expected to maintain those characteristics when he takes the wheel of a car.<sup>17</sup> If he is properly trained as a driver and abides by his training, he is likely to escape injury.<sup>18</sup>

Unfortunately, too many motorists do not meet those specifications, else the record of traffic law violations would not show that the traffic case load has mounted, as year by year more cars roll onto car-saturated roads.<sup>19</sup> To deal with this aspect of the problem, there must be more effective law enforcement and more individual self-discipline, and the motorist must come to realize that his duties as a driver include not only the safety of himself but also a great social responsibility for the safety of others who ride in and drive automobiles on the highways.

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<sup>15</sup>Id. at 66-67.

<sup>16</sup>Chief Justice Arthur T. Vanderbilt, quoted in Zeichner, *The Errant Motorist: Public Enemy No. 1*, 46 A.B.A.J. 151 (1960).

<sup>17</sup>Id. at 152.

<sup>18</sup>Gene Blake, writing in the *Los Angeles Times* of December 13, 1959, says that one out of every two Californians now living will die or be seriously injured in a traffic accident before reaching the age of 65 years.

<sup>19</sup>Zeichner, *The Errant Motorist: Public Enemy No. 1*, 46 A.B.A.J. 151 (1960).

In addition, there has developed in the last decade an increased claim consciousness on the part of the American people. A general feeling has grown up that if something happens to injure a person or his property, someone else ought to pay for it, regardless of whether the injured person might have caused the damage himself. William H. Rodda, Secretary of the Transportation Insurance Rating Bureau, Chicago, speaking before an institute of the Nebraska Insurance Federation in Omaha, in October, 1959, said:

"There is also the feeling that an accident should be made a profitable thing whenever possible. Excessive verdicts for accidents, and in some areas the activities of ambulance chasers, have contributed to this feeling that a person can make money out of any accident that occurs."<sup>20</sup>

The utterly unscrupulous attitude of many persons in the matter of claims for damages has been severely criticized by the Very Rev. Francis J. Connell, of Catholic University of America, who has said:

"When a person has suffered some real harm, he may press his claim to the genuine amount of loss he has incurred and may make use of legal measures to win his claim. But if he demands more than what he realizes was the true amount of the injury, he is just as truly a thief as a man who enters a house and steals from a safe."<sup>21</sup>

Despite the efforts that have been made in public education, there is an unfortunate lack of general understanding that insurance companies are fundamentally merely the administrators of the funds with which they pay claims and satisfy judgments. Those funds are derived from the premium contributions of the motorists in the jurisdiction of the court where the awards are made, and it is the "home town dollar" provided by the motorist himself, not wealth from the treasury of some non-resident corporation, that foots the bill for automobile accident losses. Were this fact better understood, it probably would not have been necessary for Monsignor Connell to say:

"Sometimes people have the idea that when an insurance company is bearing the expense, they may raise the amount beyond the sum of actual damage. Of course, this is an erroneous notion. It is just as much a sin of injustice to exact money from an insurance company by false claims as it is to victimize a private individual."<sup>22</sup>

Thoughtful observers have noted an apparent weakening of the

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<sup>20</sup>444 *Ins. L. J.* (1959).

<sup>21</sup>*The Liguorian*, July, 1958.

<sup>22</sup>*Ibid.*

moral fiber of the community as it bears on claims for personal injuries. In a recent report,<sup>22a</sup> a committee of prominent trial lawyers says:

“Prosecuting authorities, even judges, ignore demonstrated instances of perjury and, as if they arose out of some kind of game, they are lightly brushed aside. There seems to be a belief, even among people of otherwise high moral principle, that the word ‘honesty’ has a different and more liberalized meaning in litigation involving claims for personal injuries.”

