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Some Comments In Favour of the Abolition of Fault Law

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SOME COMMENTS IN FAVOUR OF THE ABOLITION OF FAULT LAW*

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THE ALARMING NUMBER of automobile accidents resulting in death or injury to thousands of persons each year and the direct and indirect costs associated with these accidents is one of the more depressing features of modern life. Unfortunately, there is no reason to believe that there will be a dramatic improvement in this situation in the foreseeable future because: automobile transportation is central to the North American way of life, the majority of drivers have no competence in anything but routine driving situations, and often factors beyond a motorist's control cause or contribute to accidents. For these reasons it is reasonable to expect that automobile accidents will still occur even if all users of the road exercise care and that the carnage on the highways must be regarded as a phenomenon of twentieth century society.

The suffering and loss of life resulting from automobile accidents and the consequent social and economic dislocations have forced governments at all levels to give serious thought to the problems of alleviating the plight of accident victims and their dependents. Thus, there has been a re-evaluation of the fault system of compensation—its functions, its bases, and its traditional principles. In the light of existing social, economic and technical conditions, a search is being conducted for meaningful reforms to, or alternatives for, that system.[1]

While there has been widespread agreement on the fact that reform of the fault system of compensation is urgently needed there has been no general agreement on the direction reform should take.[2] However, it is possible to discern three broad categories of reform in the post-war period:

1. those directed at improving the operation of the fault system of compensation both at the financial responsibility and administrative levels;

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[1] For a discussion of the reason for abolishing the fault system and of the constitutionality of the "no-fault" legislation *see* Pinnick v. Cleary, 271 N.E.2d 592, 42 A.L.R.3d 194 (1971). *But see Massachusetts No-Fault Opinion: Shallow Reasoning, Unsupported Dicta*, TRIAL, Vol. 7, No. 4 at 60 (July 1971).

[2] *See* Ghiardi and Kircher, *Automobile Insurance Reparations Plans: An Analysis of Eight Existing Laws*, 55 MARQ. L. REV. 1 (1972).

2. those which would supplement the fault system of compensation with a scheme of no-fault insurance;
3. those which have as their objective the abolition of the fault system of compensation and the introduction of a scheme of accident insurance.

It is not surprising that there has been no unanimity on how best to mitigate the disastrous financial consequences which the automobile accident victim and his dependents so often have to bear. All investigations into this problem are attended by controversy. The opponents and proponents of the fault system of compensation and the various avenues of reform are vocal, often vociferous. Interest groups are eager to present their points of view—and to have them accepted.

THE FAULT SYSTEM AND THE LEGAL PROFESSION

One such interest group is the legal profession. North American lawyers have been, and are, vitally interested in all proposals to reform the fault system of compensating the victims of automobile accidents because they feel their vested interests threatened.[3] Many lawyers specialize in handling plaintiff claims for death and personal injury arising out of automobile accidents; others specialize in the representation of the interests of insurance companies.

Notwithstanding the vested interest that these advocates have in the fault system and its continuance, their experience and "know-how" would be exceedingly valuable in the search for solutions to the problems raised by the system, and for a better system of dealing with the compensation of victims of automobile accidents. These lawyers are skilled practitioners, dedicated and effective. They know the problems involved within the confines of the fault system in obtaining the truth and achieving justice in the determination of the consequences of an automobile accident which has resulted in loss of life or limb.

Thus, it is a cause of concern when a sizable segment of the legal profession comes down on the side of the fault system of compensation and protests any changes which would substantially restrict, or abolish totally, recourse to that system by victims of automobile accidents.[4] Such protest is widespread within the legal profession despite the fact that the fault system has been subjected to severe authoritative criticism.[5]

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[3] *See, e.g.*, AMERICAN TRIAL LAWYERS ASSOCIATION, JUSTICE AND THE ADVERSARY SYSTEM (1969); *accord*, DEFENSE RESEARCH INSTITUTE, FAULT—A DETERRENT TO HIGHWAY ACCIDENTS (D. Ross ed. 1969). *See also* DEFENSE RESEARCH INSTITUTE, PSYCHOLOGICAL ASPECTS OF THE FAULT SYSTEM AS COMPARED WITH THE NO-FAULT SYSTEM OF AUTOMOBILE INSURANCE (L. Lawton ed. 1969).

