Compensation of Victims—A Pious and Misleading Platitude

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So much is currently being written on the subject of compensation of victims, especially of victims of automobile accidents, that one enters the field with some trepidation. The question is an important one, however, and it may always be hoped that some additional persons will be convinced of the proper solution by further argument on the subject.

Compensation of victims sounds like a very noble goal, but on further examination it appears that these high sounding words are disguising some simple truths. When a person has been injured a loss has been suffered by society as a whole, and not only by the person directly injured. There is no way in which society can remove that loss. The question is whether it should be borne by the person upon whom it has fallen or by someone else. Frequently those who are in favor of shifting such losses talk about compensation of victims in a manner which makes it sound as though continual shifting of losses will somehow cause the losses themselves to disappear.

There are two fundamental principles which underlie the goal of compensation of victims. In different degrees both principles support the shifting of losses, and therefore the compensating of victims, but they are separate principles and they should be directly and explicitly considered. The first—the deterrence principle—is that the shifting of losses deters careless acting and thereby lessens the number of losses which will in fact occur. The second—the insurance principle—involves the spreading of losses to prevent one person from bearing a burden greater than its weight when spread and borne by many people. These two principles which support a shifting of loss have operated differently with distinct effects in recent periods of our history.

I

THE DETERRENCE AND INSURANCE PRINCIPLES

A. The Minimising of Losses

It is obvious, indeed trite, to say that losses should so far as possible be held at a reasonable level where the benefits from additional activity just offset all of its costs, including the losses which the activity may cause. In the common law world, the modern attitude puts

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the emphasis on the deterrent aspect of shifting losses to discourage acting in an unreasonable fashion. The actor who fails to take adequate and reasonable precautions, given the surrounding circumstances, is made to bear the losses which result and thereby is encouraged to bring his standard of activity up to the level of reasonableness. Frequently overlooked is the other aspect of excessive damage: reasonable but excessive activity in an area. If a real consequence of an activity is the causing of losses to others in society, then this should be treated as an economic cost of that activity before the actor decides whether or not the activity is worthwhile. To achieve this result all of the losses which are caused by the activity must be borne by it. This is an argument for strict liability. Imposing strict liability satisfies the deterrent purpose which so concerns those who favor a fault principle for liability. When strict liability is imposed on an actor, he is constrained by his own reason to minimize losses, or, rather, to bring them to a level which is reasonable having regard to their cost and that of avoiding them.

The imposition of strict liability upon trespassers can be seen as a simple illustration of the desire to keep losses at a reasonable level. Putting an object in motion carries with it certain risks of harm which that object may do before it comes to rest. By imposing the cost of all such risks upon the person moving the object, he is led to consider before acting the possibility of all the various types of harm which might result. In trespass, therefore, strict liability was a simple and straightforward answer.

The same principles are applicable to cases outside of trespass where the action nonetheless clearly causes harm to the victim without him doing anything to put himself within the area of the risk. These cases are comparatively rare, however, and are therefore not particularly important. Rather different issues arise when the victim has suffered the loss after having brought himself within the area of the risk. In these

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3 The basic type of injury falling into this category would be one produced by a nuisance. For specific examples, see Prosser, *Torts* 595-97 (3d ed. 1964), and cases cited therein.

4 Hence in Rylands v. Fletcher (1866) L.R. 1 Ex. 265, 286, Blackburn, J., distinguished the application of strict liability in the case before him from highway cases where "those who go on the highway, or have their property adjacent to it, may well be held to do so
situations it remains desirable to discourage incautious or unreasonable acting so that unnecessary harm is not done. With regard to reasonable but excessive acting, however, the whole situation must be examined to determine how much of the burden should be allowed to stay upon the victim to minimize losses by encouraging him to stay out of the area of the risk. Even the question of what precautions the actor ought to take in acting reasonably is clouded because we must first decide whether he should judge his proper cautions as though the potential victim were not present, or whether he should take the presence of the victim into consideration when deciding what constitutes reasonable conduct.