Coincidental with the development of those attitudes has been the formation and growth of an organization of lawyers<sup>23</sup> claiming to be “dedicated to the rights of injured persons.” It came into existence in 1946 and was “7500 strong” in 1959.<sup>24</sup> It became the advocate of “the adequate award,”<sup>25</sup> and then “the more adequate award.”<sup>26</sup> It decried “gaslight verdicts in the atomic age.”<sup>27</sup> It described its “adversaries” as “the powerful insurance associations and lobbyists, the gigantic automotive industry, the vast drug and pharmaceutical enterprises and others.”<sup>28</sup> It gave as a reason for the increasing size of jury verdicts the fact that “the plaintiffs’ bar has become better trained and educated.”<sup>29</sup> Its editor-in-chief has spoken of it as “an unvarnished bar association of plaintiffs’ lawyers,”<sup>30</sup> and as an “organization to comfort the afflicted and to afflict the comfortable.”<sup>31</sup>

A past president of that organization, and one of its most prolific writers has authored a five-volume, 5018 page work expounding his views as to what the plaintiff, his counsel, his investigators, his witnesses, the judge and the jury should do in a personal injury case.<sup>32</sup> Dean William L. Prosser says<sup>33</sup> that this book tells “how to wring from an impressed and sympathetic jury every last possible nickle that can be obtained for the plaintiff, and how to build up and mag-

<sup>22a</sup>Report of Automobile Insurance Committee—1957, 25 Ins. Counsel J. 11, 12 (1958).

<sup>23</sup>National Association of Claimants’ Compensation Attorneys, commonly called “NACCA.”

<sup>24</sup>NACCA Thirteenth Annual Convention Proceedings 749 (1959).

<sup>25</sup>Belli, *The Adequate Award*, 39 Calif. L. Rev. 1 (1951).

<sup>26</sup>Belli, *The More Adequate Award* (1952), noted in 10 NACCA L.J. 342 (1952).

<sup>27</sup>Lambert, *NACCA—Rumor and Reflection*, 18 NACCA L.J. 25, 33 (1956).

<sup>28</sup>Ashe, *NACCA—An Appraisal of Its Objectives*, NACCA Thirteenth Annual Convention Proceedings 748 (1959).

<sup>29</sup>Lambert, *NACCA—Rumor and Reflection*, 18 NACCA L.J. 25, 33 (1956).

<sup>30</sup>*Ibid.*

<sup>31</sup>24 Ins. Counsel J. 178 (1957).

<sup>32</sup>Belli, *Modern Trials* (1954). Volumes 4 and 5 relating to Damages were published in 1959.

<sup>33</sup>3 Calif. L. Rev. 556, 557 (1955).

nify whatever case he may have until the recovery reaches or exceeds the absolute maximum which any court can conceivably allow to stand." He notes that the author "has no interest or concern with evenhanded justice" but seeks the "maximum possible amount for the plaintiff."

In reviewing that book in 1955, Dean Prosser predicted that, as its impact spread across the country, more would be heard of proposals to abolish jury trials in personal injury suits in the United States. He spoke as a prophet. The "Hollywood Type of Trial," advocated by the NACCA writers, has emerged in state after state, and dissatisfaction with that type of court proceeding has unquestionably been an important factor in producing the spoken and written words of judges, torts professors, editors, insurance executives, and office holders in high places, who question whether we must sacrifice our heritage of trial by jury for reasons of economic necessity.<sup>34</sup>

Another development during the past decade relates to the medical aspects of personal injury litigation. The organized plaintiffs' lawyers consider the subjects of forensic medicine and medical-legal learning of "prime importance" in their educational program.<sup>35</sup> They have devoted hundreds of thousands of man-hours to seminars where doctors and lawyers join in training their fellows in the art of "making the most" out of even trivial injuries. A flood of books relating to medical-legal matters and trial tactics has streamed from the presses. In their thousands of pages these books supplement the material presented in the seminars. Their publishers make a direct appeal to the profit motive, as is evidenced by advertising urging prospective readers to "cash in on negligence cases" and to "learn better ways to obtain larger verdicts in personal injury cases."

The Law-Science Academy of America and its affiliate, The Law-Science Foundation of America, under the leadership of Dr. Hubert Winston Smith, a physician-lawyer on the faculty of the University of Texas School of Law, conduct teaching programs in "medicolegal trial techniques" from coast to coast and, in the summer of 1960 presented such a program for eight weeks at Crested Butte, Montana, where registrants may vacation with their families while studying what Dr. Smith has called "the nature and consequences of trauma and injury in respect to civil and criminal litigation, and medicolegal trial technique."<sup>36</sup> These same organizations are establishing a law club for

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<sup>34</sup>Ryan, *Some Signs of Approaching Disaster*, 1 *For the Defense* 1 (1960).