[4] *See, e.g.*, BARREAU DU QUEBEC, MEMOIRE DU BARREAU DU QUEBEC AU COMITE D'ETUDE SUR L'ASSURANCE AUTOMOBILE (1971); THE ADVOCATES' NO-FAULT AUTOMOBILE INSURANCE—THE NEW PROPOSALS (1974).

[5] *See, e.g.*, R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM

Why is it that so many lawyers are so keenly interested in retaining the fault system with the courts as the final arbiters in fixing blame and awarding damages? Is it blind faith in the concept of fault? The fault concept is commonly, but erroneously, regarded as an integral and long-standing part of our Anglo-American legal heritage. Is it because the status quo best serves the interests of the legal profession? After all, a substantial portion of the fees earned by North American lawyers comes from automobile accident claims and litigation. Or, is it because the fault system of compensation best serves the interests of society? The legal profession would have the public believe that it is for the latter reason that they so vehemently oppose all major reforms of the fault system of compensation. Let us accept this position, for what it is worth, and examine the arguments put by the profession in support of it.

At this juncture, I feel, it is necessary to clarify one thing. From the stand taken by the legal profession on the question of how best to compensate the victims of automobile accidents, it appears that the profession believes that the legal system should concentrate, not on what the public demands nor on what the public gets, nor even on what the public needs or deserves, but rather that the legal system should concentrate on what the public *should* get—and that it is to be the legal profession which is to determine what the public should get.

The problem with this state of affairs is that in deciding what the public should get the person or body making that determination is in fact making a value judgment—a decision which at bottom is both subjective and unverifiable. The decision can be argued about, but in final analysis it can only be regarded as valid if it accomplishes the ultimate objectives sought to be achieved by the decision maker. And, whereas the value judgment itself may not be verifiable as objective truth, it can be ascertained through observation and analysis whether the goals sought are in fact attained.

So let us now examine the declared objective of the fault system, compensating victims of automobile accidents. We shall also note the various categories of reform which have been proposed or implemented to determine whether this objective has been fulfilled.

THE DEFICITS OF THE FAULT SYSTEM

The fault system of compensation rests on the value judgment that only a person who, by his fault, has caused loss to another ought to make

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(1965) [hereinafter cited as KEETON]; ISSON, THE FORENSIC LOTTERY (1967) [hereinafter cited as ISSON]; REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURIES IN NEW ZEALAND (1967); REPORT TO GOVERNOR NELSON A. ROCKEFELLER, AUTOMOBILE INSURANCE ... FOR WHOSE BENEFIT (1970); GOUVERNEMENT DU QUEBEC, RAPPORT DU COMITE D'ETUDE SUR L'ASSURANCE AUTOMOBILE (1974).

compensation to that other person. This principle in its modern day application, its advocates contend, fulfils three functions: [6]

1. It satisfies the public's sense of justice when the wrongdoer is brought to account.
2. It deters people from acting irresponsibly.
3. It guarantees the injured party compensation commensurate to the injury he sustains.

Justice

To the layman there is an identification in large measure of legal responsibility with moral blameworthiness in the notion of fault—no one who is not to blame, or who is not culpable, should be made to pay compensation.

That legal fault corresponds to moral fault in the fault system of compensation is a misconception. Legal fault is determined by reference to the standard of the reasonable man—a creature of myth. The question that is asked in any given case is not "was the defendant morally culpable in causing the loss," but rather "did the defendant's conduct conform to the standard of conduct which, in similar circumstances, could be expected of the reasonable man." Thus, it is incorrect to think that the fault system is concerned with genuine individual fault. It is concerned with the largely fortuitous consequences of the defendant's conduct.[7]

This situation is particularly true when the fault system is applied to the field of automobile accidents, for here the causative factor in many cases is not fault but mere human error—the unavoidable result not of blameworthy conduct but of human imperfection. Unfortunately, human error is often equated with fault because the question of compensating some injured person hinges upon a finding of fault.