Whether one talks about *volens* or about contributory negligence, the policy question to be determined is the sharing of the burden of losses, having regard to the relationship of the parties and all the circumstances affecting their coming together in connection with the activity which resulted in the loss. The coming together of an actor with a victim who brings himself into the area of the risk may occur in circumstances where it is clear that the parties could sit down together beforehand and agree upon the proper bearing of potential losses. In most of these cases, however, the parties do not do so. When they do not, or when it is impractical for the parties to be together in discussions before they bring themselves into one another’s area of activity, the law must impose upon them a policy decision about the bearing of losses even though it would be happy to accept their arrangement if they had reached one.

When the activity of actor and potential victim is very much the same, the manner of bearing losses will apply equally between them. For example where one is considering the bearing of losses between those people who join in automobile travel, the question of who should bear the loss will depend upon which solution will produce the maximum benefits for all motorists. Any even-handed principle will act to impose the proper cost of losses on all drivers. This could be accomplished by leaving all of the losses where they lie or by shifting all of them to the car travelling in a northerly direction, or by any other arbitrary even-handed principle. Motorists should want to discourage conduct which is unreasonable under all the circumstances. Imposing liability on those who act unreasonably accomplishes this deterrent purpose. However, motorists will not want to switch losses to unreasonable actors if the cost of doing so is too great, and especially if part of this cost falls on the innocent as well as on the unreasonable driver. In general, the attempt will be worthwhile only if the gain from encouraging reasonable

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subject to their taking upon themselves the risk of injury from the inevitable danger.” *Id.* at 286.
action outweighs the cost of imposing a shift of losses upon unreasonable actors.\(^5\)

Where the persons who come together in an area of activity are not doing identical things, a preliminary policy question has to be decided. Does the road belong to the motorist, with the pedestrian there on sufferance, so that the pedestrian takes the road and its drivers as he finds them? Or does he have at least equal rights with the motorist? Is he in a position to demand a reasonably high standard of conduct on the part of the motorist? This policy question is a major political question, very similar to the kinds of questions which have to be answered when deciding whether motorists pay for the construction costs of highways or whether part of this cost is borne by the general revenue. In our society, however, even the non-driving pedestrian has a significant interest in avoiding shifting losses between himself and motorists by a method which increases administrative costs. He has this interest because of the thousand and one services which directly or indirectly depend upon the motor vehicle. On principle, some part of the burden of losses suffered by pedestrians should remain on pedestrians so that they are led to take appropriate decisions about whether or not to walk on the road.

**B. Desirability of Insurance**

As insurance develops to cover certain areas of activity, notably motoring, the impact of the deterrent principle in support of giving compensation to some victims is seriously lessened. Through this same development the other principle which supports the compensating of victims—the insurance principle—begins to operate. Insurance is significantly desirable for losses which a large group of people will suffer periodically so that spreading the risk among those people prevents a large loss from falling at one time upon one person.

Whenever it is open to men to decide for themselves upon whom

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\(^5\) Defending his innocence now costs the innocent driver significant amounts of money, and the total cost of attempting to shift losses has become exorbitant. Franklin, Channin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Legislation*, 61 Colum. L. Rev. 1, 25 (1961). Uncertainty about both the facts of a case and what constitutes reasonable acting makes it unwise to attempt to shift losses for unreasonable action. See the attempt by Blum and Kalven to erect and destroy straw arguments in *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. Chi. L. Rev. 641 (1964). The existence of insurance serves two purposes here. It illustrates the insurers' view about the impracticability of too delicate an application of special premiums for wrongful conduct causing accidents, and indicates the manner in which the high cost burden of attempting to shift losses is borne by innocent as well as by unreasonable drivers. No group of drivers sitting down together to discuss the arrangement of possible losses would arrive at a solution which is this difficult and expensive to apply.
losses should fall, there will be a tendency for them to impose the loss upon the person or persons who can most conveniently insure. In deciding the question of convenience, one includes the question of cost of insuring. One may also include the question whether or not another group would in fact insure at all. Taking motorists as our example, there is no striking reason why motorists who are potential harmdoers should find it more convenient to insure than motorists who are potential victims. Because our law chose to impose liabilities upon motorists who were found guilty of some misconduct in driving, it became more important for the motorist-actor to insure than it was for the motorist-victim. The size of the loss (liability) which usually falls upon the motorist-actor is significantly greater than the usual size of loss for an individual victim. This may point out one convenience in the motor vehicle field in favor of insurance by actors: insurance policies cover vehicles, and there are far fewer of these than persons who use the highways and are potential victims. Because it is both more important and easier for the actor to insure, he is more frequently insured than are his victims. The desire to shift losses in order to spread them leads to the imposition of liability without an over critical judgment of the conduct of the defendant motorist.