<sup>35</sup>Lambert, *NACCA—Rumor and Reflection*, 18 *NACCA L.J.* 25, 30 (1956).

<sup>36</sup>Smith, *Law-Science Movement: Philosophy and Practice*, 9 *Va. L. Weekly*, No. 4 (1958).

students who are particularly interested in preparing for trial practice and will provide "scholarships" for some such students at the Crested Butte program. While Dr. Smith has described the Law-Science Academy as "a spearhead of a social movement for the improvement of Law and the administration of Justice,"<sup>37</sup> his teaching program probably tends to overemphasize the medical aspects of personal injury trials, with the results that (1) some such trials are more time-consuming than would seem to be justified, (2) certain types of injuries are caused to appear more serious than they really are, and (3) the emphasis on injuries and damages tends to minimize the importance of determining that liability must exist before damages can be awarded.

Another contributing cause of our existing court congestion and delay is the apparent unwillingness of parties and their counsel to settle cases without going to court. J. Harry LaBrum,<sup>38</sup> in an excellent discussion of this subject, says:

"A staggering part of our backlog in almost every court represents cases which will *never* be tried. They are bound to be settled. Many of them are cases which, with some determined effort and plain talk by an adjuster or by house counsel, would never have reached court."<sup>39</sup>

There is too much of the "courthouse door" complex in settlement negotiations. We are told that this is due to "human nature." If that be true, the time has come when lawyers and litigants must substitute good judgment and common sense for such human nature. Every just claim, whether it be for personal injury or property damage, should be promptly and adequately compensated, and every non-meritorious or exaggerated claim should be effectively resisted. This means that both sides should fairly, honestly and realistically evaluate a case and make a determined effort to dispose of it, if a settlement is warranted, at the earliest possible moment. Also it is necessary to make a further reduction in the number of cases presently coming to trial by using the influence of the judicial machinery to dispose of lawsuits before they reach the courtroom. Unquestionably, the increasing cost of litigation plays a substantial part in the current agitation for some plan, other than trial by jury, to dispose of automobile accident claims.<sup>40</sup>

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<sup>37</sup>Quoted from the Newsletter of the Law-Science Academy, September 15, 1959.

<sup>38</sup>Of the Philadelphia bar.

<sup>39</sup>LaBrum, *Congested Trial Calendars: It's About Time To Do Something About Them*, 43 A.B.A.J. 311, 312 (1957).

<sup>40</sup>Cowie, *The Growing Cost of Tort Litigation and Its Significance to The Public and The Profession*, 26 Ins. Counsel J. 590, 592 (1959).

Finally, in surveying these causal factors of court congestion and delay, we must recognize the following:<sup>41</sup>

- (1) Undermanned courts.
- (2) Lack of centralized court administration.
- (3) Inadequate case assignment methods.
- (4) Uneven distribution of judicial work.
- (5) Failure to make adequate use of time-saving methods like pre-trial.
- (6) Inefficient use of the time judges spend at work.
- (7) Dilatory tactics of some lawyers and their tolerance by some courts.
- (8) Complicated court systems.
- (9) Short jury trial days.<sup>42</sup>
- (10) Short jury terms.
- (11) Prolonged vacation periods.
- (12) Lack of standardized instructions and proper rules of court.
- (13) Insufficient number of trial lawyers in some law offices handling a large number of negligence cases.
- (14) Lack of cooperation of some counsel with the courts.

The listing of those causes of court congestion and delay readily emphasizes the fact that manpower is the basic problem. The creation of additional judgeships has been recommended on countless occasions. But the full utilization of our existing judicial manpower is as important as the creation of new judgeships. Such a rare and unique resource must not be wasted.<sup>42a</sup>

Likewise, better use must be made of the available trial lawyers, especially in the large metropolitan areas. It is true that much civil trial work is concentrated in a few law offices, but changes in scheduling procedures and a firm policy of avoiding last minute delays can do much to improve this situation. Also, the legal profession must train young men to take care of the legal needs of the community,<sup>42b</sup> and when more business becomes concentrated in one firm than it can handle, it must put on more legal help or let some of the business go to offices which have the time to handle it.<sup>42c</sup>

<sup>41</sup>Ghairdi and Morris, *Can Courts, Juries and Cars Coexist*, 25 *Ins. Counsel J.* 346, 351 (1957); Norris, *The Law's Delays in Ohio: Remedy Without New Legislation*, 33 *The Ohio Bar* 789 (1960).