The hollowness of the notion of fault is perhaps best exemplified by reference to the following facts:

1. That the use of common law[8] and statutory presumptions of fault[9] can result in liability being imposed on a defendant, where these presumptions operate to shift the burden of proof onto him, not because in truth he was at fault, but because he was unable, often for factors beyond his control, to establish his innocence.
2. That studies have shown there is a tendency for liability to follow the incidence of insurance notwithstanding that fault should

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[6] *See, e.g.*, AMERICAN ENTERPRISE INSTITUTE OF PUBLIC POLICY RESEARCH, NO-FAULT AUTO INSURANCE PROPOSALS (1971); KEETON, COMPENSATION SYSTEMS—THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW (1969).

[7] *See* ISSON, *supra* note 5, at 10-12 and 18-22.

[8] *E.g.*, the doctrine of *res ipsa loquitur*.

[9] *E.g.*, Highway Victims Indemnity Act of 1964, R.S.Q., c.232, s.3 (Can.).

be the sole criterion of liability[10]—and most automobile owners possess liability insurance.

3. That the sanction of the fault system of compensation ignores the moral quality of the defendant's conduct—it is a capricious sanction over which the courts have little control once the determination is made that the defendant is at fault.[11]

All in all, the fault system of compensation is a kind of gamble. The outcome of a case can depend not so much on the presence or absence of true fault but on such factors as the skill of the lawyers, the existence of insurance, the sentiment of the judge or jury, or the availability of a witness.

Deterrence

The advocates of the fault system of compensation argue that it serves as a deterrent to careless conduct, that the fear of civil liability educates people to act responsibly. This is, at best, a dubious claim.

For a sanction to be effective in curbing anti-social behaviour there must be available to those persons whose conduct may result in an imposition of the sanction, two possible courses of conduct. Assuming *arguendo* that automobile accidents are statistically unavoidable, notwithstanding the use of care by motorists, and that human error and factors beyond the control of drivers are the principal causes of accidents, does the choice between two possible courses of conduct really exist? The short answer appears to be no, unless it can be said that the choice lies between driving and not driving.

However, the most glaring weakness in the argument that the fault system deters careless conduct is that the majority of motorists are protected against the operation of the sanction of that system by liability insurance. The possession of third party liability insurance by owners and operators of automobiles is the rule, not the exception; and, in fact, most jurisdictions encourage the purchase of such insurance.[12] It cannot realistically be claimed that a sanction can effectively control the activities of persons immune to it.

Perhaps if liability insurance was abolished the threat of civil liability would become an effective deterrent. But even this is doubtful since the fear of death, bodily injury, imprisonment, loss of license and fines seem to have little effect on driving habits.

Finally, it should be borne in mind that the sanction of the fault system only operates when a person's fault causes damage to another to whom he owes a duty. Careless driving which does not result in loss or

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[10] *E.g.*, SAWYER, LAW IN SOCIETY 145 (1965).

[11] The severity of the sanction is geared to the amount of damage caused.

[12] *Supra* note 5.

injury to a third party is outside the scope of the operation of the fault system.[13] Consequently, careless drivers who are prepared to run the risks of death and bodily injury because of the belief that an accident will never come their way will also be prepared (assuming that they even turn their minds to the matter) to run the risk of civil liability.

Compensation

The remedy afforded an injured party by the fault system, namely damages, is supposed to put the plaintiff in the same position as he would have been if he had not been injured.[14] This, in theory, is the aim of the fault system. In practice, however, no one will ever know how often this aim is in fact achieved, although the evidence available would indicate that such occurrences are rare.[15]

The assessment of all damages, with the exception of special damages, is based on guesswork.[16] It is true that the courts have developed rules to guide them in assessing damages but in final analysis an award is only an approximation of the plaintiff's losses. It cannot be otherwise for two reasons: first, precision in assessing future losses is impossible for no one know what the future holds, or would have held, for the plaintiff; and secondly, it is an impossible task to assess exactly, in monetary terms, the compensatory value of physical disabilities and mental anguish. The inevitable result is that some plaintiffs recover more, and others recover less than full compensation.