If compensation based on fault was an expensive and therefore undesirable method of deterring unreasonable action, it became even more undesirable when the principle involved was the spreading of losses. To serve this principle it was as important to spread the losses of those victims who were injured where no motorist was at fault, or was insured, as it was in those cases where fault or insurance were present. In both cases the retention of an examination into fault produced a cost, through what might be termed friction in administration, which was a net loss for the group of motorists, passengers and pedestrians.

At the beginning of the automobile era, significant wrongdoing was required to impose liability upon a defendant driver. The plaintiff would fail if he himself had been negligent. As insurance became more common and the deterrent effect disappeared, the loss-spreading objective took over. We moved to a readiness to find fault and, in most jurisdictions, we replaced complete defeat for a negligent plaintiff with partial victory through apportionment.\(^6\)

\(^6\) This was accomplished through contributory negligence acts in Canada, Britain, New Zealand, and most of Australia. Ontario enacted one of the earliest in 1924. Its successor today is The Negligence Act. Ont. Rev. Stat. ch. 261 (1960). See generally, Wright, Cases on Torts 560-68 (3d ed. 1963); Fleming, Torts 236-37 (3d ed. 1965). This was also frequently accomplished through jury verdicts in the United States. See Prosser, Selected Topics on the Law of Torts 7 (1953).
II

IMPLEMENTATION OF THE TWO PRINCIPLES OF COMPENSATION

It is contended that behind the question of compensation lurk two major objectives: the deterring of overacting or unreasonable acting and the desirability of insuring or spreading losses. Motorist and pedestrian, or any other pair of individuals who are in an actor and potential victim relationship, should want to accomplish these objectives with minimum waste in the handling and settling of losses. Any solution which would be ideal if there were no costs of administration attached to it, may be third or fourth rate when examined with its true costs of administration attached.

A. Friction and the Costs of Calculation

The wastage in tort settlement is similar to friction where it is an important factor in determining a machine’s efficiency. It is here that the fault test and the procedure of measuring precise damages suffered by a victim fail completely. Although either the fault or the strict liability principle would accomplish the objective of eliminating unreasonable action, the latter is the superior principle because it also assists in eliminating excessive activity of a reasonable kind. Even if the fault principle were a nearly satisfactory solution, it still fails entirely when examined in its administrative set-up. Its application depends on the existence of specific facts, and thus raises tremendous problems of evidence and of conjecture. Problems of this sort not only waste a court’s time, and therefore affect its accessibility, but they also needlessly consume lawyers’ time. This is a cost which motorists and pedestrians and similar groups ought to strive hard to avoid.

When the objective is spreading or insuring losses, the selection of fault as a determinant of which losses will be spread is also open to criticism. The victim injured by a non-fault accident is as interested in spreading the loss and as worthy of consideration as is the victim in a fault situation. Attempting to spread losses efficiently also leads to problems of calculating costs and of avoiding that method of spreading losses which is particularly costly. On this basis the fault test is to be eschewed and a specific measure of damages covering the specific plaintiff is undesirable. Where many people are acting in quickly changing situations, as with automobiles, the solution lies in paying for all persons who are injured, putting the cost of injury upon the automobile operation, and producing a schedule of damages which provides a decent but modest standard of living with no variation for the income of the victim or

7 Ziessel, Kalven & Buckholz, Delay in Court ch. 3 (1959).
any personal property which he happens to be carrying with him. The goal is to approximate the cost which automobiles ought to bear for the damage they do. When a calculation is very costly to make, it is frequently more satisfactory to guess than to calculate. If the guess is sufficiently close to the calculation, so that the loss through inaccuracy in using the guess is less than the additional cost of making the calculation, we are better off with the guess.