<sup>42</sup>See also, Kalven, Zeisel and Buchholz, *Delay in Court*, chs. 15 and 16 (1959).

<sup>42a</sup>Johnson, *Judicial Manpower Problems*, 328 *The Annals of The American Academy of Political and Social Science* 29-36 (March, 1960).

<sup>42b</sup>Judge Ulysses Schwartz in *Gray v. Gray*, 6 *Ill. App.* 571, 580-81, 128 *N.E.2d* 602, 606-07 (1955).

<sup>42c</sup>*Mr. Justice Jackson in Knickerbocker Printing Corp. v. United States*, 348 *U.S.* 875 (1954).

Of course, the causes of court congestion and delay mentioned above apply to all types of personal injury litigation, not merely to automobile cases. In 1959 work accidents injured 4,300,000 persons, home accidents disabled about 4,000,000 persons, and public non-motor-vehicle accidents produced about 2,000,000 disabling injuries.<sup>43</sup> Thus, we see that the disabling injuries (1,400,000) from automobile accidents amounted to about 12 per cent of the total. But it is likely that automobile accidents produce more lawsuits per accident than do the other types, although no reliable statistics have been found. Consequently, it is understandable that the hue and cry for reform is directed at automobile accident litigation. Let us, then, consider some of the suggested remedies.

### *Some Proposed Remedies*

As a result of the mounting toll of losses due to bodily injuries and deaths caused by the operation of automobiles, and the court congestion and delay allegedly resulting, at least in part, therefrom, many persons have come forth with "remedial" suggestions which they hope or believe may provide solutions to the apparent problem. Financial responsibility laws exist in forty-nine states<sup>44</sup> and are being constantly improved. Massachusetts, North Carolina and New York have compulsory insurance statutes.<sup>45</sup> Legislation has been enacted in various forms to provide for unsatisfied judgment funds.<sup>46</sup> "Medical pay" provisions in insurance policies have been broadened, and one insurance company is writing a policy that includes a voluntary compensation plan.

Rehabilitation of injured automobile accident victims is a subject that is receiving careful study. This subject presents a problem more serious than that of rehabilitation of persons injured at work, in which field considerable progress has been made. Many automobile accident victims could be helped substantially by having access to great rehabilitation centers such as the Kessler Institute for Rehabilitation, in West Orange, New Jersey, the Institute for the Crippled and Disabled and the Institute of Physical Medicine and Rehabilitation at New York University—Bellevue Medical Center. Establishment of similar facilities throughout the country is in process but needs to be expedited. Rehabilitation has emerged as a new and dynamic force

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<sup>43</sup>National Safety Council, *Accident Facts* (1960).

<sup>44</sup>Loiseau, *Innocent Victims* 1959, 38 *Texas L. Rev.* 154, 157 (1959).

<sup>45</sup>*Ibid.*

<sup>46</sup>North Dakota, New Jersey, Maryland and New York.

in modern medicine and its effective utilization can do much to repair the damages suffered by automobile accident victims. An anticipated result thereof would be less litigation and fewer exorbitant verdicts.<sup>46a</sup>

Lately there has been a renewal of interest, in some quarters, in automobile accident compensation concepts which would compel the payment of compensation regardless of fault.<sup>47</sup> The only such program now in operation in the Americas is in effect in the Province of Saskatchewan, Canada.<sup>48</sup>

These compensation proposals are predicated upon the premise that the automobile accident is a social hazard, an inevitable result, and a by-product of motor-minded American progress.<sup>49</sup> One writer contends, "The use of automobiles is compulsory, not voluntary; the risk of injury is compulsory; protection by insurance should be compulsory, and without regard to fault."<sup>50</sup> Support for this concept stems "from the difficulty of fixing or measuring blame in most accidents and from the idea that our society should shoulder the responsibility for alleviating injury inherent in its mechanization."<sup>51</sup>

Under such a program every person who sustained injury would be paid according to a fixed schedule of compensation.<sup>52</sup> "The heedless, callous person causing injury would be paid on the identical formula as the innocent victim."<sup>53</sup> The careful motorist would have his defenses taken away from him and would be required to underwrite

<sup>46a</sup>See Fougner, *Rehabilitation: Its Future Role in Third Party Claims*, 27 *Ins. Counsel J.* 378 (1960).

