CHAPTER 2

Functions of Reparation Systems

INTRODUCTION

In order to think effectively about the diversity of reparation systems and what they accomplish, it may be useful to attempt an analysis of the functions which might be desired in reparation systems and to note how these functions seem to be served at the present time.

One may start by asking why reparation should be made at all; a dozen ideas come quickly to mind. "Justice" and "fairness" may lead the list and will as quickly be laid aside as one recalls the endless disputes about what is just and fair. To some observers, justice imperatively demands a negligence standard, while the negligence standard is just as clearly unjust in the minds of others. Furthermore, a little investigation reveals that there is no unanimity among civilized countries, nor among advanced and industrialized countries, nor among Christian and free-enterprise countries, about what is "just" or "fair" in this sphere. In any event, "justice" seems to be a package of ideas which can be better understood if they are pulled apart and examined one by one.

It would be easy to list twenty or thirty distinguishable objectives of reparation, but it will probably prove more useful to present a smaller number of categories under which functions may be grouped and to employ concepts broad enough to accommodate items more numerous than can be detailed here. To this end, reparation functions will be discussed under the following headings:

1. Conferring benefits on injury victims and their families
2. Allocating the burdens of reparation
3. Economy of operation
4. Satisfying the popular sense of justice

As these functions are examined, it may help to remember that “reparation” is not the totality of actions that may be taken in regard to automobile accidents. Injury victims may employ doctors and hospitals, and take off time from work in order to recover with no “reparation” at all; in such cases they pay from their own past or future savings, or by foregoing other satisfactions. Careless drivers may lose their licenses, and even be locked up in jail, without any “reparation” taking place.

“Reparation” occurs when the primary victim of the accident gets some of his economic loss made good by somebody else—by the guilty driver, by the unpaid doctor, by the taxpayers who support the public hospital, or by the insurance company which has insured the victim against injury or the guilty driver against liability. It may take place with or without any mitigation of accident consequences. Money paid to an injury victim is “reparation” whether he uses it to heal his woe, or donates it to the Red Cross, or invests it in a sweepstakes ticket. This variability in the possible consequences of reparation prompts the inquiry into what functions are performed in practice by existing reparation systems.

A. Benefits to Injury Victims and Their Families

Reparation systems may benefit injury victims in a great variety of ways: by furnishing medical treatment, by paying medical bills, by supplying vocational rehabilitation, by supplying weekly payments to replace wages, and by furnishing lump sum payments which may be designed to compensate for past wages, future wages, or for psychic losses such as pain, humiliation, and loss of companionship. For purposes of workmen’s compensation, whether by commissions or by courts, it is common to classify these various kinds of benefits by their form, as “medical benefits,” “weekly benefits,” and “lump sums.” For tort suits, damage pay-
ments may be classified by the kind of loss that justifies them—“medical,” “wage loss,” or “pain and suffering.”

The present purpose is not to distinguish between elements of a single reparation system (weekly payments vs. lump sum), but to describe the essential differences among reparation systems—the things that differentiate social security from workmen’s compensation, or distinguish voluntary direct loss insurance from tort law. For this purpose, it is more useful to draw distinctions based on the social objectives of reparation. To this end, variations in benefit patterns will be discussed under these headings:

1. Restoring the injury victim to his job and to other aspects of effective living (“restoration”);
2. Maintaining a minimum standard of living for the injury victim and his dependents (“subsistence”);
3. Otherwise bringing the economic and psychic welfare of the victim to pre-injury levels (“loss equalization”).

1. Restoration

Whether one is moved by sympathy for the individual injury victim and his family, or by a desire to maximize the victim’s contribution to the Gross National Product, the function of restoring the injury victim to effective working and living must be placed in the first rank of social objectives. The means which will help most to these ends are primarily medical, starting with emergency first aid, including curative treatment, and perhaps concluding with prosthetic equipment and psychiatric treatment. In a limited number of cases (which probably ought to be increased) there are benefits by way of vocational training for new occupations. Rarely, there may be need for restoration of property, such as a salesman’s car.

It is not easy to draw the line between medical treatments which tend to restore the patient to effectiveness, and those which merely ease pain, diminish humiliation, and prolong an economically unproductive life, except in the case of persons who have passed retirement age. For present purposes, there seems to be no need to
draw such a line, and all medical treatment will be assumed to be restorative.