B. The Significance of Volens

In attempting to produce a schedule of damages which accomplishes a spreading of losses among those engaging in a given activity, a schedule designed to afford a decent but modest standard of living is appropriate for the victim who has brought himself into the area of risk. A high income individual should not be able to impose upon the rest of society the extra burden of risk involved in his entering into a dangerous situation. If a pianist risks his valuable hands by going about ordinary activities, he should be prepared to bear the extra risk over that which would be involved to ordinary individuals. This makes good social sense as well because out of the extra value of his hands he can readily pay for additional insurance coverage.

There are many advantages in scheduling damages for tort injury instead of paying according to the specific situation of the injured person. As potential actors who may cause damage, we should all welcome this system as the one which will be administered much more cheaply than any other. With the saving which accrues from this less expensive system, all of us can afford to insure personally and specially our additional value as potential victims. We will agree in advance about the value of our hands or the value of our life, and the problem of damages will not arise after the fact. Although the pianist with million dollar hands will be paying more to protect that value than the ordinary citizen, the net costs of spreading losses will be smaller.

8 A Stradivarius will be treated at best as an ordinary violin, and the violinist’s hands as average hands. Damages for pain and suffering can be eliminated or averaged. Damages for a person killed will be designed to provide a decent but modest standard of living for his dependents and will vary according to their needs.

9 The schedule of damages should be a true average of losses if the activity is to pay in full for the losses which it causes. It may frequently be reduced, however, if our guess is that the activity does not produce benefits solely within the control of the actor. This is the only justification for the decision in Bolton v. Stone [1951] A.C. 850, where the cricket players who acted reasonably did not have to pay for the injury to the plaintiff who was struck by a cricket ball. A lower than average schedule for damages would have been a better way to compensate for benefits (to free-loaders, etc.) which the players did not control. This may also justify eliminating any damages for pain and suffering. If they are to be retained, an automatic amount is to be preferred over the cost of assessing actual loss.
C. Methods and Effects of Allocation of Losses Among Motorists

The thesis of the foregoing argument is that activities should bear approximately the cost of the injuries which they may cause. Because careful calculation is too expensive, we must approximate the figure. Whenever we can, however, we ought to impose a cost according to the magnitude of the risk. This leads to the conclusion in the automobile field, to take it again as our example, that a portion of the cost of accidents should be rated according to the number of miles driven if, as is likely, there is a significant relationship between number of miles and the risk. One way to accomplish this would be to base a portion of the insurance or accident cost for automobiles on a gasoline tax. A refinement of this method would be to charge a slightly higher license insurance fee for a small automobile which consumes less gasoline per mile than a large vehicle. Whether we adopt this or a similar allocation of cost method will again depend upon whether a calculation is worth its cost or whether we should rely on a guess.\textsuperscript{10}

The imposing of an insurance charge per vehicle or per gallon of gasoline will place the cost of accidents upon operators of motor vehicles. It will do nothing to encourage motorists to drive in a reasonable fashion. For this purpose other measures must be considered. Whether any measure is acceptable will depend upon whether or not it is worthwhile with respect to the cost of implementing it. Driving which creates extra hazards should in theory pay additional premiums towards the costs of accidents. This should be true whether the specific conduct results in an accident or not. Indeed, one of the strange absurdities of our present law is that we place a great burden upon one driver whose conduct results in an accident and no burden at all on a similar driver whose blind luck saves him from an accident. When unreasonable conduct is viewed in relation to increasing accident costs, it is clear that the driver who engages in such conduct ought to bear the appropriate share of the increased cost. If he does not bear that cost, other drivers who do not contribute to the increase will have to carry it for him. This leads readily to the conclusion that unreasonable conduct in driving is not a matter for the criminal or quasi-criminal law of traffic offenses where it is usually placed at present. In place of highway traffic offenses, special premiums ought to be imposed on those drivers who engage in unreasonable conduct, the test for what constitutes unreasonable conduct being based, so far as possible, on an analysis of the conduct in relation to increased accident costs.

Thus, while the concept of fault is eliminated completely in the area

\textsuperscript{10} It should be recalled that as an off-set item for a large vehicle, there will be a higher insurance charge per vehicle for the more expensive car if the amount to be paid for damage to it is based on its value.
of compensation of victims, it is to be retained in proceedings before a magistrate or judge to determine whether a particular driver's conduct was unreasonable. The basic purpose of these proceedings would be to provide a system that will deter drivers from engaging in unreasonable conduct. This system will take the place of the existing methods of deterring by using prosecutions for vehicle offenses and by imposing civil liability for fault. The latter deterrent effect has been much weakened by liability insurance and would be eliminated entirely in the proposed scheme.