<sup>47</sup>Since at least 1925, Robert S. Marx, of Cincinnati, Ohio has advocated such a plan. See Marx, *Compulsory Compensation Insurance*, 25 *Col. L. Rev.* 164 (1925); Marx, *Compensation Insurance For Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 *Ohio St. L.J.* (1954).

<sup>48</sup>For a discussion of this and other plans (recently proposed), see Ryan and Green, *Pedestrianism: A Strange Philosophy*, 42 *A.B.A.J.* 117, 118 (1956). See also Ehrenzweig, "Full Aid" Insurance for the Traffic Victim, *Univ. of Calif. Press* (1954), reviewed by Prof. Fleming James in 43 *Calif. L. Rev.* 559 (1955); and Green, *Traffic Victims, Tort Law and Insurance* (1958).

<sup>49</sup>Marx, *Compensation Insurance for Automobile Accident Victims: The Case For Compulsory Automobile Compensation Insurance*, 15 *Ohio St. L.J.* 134, 137 (1956).

<sup>50</sup>*Id.* at 138.

<sup>51</sup>Weigel, *Preliminary Report on Plans for Inquiry Into the Wisdom of a California Automobile Accident Commission*, 34 *Calif. State B. J.* 393, 403 (1959).

<sup>52</sup>It is sometimes suggested that payment would be denied to a motorist who is guilty of driving while drunk, or at greatly excessive speeds, or similar inexcusable, quasi-criminal or actually criminal conduct. See Weigel, *supra* note 51.

<sup>53</sup>Kramer, *Fallacies of a Compensation Plan for Automobile Accident Litigation*, 26 *Ins. Counsel J.* 420, 421 (1959).

compensation for the careless and the irresponsible, to pay them for injuries that they caused to themselves.<sup>54</sup>

The sponsors of such suggestions seem to see nothing unrealistic in the idea of special generosity to a particular class of sufferers (automobile accident victims) while ignoring the "economic losses" resulting from injuries and deaths occurring in airplanes, on railroads, in the home, on the farm, and everywhere other than on the highways. If the matter is to be approached from the standpoint of social responsibility, it would seem that the compensation idea should include any and all forms of accidental injury and death. As shown above, in 1959, out of a total of some 11,800,000 accidental deaths and injuries, about 10,362,200 were nonautomotive accidents, and only 1,437,800 injuries and deaths were caused by automobiles in the entire United States.<sup>55</sup> Should our "social responsibility" require us to provide compensation for the 10,362,200 persons injured and killed otherwise than by automobile accidents? Should all those who have provided accident insurance and financial responsibility for themselves if an accident be the result of their fault be compelled by law to provide financial protection for persons who, injured as a result of their own negligence, have failed to provide accident-insurance for themselves?<sup>56</sup>

There are those who point to workmen's compensation as if it were the "father" of the automobile commission compensation concept. The two situations are not analogous, as has been frequently demonstrated.<sup>57</sup> In workmen's compensation the accident must arise out of and in the course of employment; the employer can and does pass on his cost of insurance or loss to his customer; there is privity of contract between the employer and claimant; preventive safety measures can be used effectively; facts can be established by an immediate investigation on the premises where the accident occurs; there is comparative equality of awards based on generally similar wage scales; the employee has a job to go back to and this, combined with the relationship of employer-employee, tends to speed recovery from disability and reduce fraudulent claims and exaggeration of injuries; workmen's

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<sup>54</sup>McVay, Reply to "The Case For Compulsory Automobile Compensation Insurance," 15 Ohio St. L.J. 161, 166 (1954).

<sup>55</sup>National Safety Council, Accident Facts, (1960).

<sup>56</sup>McVay, *supra* note 54.