The first and most important question is whether injury victims get the treatment that they need, regardless of how it may be paid for. The answer which appears from the Michigan survey is that in the overwhelming majority of cases they do. In none of the sampled cases did it clearly appear that emergency and curative treatment during the period of acute distress had been lacking. About 14 percent of the serious injury subjects were dissatisfied with some aspect of their medical care, but only about 3 percent reported that they would forego future treatment which they needed because of expense.\(^1\) However, it seems likely that in many cases where victims did not report unmet needs, further rehabilitation would be possible. This is suggested by reported experience under rehabilitation programs which have been set up for victims of industrial accidents.\(^2\)

In view of the high desirability of restoration, both from individual and from social points of view, it is of special interest to consider how reparation systems tend to secure it. The first thing to notice is that a good deal of restoration is achieved without any reparation. A great many people pay a great many medical bills out of their own current income or their savings. Medical care for acute conditions is probably one of the consumption goods which gets highest priority in a pinched budget.

Among the various forms of reparation, there can be little doubt that the one which contributes most to restoration is medical (including hospital) insurance. Its benefits are not transmutable into any other means of satisfaction; doctors and hospitals are

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\(^1\) Based on questions asked of serious injury victims or members of their families, as more fully explained in Chapter 9 of this report.

fairly sure of its availability and its extent, without having to speculate on the results of bargaining or litigation; it is usually paid promptly.

Medical insurance now covers nearly three fourths of all Americans in one form or another, but is sometimes available only on condition of hospitalization.\(^3\) The Michigan survey indicated that about 50,000 automobile injury victims incurred medical expense in 1958, while only about 20,000 received reparation from medical insurance. Medical insurance appears in a variety of forms; in individual policies, in group policies taken for a class of employees or the members of a club, and as a line of coverage in a policy primarily designed for other risks. Illustrating the latter are the "medical benefits" clauses frequently carried in today's automobilists' or landlords' liability insurance policies.

Medical benefits may also be supplied under workmen's compensation liability laws. For those who benefit from them, they are one of the best forms of reparation, since the medical service is often furnished very close to the scene of the injury, and is commonly supplied without limiting its cost.\(^4\) Its only shortcoming is that it is limited to workmen injured in the course of their employment, and then only if they work for certain kinds of employers.\(^5\) Among the 50,000 subjects of automobile injuries who incurred medical expense, only about 700 received benefits under the workmen's compensation law.

A third form of reparation which contributes to personal restoration is "free" medical care—care that is not paid for by or on behalf of the patient. Of the serious injury victims in the Michigan survey, 4 1/2 percent reported receiving "free" medical or hospital care. While these reports referred to care for which no charge was intended, there is also care which becomes "free" because the

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\(^3\) See Chapter 1, note 41.

\(^4\) See generally Cheit, Injury and Recovery in the Course of Employment, pp. 27-60.

recipient never pays the bill for it. This is a natural result of the fact that hospitals and doctors accept emergency cases without determining whether the patient is able or willing to pay.

In addition to care which the parties would describe as "free," there is care so heavily subsidized as to make it economically equivalent to free care. In one of the surveyed cases, a small boy sitting in the front seat of a car fell forward and cut his head on the instrument panel as the result of a collision. He was taken to a public hospital in an ambulance, anesthetized, and given several stitches in the head by a surgeon, for a total charge of five dollars.

Care of this sort, administered without charge, or at a very low charge, or without collecting charges which may be made, contributes greatly to assuring the restoration of injury victims. Since the care is eventually paid for by someone, it is a form of reparation by which injury losses are shifted from the injured person to taxpayers, to the patrons of charities, to uncompensated doctors and nurses, or to the paying customers of medical services, whose bills may include compensation for services rendered to those who do not pay.

As means of assuring restoration through medical care, one would probably list tort law at the end of the list of reparation sources. This is because the tort settlement generally waits until after the permanence of the injury is definitely known, which means after most of the medical treatment has been given.\(^6\) Tort law settlements then reimburse the injury victim, his survivors, or his insurance company for the medical care which has been paid for. But the question whether any settlement will be paid normally remains doubtful until the sum is in hand; the possibility of reimbursement can not exercise a very strong influence on the rendering of the necessary service.

It might be suggested that the tort settlement proceeds would be useful in obtaining the medical services needed by permanently

\(^6\) For an analysis of time from injury to tort settlement, see Chapter 6 of this study.
disabled persons after the settlement has been received. Undoubtedly it is so used in some cases. However, the time for most effective treatment may have passed; in any event, the injury will no longer be acute, and medical treatment may have become "elective." Medical treatment will therefore compete on no better than equal terms with debts, family subsistence, and deferred pleasures. An earlier study of the use of settlement funds for railroad injuries did not make any mention of use for subsequent medical treatment.\(^7\) A study of lump sums paid for workmen's compensation in Michigan indicated that a significant fraction of settlements was used for medical expenses, but did not show whether these were past or future expenses.\(^8\)