This conclusion appears to be further supported by the rule that the assessment of damages must be final.[17] This rule precludes the courts from re-examining an award despite the fact that the plaintiff's lawyer may have made an error in computing his client's claim, or that the extent and consequences of the injury may have been wrongly predicted. The rule, in fact, appears to be in direct conflict with the declared objective of damage awards.[18]

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[13] This point was made crisply in Haynes v. Harwood, 1 K.B.146, 152 (1935), where the court held: "Negligence in the air, will not do; negligence in order to give a cause of action must be the neglect of some duty owed to the person who makes the claim."

[14] *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973) [hereinafter cited as DOBBS].

[15] *See* KEETON and O'CONNELL, *supra* note 5, at 34; ISSON, *supra* note 5, at 12-18; REPORT TO GOVERNOR NELSON A. ROCKEFELLER, *supra* note 5, at 26-27; THE REPORT OF THE OSGOODE HALL STUDY ON COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS ch. 10 (Linden ed., 1968).

[16] DOBBS, at 140.

[17] In Grunenthal v. Long Island R.R., 393 U.S. 156 (1968), the United States Supreme Court held that it was error for the Second Circuit Court of Appeals to grant the railroad a new trial unless the petitioner would agree to remit $105,000 of a $305,000 award. Mr. Justice Brennan's opinion is an excellent example of the type of analysis the trier of fact must follow to tabulate, in the aggregate, the future lost wages and future pain and suffering for the purposes of a present personal injury award.

[18] DOBBS, *supra* note 14.

Many aspects of the actual operation of the fault system of compensation (as distinguished from its objectives)—the inordinate delays which appear to form an integral part of the system, the exorbitant waste and expense that it involves, the evidentiary problems, and the practice of awarding damages in a lump sum—have also been the subject of severe criticism, and rightly so.[19] However, I do not propose to deal in any detail with these issues. The undeniable fact that the fault system does not meet the objectives set for it by its supporters should be sufficient to force a complete rethinking of the whole problem of how best to compensate the victims of automobile accidents. That this has not been the case in many instances is painfully obvious by an examination of the various categories of reform which have been implemented in this area over the years.

ATTEMPTED REFORMS

The first group of reforms which were implemented were those aimed at improving the operation of the fault system at the financial responsibility and administrative levels.[20]

To improve the financial responsibility of defendants, compulsory insurance, financial responsibility and impoundment laws were introduced to force, or at least encourage, all motorists to carry liability insurance. Additionally, minimum insurance limits were set and assigned risk plans were created to ensure that liability insurance was available to all. In the event that a person was so unfortunate as to be injured by an uninsured and impecunious motorist or by an unidentifiable automobile, recourse to unsatisfied judgment funds or assigned claims plans was provided.

To further improve the plaintiff's chances of recovery a number of jurisdictions, in some circumstances, removed from his shoulders the burden of having to prove fault on the part of the defendant. Instead they made it the defendant's duty to prove that he was not at fault in causing the accident.

Finally, to improve the administration of the system interim payments to plaintiffs, in those cases where the issue of liability was clear, were introduced; and, in recent years, recourse has been had to arbitration for small claims.

All of these reforms assumed that the answer to the problem presented by automobile accident victims lay within the fault system of compensation—that all that was required to placate the critics of the system was to try and rectify some of its operational defects. The reforms did nothing to correct the fundamental flaw of the fault system—its failure to achieve its basic objectives. In fact, a number of reforms (particularly

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[19] For a summary of the major indictments of the fault system and the responses to these indictments *see* KEETON, *supra* note 5, at 1-3.

[20] For a discussion of these reforms *see* KEETON & O'CONNELL, *supra* note 5.

those encouraging the purchase of liability insurance and those effecting the burden of proof) eroded the ability of the system to attain its objectives by reintroducing problematical fault concepts.