<sup>57</sup>Ryan and Green, Pedestrianism: A Strange Philosophy, 42 A.B.A.J. 117, 119-120 (1956); Sherman, Grounds for Opposing the Automobile Accident Compensation Plan, 3 Law & Contemp. Prob. 598 (1936); Note, 32 N.Y.U.L. Rev. 147 (1957); Lilly, Compulsory Automobile Insurance, Compulsory Compensation for Motor Vehicle Injuries and Motor Vehicle Financial Responsibility Laws, Ass'n of Cas. and Surety Executives, 53 (1930, as reprinted in 1932).

compensation does not operate when the worker injures the employer.<sup>58</sup>

Moreover, there has been much criticism of the volume of litigation generated by workmen's compensation claims. In the states where an employee may appeal to the courts from an adverse finding by the workmen's compensation commission (of which Ohio is one)<sup>59</sup> there are numerous instances in which workmen's compensation appeals are contributing substantially to the congestion of the court dockets. It has been well said that the amount of court litigation in workmen's compensation represents "a great gap between theory and practice."<sup>60</sup> Some of this litigation turns on questions of law,<sup>61</sup> but many cases are appealed in order to present questions of fact to juries in trial courts.<sup>62</sup>

When the foregoing factors are considered in conjunction with the criticisms of inadequacy of benefits in some areas and excessively high administrative expenses in many instances, it seems apparent that an automobile commission compensation concept cannot be justified upon the theory that since workmen's compensation is "good," it would be "good" also.

The California Preliminary Report<sup>63</sup> recognizes that, "In order to keep the cost of universal compensation to automobile accident victims within manageable bounds, there would have to be some limits upon the amount of payments."<sup>64</sup> All injured persons would be paid the same for like injuries and disabilities. Sponsors of such proposals suggest that individual insurance could be carried to provide additional protection in cases where such awards would be inadequate or inequitable. Thus the skilled surgeon, who lost an arm in an auto-

<sup>58</sup>Ryan and Green, *supra* note 57.

<sup>59</sup>Ohio Rev. Code Ann. § 4123.519 (Baldwin 1958).

<sup>60</sup>Reid, U.S. Bureau of Labor Standards, Bull. 172, p. 157.

<sup>61</sup>"The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion." Lord Wrenbury in *Herbert v. Samuel Fox & Co.* (1916) 1 A.C. 405, 419, cited by Mr. Justice Murphy in *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947).

<sup>62</sup>See, e.g., *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E.2d 690 (1950); *Drakulich v. Industrial Comm'n*, 137 Ohio St. 82, 27 N.E.2d 932 (1940); *Long v. Industrial Comm'n*, 106 Ohio App. 228, 149 N.E.2d 922 (1957); *McGary v. Industrial Comm'n*, 104 Ohio App. 149, 146 N.E.2d 274 (1956); *Williams v. Industrial Comm'n*, 95 Ohio App. 275, 119 N.E.2d 126 (1953).

<sup>63</sup>Weigel, *supra* note 51.

<sup>64</sup>A frequent suggestion has been to model payments on those found in accident and health insurance policies: viz., so much for medical and hospital expense, so much for a broken leg, so much for loss of both eyes, etc. See also Greene, *Must We Discard Our Law of Negligence in Personal Injury Cases*, 19 Ohio St. L.J. 290, 309 (1958).

mobile accident through no fault of his own, would be expected to insure his own losses over and above the amount the commission would pay, under the schedule, to any person who lost an arm, regardless of age, sex, occupation, condition of health, or degree of fault.

As to the amounts of the payments to be made by an automobile accident compensation commission, there is no agreement among the sponsors. Professor James pleads "neither for greater nor for smaller payments, but rather for a more equitable distribution of whatever we do pay."<sup>65</sup> He further says, "If penury must be practiced, let it fall rather on cases where need and hardship are least, by reducing or even eliminating payments on small claims."<sup>66</sup> He would restrict the proposed compensation to "reparation of economic loss," suggesting that "allowance for intangible items like pain and suffering (natural enough where compensation is made by a wrongdoer) may well be out of place where the bill is being footed by innocent persons."<sup>67</sup>

No one contends that such a proposal would result in payment of amounts approximating those which are paid under the present system when the right to be paid is established. Obviously, no compensation concept could afford to provide just and adequate awards by common law standards for all persons injured or killed in automobile accidents, regardless of fault.<sup>68</sup>

The amounts of payments under the Saskatchewan plan are generally deemed inadequate, at least in our more populous areas.<sup>69</sup> The suggested scale of payments would ordinarily be based on the "minimum needs of low-income groups,"<sup>70</sup> but, at best, the awards would be

<sup>65</sup>James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Col. L. Rev. 408, 421 (1959).