The deterrent purpose of these proceedings would be most adequately served if a civil burden of proof, rather than the criminal burden now necessary, is required. This lighter burden of proof should make it easier to find the defendant guilty of unreasonable driving, and thus liable for a special premium, than it now is to convict a defendant in criminal proceedings or make him pay a heavy fine. The deterrent purpose of this type of system will also be better served if these proceedings are conducted whether or not the particular driver's conduct resulted in an accident, for example, whenever there is a traffic offense, such as running a stop sign. In this way all drivers whose conduct is of the type which is likely to increase accident costs will be forced to pay higher premiums. This should cost less than present vehicle offense enforcement. It may cost too much to determine exactly how much the premiums for the unreasonable driver should be increased. Whether we should calculate the amount he should pay or should merely guess will depend upon the cost of calculating. Whether it will be worthwhile to try to collect special premiums will depend upon the machinery available for detecting and apprehending those persons who increase the risk of accidents.\footnote{11}{The rather heavy handed system of penalizing drivers for involvement in an accident as proposed by Keeton & O'Connell, \textit{supra} note 1, at 356, could be adopted if, even with the civil burden of proof, enforcement was too costly.}

\textbf{D. A Low-Cost Solution}

It is well known that the province of Saskatchewan\footnote{12}{The extent to which the Saskatchewan scheme has had limited objectives and the manner in which it has achieved them is described fully in Lang, \textit{The Nature and Potential of the Saskatchewan Insurance Experiment}, 14 \textit{U. Fla. L. Rev.} 352 (1962).} has attempted in small measure to achieve for automobile losses some of the objectives discussed above. More remains to be done. Fault should be eliminated entirely as a test for a defendant's liability and payments should be made to all persons injured by motor vehicles and not only to those who happen to be involved in a fault accident. The elimination of the question "who ought to pay" further reduces the costs of providing insurance or compensation for those who have been injured. This can most easily be done...
by having one insurance company in a large area cover all motorists. The Saskatchewan compulsory government scheme has shown that through this type of monopoly the significant agency fee for writing up insurance can be eliminated, and a ten to twenty per cent cost item changed into a ten cent per policy item. The proposed use of a gasoline tax as a premium reduction item and special premiums for those drivers who engage in unreasonable conduct further indicates the desirability of having one government company. As additional provinces and states in North America enter upon schemes such as this, the conflict of laws problems should be readily solved by any even-handed and fairly arbitrary solution. Again the minimizing of costs will be a sure conductor to the correct solution.

To achieve a low-cost solution and protect the world against those who bring especially valuable objects into the area of risk, a modest schedule of damages is proposed. This has some desirable political value because it permits insurance companies, which have performed an admirable service of bringing us this far in learning about the spreading of losses, a very wide field for future endeavors. There will be great opportunity for them to encourage individuals to obtain special arrangement insurance to cover themselves, their families and their valuable property above the level which is envisaged in the minimum schedule plan. A vital part of the plan to reduce cost is that all tort liability is eliminated when the plan is introduced.

While this is put forward as the ideal practical solution for the bearing of losses in the automobile field, we should remember that some jurisdictions do not try to impose full costs upon this activity. Automobiles are not always required to bear the total cost of building highways, and one need not be too adamant in demanding that the accident cost be placed entirely upon them. It is strenuously urged, however, that some less expensive solution than we presently use is needed. The excess cost in courts' and lawyers' time, and in insurance administration, is an international disgrace. It would be far better to eliminate entirely all shifting of losses in connection with automobiles than to employ our present system. While the insurance advantage would be lost to some extent for a time and automobiles would not bear their full cost, the insurance problem would gradually be solved as potential victims learned to acquire personal coverage. Meanwhile the tremendous wastes of human energy and resources which are involved in the existing tort solution would be eliminated. It would be useful to place appropriate burdens on a basis of civil wrongdoing upon drivers who increase risks even if the money recovered in this way was not used for premium reductions for other drivers, or for potential victims.