Indeed, as the practice of insuring against liability became commonplace, impetus was given to the development of a fourth objective for the system, namely that of loss distribution.[21] Underlying the fault system's objectives of justice and deterrence is the idea that the loss caused by a wrongdoer should be borne by him and the system was designed to ensure that this occurred. However, through insuring against liability the wrongdoer instead of personally "footing the bill" assessed him under the fault system, is able to pass the loss on until it is finally absorbed by an appreciable section of the community—wrongdoers and innocents alike. In other words, "loss shifting" has been largely replaced by "loss spreading."

If the objective now sought is the distribution of losses arising from automobile accidents there surely must be a simpler, more rapid, more economic, and more just and equitable method of achieving this than through the use of the fault system with its many defects.

NO-FAULT PLANS

The continued attacks on the fault system of compensation, despite the various reforms to that system just mentioned, led to the introduction in some jurisdictions of no-fault insurance laws. These laws are based on:

1. The value judgment that all (or nearly all[22]) automobile accident victims are deserving of compensation regardless of any question of fault.
2. An acknowledgment that the fault system of compensation, with all its inherent defects, is incapable of dealing satisfactorily with the problem presented by automobile accident victims.

In view of this one would have thought that no-fault insurance plans, as their name suggests, would have abolished, or at least severely restricted recourse to the fault system of compensation. However, this has not been the case. That is not to say that no-fault insurance laws lack any redeeming features—they do have the merit of providing some compensation to persons who, under the fault system, would recover nothing at all.

It is unrealistic to believe that no-fault insurance laws will drastically curtail recourse to the fault system of compensation since most schemes have imposed a low limit on the amount of no-fault benefits a victim may recover.[23] This situation coupled with the fact that many plans place

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[21] *See* J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 13-30 (3d ed. 1967).

[22] All schemes deny benefits to one or more categories of victims. *See* GENERAL ADJUSTMENT BUREAU, INC., A COMPARATIVE ANALYSIS OF AUTOMOBILE NO-FAULT STATUTES (1973).

[23] FLA. STAT. ANN. §§ 627.730-627.741 (1972); *ILL. ANN. STAT. ch. 73, §§ 1065

no restriction on the right to sue for non-economic losses[24] ensure that there will be litigation.

In general it can be said that no-fault laws aggravate one of the inequities of the fault system of compensation—the fact that small claims are better serviced than large claims. Those persons who suffer severe losses and who are in the greatest need of assistance still remain at the mercy of the fault system.

Finally, it must be asked whether there is room for two conflicting value judgments to operate in this area. The first, of course, being that only those injured through the fault of another should receive compensation; and, the second being that all persons are entitled to compensation regardless of any question of fault. No-fault insurance laws have created a situation in which all persons are entitled to some compensation but in which some persons are entitled to more compensation than others. And the preferential treatment accorded some victims, if it can be so termed, is not based on their innocence, but the innocence or fault of the person causing the loss. Thus, as between two innocent victims who suffer severe loss one may recover only the no-fault benefits, while the other may recover a substantially greater amount because he was fortunate enough to be injured by another who is found to be at fault. Such an outcome can hardly be termed equitable and just.

As one study has stated, no-fault insurance laws are merely palliatives designed to patch up some of the defects of the fault system.[25] No-fault insurance laws do not come to grips with the fundamental unsoundness of the fault system.

The value judgment that all automobile accident victims are entitled to compensation irrespective of any question of fault places, I would suggest, the problem presented by the victims of automobile accidents in its proper perspective. The judgment accepts automobile accidents for what they are—an unavoidable and tragic factor of modern life, a necessary evil, which affects all aspects of society from the home to the national economy, the costs of which must be borne by society which is

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150 — 1065.163 (Smith-Hurd Supp. 1974) (found unconstitutional in Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972); MD. ANN. CODE art. 48A, §§ 538-546 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1974); ORE. REV. STAT. §§ 743.786 - 743.835 (1973); S.D. COMPILED LAWS ANN. § 58-11-9 *et seq.* (Supp. 1974); The Insurance Act, R.S.O. 1970, C.224, §§ 199-240 (Can.).