<sup>66</sup>*Ibid.*

<sup>67</sup>James, *Some Reflections on the Bases of Strict Liability*, 18 La. L. Rev. 293, 297 (1958).

<sup>68</sup>Kramer, *supra* note 53.

<sup>69</sup>Weigel, *supra* note 51, says that "the Saskatchewan Plan is far from the equivalent of experience with an Automobile Accident Commission in a state such as our own."

Marx, note 49 *supra* at 141, says, "Saskatchewan is primarily a rural province. It does not have the heavy traffic to be found on the roads of Ohio." The Temple Survey notes that a careful examination of the background of the Saskatchewan program, "the physical, demographic, and geographic facts of the Saskatchewan universe, the evolution of the program itself, and an evaluation of the techniques in use in Saskatchewan, made it apparent that its parameters—social, economic and physical—are so different from those of New Jersey that no real basis for comparison existed." *Economics and Business Bulletin*, School of Business and Public Administration, Temple University, Vol. 12, pp. 54-56 (March, 1960).

<sup>70</sup>Ryan and Green, *Pedestrianism: A Strange Philosophy*, 42 A.B.A.J. 117, 120 (1956).

similar to workmen's compensation schedules as now adopted by the various states.<sup>71</sup>

In California, where such a concept is receiving serious study, there were about 240,000 automobile accident claims in Los Angeles County last year. Gene Blake, writing in the *Los Angeles Times*,<sup>72</sup> makes comparative estimates resulting in the conclusion that it would require 3000 employees and 570 referees, with a budget of \$22,000,000, for the operation of an automobile commission compensation program in Los Angeles County alone. Conversely, he shows that these 240,000 claims resulted in 14,500 suits, of which only 4,800 were actually processed through the courts<sup>73</sup> under the present jury trial system. All the rest were settled before the automobile got into court.

Even Professor James, who has written with some enthusiasm about the automobile compensation concept, admits that if such a system were more expensive to administer and would invite more malingering and fraud than does the present system, then these charges "would constitute drawbacks" to such a program.<sup>74</sup>

And then there are those who feel that the proper future course for the development of tort law lies in a strict rule of liability and the effective elimination of defenses that enable defendants or their insurers to avoid such liability.<sup>75</sup> It is difficult to understand the thinking behind such proposals in the face of the admission by one of the proponents that "liability insurance rates here are already the highest in the world even though strict liability has not been adopted."<sup>76</sup> It seems apparent that those who make such proposals do so without regard to the fact that, by reason of the growing cost of tort litigation and the heavy underwriting losses of the automobile insurers,<sup>77</sup> the very existence of private insurance is threatened.<sup>78</sup>

<sup>71</sup>For schedules showing compensation awards in the various states, see St. Clair, *The Case for Private Insurance of Workmen's Compensation*, 27 *Ins. Counsel J.* 99, 112-116 (1960).

<sup>72</sup>Issue of December 15, 1959.

<sup>73</sup>*Ibid.*

<sup>74</sup>James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 *Col. L. Rev.* 408, 419 (1959).

<sup>75</sup>See Harper and James, *The Law of Torts* (1956), reviewed by Prof. Warren A. Seavey in 66 *Yale L.J.* 955 (1957).

<sup>76</sup>James, *supra* note 74, at 418.

<sup>77</sup>*Year Underwriting Loss Sustained*

1956	\$109,276,660.00
1957	205,451,725.00
1958	166,528,623.00

See Lusby, *The Impact on the Casualty Insurance Industry of Recent Developments in the Personal Injury Litigation Field*, 27 *Ins. Counsel J.* 23, 31 (1960).

<sup>78</sup>Cowie, *supra* note 40, at 693.