[24] DEL. CODE ANN. tit. 21, § 2118 (Supp. 1972); FLA. STAT. ANN. § 627.30 - § 627.710 (1972); ILL. ANN. STAT. ch. 73, § 1065.150 - § 1065.163 (Smith-Hurd Supp. 1974); MD. ANN. CODE art. 48A, § 542 (Supp. 1973); ORE. REV. STAT. § 743.786 - § 743.835 (1973); S.D. COMPILED LAWS ANN. § 58-11-9 *et seq.* (Supp. 1974); The Insurance Act, R.S.M. 1970, c. 126, § 237 *et seq.* (Can.); The Insurance Act, R.S.O. 1970, c. 224, § 199-240 (Can.); Automobile Accident Insurance Act, R.S.S. 1965, c. 409 (as amended 1973) (Can.).

[25] REPORT TO GOVERNOR NELSON A. ROCKEFELLER, *supra* note 5, at 49-55.

after all the ultimate beneficiary of all the advantages of highway transportation. The logic of this situation of necessity must lead to the conclusion that the fault system of compensation, as we know it, must be abolished. If it is felt that some distinction must be drawn between victims let the only distinction be between the innocent victim and the victim who is truly morally at fault.

The major objectives of any reform based on the above value judgment should be threefold:

1. Community responsibility or, in other words, loss distribution.
2. Compensation of all victims of automobile accidents.
3. Real compensation for economic losses.

Deterrence is not an objective though it may well remain a factor in that the contribution of members of society to the scheme should reflect their driving record.

The only practical restriction on the type of reform here advocated is a factor which affects so many judgments—namely, that of cost. However, in view of the fact that a number of serious and comprehensive studies (*e.g.*, those undertaken in New York,[26] British Columbia[27] and Quebec[28]) have advocated the total abolition of fault liability, and the fact that one jurisdiction, New Zealand,[29] has taken this step, I am very skeptical of the argument that a combination of real compensation and the abolition of fault liability would involve an impossible financial burden for the community.

Of course, initially, there will have to be limits on the amounts and heads of compensation payable. The first concern of reform should be to provide real compensation for the economic losses of all victims. The compensation of non-pecuniary losses should be of secondary importance. That is not to say they should not ever be compensated. Rather, if the resources available are found to be sufficient then these losses can also be compensated within reasonable limits.

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[26] *Id.*

[27] ROYAL COMMISSION ON AUTOMOBILE INSURANCE, REPORT OF THE COMMISSIONERS (2 vols. 1969).

[28] GOUVERNEMENT DU QUEBEC, RAPPORT DU COMMITE D'ETUDE SUR L'ASSURANCE AUTOMOBILE (1974).

[29] The Accident Compensation Act of 1972, Stat. No. 43 (as amended) (N.Z.).

CONCLUSION

It is not necessary for those who advocate drastic reform to prove that it is either ideal or perfect. Any system will necessarily be open to criticism because of defects. However, it should be sufficient justification for change in this imperfect world of ours if the new system meets the objectives set for it and is relatively better or more just than the system it replaces.

I suppose it is trite to say that the task of law reform is not a simple one, and that lawyers and the legal profession have a very special responsibility to the public in this field.

It is true that with the introduction of no-fault insurance laws the public has been presented with reform. But is it just a reform or is it the best possible reform? I would suggest that it is the former—a compromise solution that hopefully will satisfy the public and yet not upset the legal profession's "apple cart" to any great extent.

It is time for the legal profession to divorce itself from its peculiar interest in the problem of the compensation of automobile accident victims and to take an objective view of it. This is essential when we bear in mind that the legal profession is so well represented in many legislatures, and that the bar constitutes one of the most persuasive of lobby groups.

The image of the legal profession has become somewhat tarnished in recent years and lawyers must realize that there is a critical relationship between reform of the existing fault system and their public image. While the public's understanding of the defects in the law relating to the compensation of automobile accident victims is vague, it is clear they want reform and we should ensure that they are presented with the best reform.

Fault law was developed to meet the needs of our society in the nineteenth and first half of the twentieth centuries; it is now time for us to develop a system which can successfully grapple with the problems society currently faces. It is time for change—drastic change. The legal profession is not immune to "future shock."