Furthermore, our law to date has developed on the theory that "strict liability" is usually justified only by the high degree of harm certain activities are likely to produce and the unusual circumstances in which such activities generally take place. One writer has suggested that the "imposition of different rules," such as the rule of strict liability, "can be justified only if the manner in which the activity is pursued is different from the manner in which the individual member of society as a whole is expected to conduct his business."<sup>79</sup> The doctrine of strict liability was certainly never intended to be applied to the operation of a modern-day service such as the family-purpose-automobile, which is not inherently dangerous<sup>80</sup> and which can be operated with safety whenever stable, reasonably mature drivers pay attention to and respect motor vehicle statutes and the ordinary rules of the road.

### *Conclusion*

That the automobile in court poses some serious problems cannot be denied. Fortunately, many thinking people are gravely concerned as to the recent developments, and numerous proposals have been made for corrective measures.<sup>81</sup> Of course, law should never be changed lightly and "the story of law must teach us that changes are to be made by the innovations of time slowly and by degrees."<sup>82</sup>

In a society that offers only limited social security, the wisdom of special generosity to a particular class of sufferers seems unrealistic, particularly when a concept such as automobile commission compensation appears to take no account of the cause of the condition it seeks to remedy.

It is generally agreed that the best defense against injuries is their prevention. More effective enforcement of our traffic laws is essential. Drivers of automobiles must be brought to realize that they cannot be allowed to drive unless they drive safely. The social responsibility of the motor vehicle operator to protect his fellows from injury and death on the highways must be recognized. The first step toward the solution of our problem must be prevention.

But despite all preventive measures, accidents will continue to oc-

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<sup>79</sup>Greene, *Must We Discard Our Law of Negligence in Personal Injury Cases*, 19 Ohio St. L. J. 290, 299 (1958).

<sup>80</sup>*Elms v. Flick*, 100 Ohio St. 186, 126 N.E. 66 (1919). Compare *Elliott v. Harding*, 107 Ohio St. 501, 140 N.E. 338, 36 A.L.R. 1128 (1923), and *Williamson v. Eclipse Motor Lines, Inc.*, 145 Ohio St. 467, 62 N.E.2d 339, 168 A.L.R. 1356 (1945). See also 5A Am. Jur. *Automobiles and Highway Traffic*, § 194 (1956).

<sup>81</sup>*Loiseau*, *supra* note 44.

<sup>82</sup>*Zane*, *The Story of Law*.

cur and persons will continue to be injured and killed. How, then, shall fair and reasonable compensation be made? There is no assurance that a commission compensation concept will relieve court congestion<sup>83</sup> and, as shown above, there is reason to believe that the cost of operating such a plan would be enormous. Furthermore, the thesis of liability without fault is antagonistic to our long standing conviction that a man's freedom of action is subject only to his obligation not to infringe any duty of care which he owes to others.<sup>84</sup>

It is not sound legal thinking to recommend the adoption of a proposal such as liability without fault, which is entirely foreign to our basic concepts, merely because of the type of activity pursued by some drivers of automobiles, while the rest of our society lives under different rules.<sup>85</sup> While it is natural that well-meaning persons will propose drastic changes in an effort to remedy the problem, it is our duty as lawyers and citizens to make sure that such changes as are made will be consistent with the ultimate best interests of all the people, and that they will preserve and maintain individual dignity and individual rights in our free society. The principle of individual responsibility for action is so firmly imbedded in our law that any change eliminating that principle would be bound to cause a chain reaction bringing about deterioration of moral standards in particulars not now predictable. Also, we submit, the doctrine of liability without fault tends to make the individual "a beneficiary of his own carelessness and his own disregard for his fellow man."<sup>86</sup>

An intelligent and realistic approach to change, combined with a vigorous and well conceived attack on the real causes of court congestion and delay, will solve the problem of the automobile in court. It is neither necessary nor sensible to destroy our system of jurisprudence to accomplish that result.

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<sup>83</sup>Loiseaux, *supra* note 44.

<sup>84</sup>Read v. J. Lyons & Co., [1947] A.C. 156, 171. See also Prosser, *Torts*, 15, 315-49 (2d ed. 1955).

<sup>85</sup>Compare Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 *Tenn. L. Rev.* 938, 948 (1957).

<sup>86</sup>Kramer, *Fallacies of a Compensation Plan for Automobile Accident Litigation*, 26 *Ins. Counsel J.* 420, 424 (1959).

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