Turning from medical care to vocational rehabilitation, it appears that there is very little tendency for any of the prevailing types of reparation for automobile injuries to bring about rehabilitation. In industrial accidents, the laws of a few states provide for employers' liability for rehabilitation costs, and some insurance companies publicize their rehabilitation programs. Although tort law theoretically would provide the costs of rehabilitation, its actual effect is probably to disfavor it. Pending the settlement, the injury victim's impulse to be rehabilitated conflicts with his desire to prove the highest possible degree of disability. After the settlement, there is no mechanism for channeling the proceeds toward a rehabilitation program, rather than toward paying debts, buying a car, or other purposes which press more strongly on the victim's consciousness.\(^9\)

Restoration via replacement of property presents no major problems, but may merit passing attention. If the property is a car, there is a good chance that the replacement may be made from collision insurance, less a "deductible" amount. If there is no


\(^8\) James N. Morgan, Marvin Snider, and Marion J. Sobol, Lump Sum Redemption Settlements (Univ. of Michigan, Ann Arbor, 1959), pp. 96-104.

\(^9\) Compare Cheit, Injury and Recovery in the Course of Employment, p. 299.
applicable collision insurance, the victim's principal hope lies in getting a tort settlement. This hope is subject to the hazards of proof of negligence, and of freedom from contributory negligence. Assuming that these can be surmounted, it is still doubtful that the tort settlement will arrive in time to fill the victim's need, since the settlement for property damage and personal injury are generally made in a single package, which is slow in coming. When the tort settlement arrives, it may help to pay the mortgage on a car previously purchased, or to replenish savings spent for a car, but it is fairly unlikely to be the direct means of restoring the injury victim to vehicular mobility.

2. Subsistence

A second function of reparation systems which deserves separate attention is maintaining the injury victim and his dependents at some level of subsistence which is designed to maintain life and health, but which may be deliberately set below the normal standard of living. Although this function may be regarded as an integral part of the entire process of loss shifting, it deserves separate attention because impoverishment below the subsistence level is believed to have multiplier effects which do not apply to relative impoverishment at higher levels; disease, family disintegration, and crime are associated with substandard subsistence. Whether or not this is true, levels of support which are less than pre-injury wages have been deliberately chosen as the objectives of some of the most extensive reparation regimes, such as workmen's compensation and social security.

Fortunately, there are a great many cases in which subsistence is not a problem. One may assume that when the injured person is not gainfully employed, subsistence is unaffected by the accident; this eliminates about 46 percent of all the injury cases. In cases where the victim is employed, subsistence can probably be supplied from savings, or from borrowings against future earnings,
Without outside reparation, for a limited period. But where a severe injury is suffered by a wage earner it is likely that subsistence will eventually suffer unless reparation is supplied from some outside source. The Michigan survey indicated that in 1958 about 4500 employed persons suffered injury losses amounting to over $1000 apiece; many of these would be likely to have some need for reparation to maintain subsistence.\(^{10}\)

When the subject is a wage earner, the first source of subsistence is likely to be sick leave.\(^{11}\) In a small fraction of cases, the victim's injury is so connected with his work that he becomes entitled to workmen's compensation.\(^{12}\) Unlike sick leave, which may pay the full regular wage, workmen's compensation is a true subsistence program, never paying more than a stipulated fraction of the regular wage, and subject to arbitrary maximum dollar limits, which may vary according to the number of dependents, and which are usually well under the average wage of industrial workers.

If the worker proves to be totally and permanently disabled, he will be qualified after six months to a social security pension just as if he were over sixty-five.\(^{13}\) Like monthly benefits under workmen's compensation, it is deliberately established as a fraction of the former wage, with a fairly low ceiling.\(^{14}\) If none of these programs are available, actual starvation will probably be prevented by public assistance and charity. In any event, savings while they last are likely to be drawn on to fill the waiting period

\(^{10}\) For distribution of injury victims by age and family income, see Figures 5-3 and 5-4, infra, Chapter 5.

\(^{11}\) Of 86,000 injury victims who suffered some economic loss, about 25,000 received sick leave pay or other compensation from their employers.

\(^{12}\) Of 86,000 injury victims who suffered some economic loss, approximately 700 received workmen's compensation benefits.

\(^{13}\) The Michigan survey showed about 600 social security beneficiaries out of 86,000 injury victims with some economic loss. It is probable that the questionnaires, mostly answered in 1960, did not reflect potential benefits under the 1960 amendment of the Social Security Act to embrace permanently and totally disabled persons under the age of 55. U. S. Public Law 86-778, approved Sept. 13, 1960, amending Social Security Act §§ 401, 402 (42 U. S. Code §§ 401, 402).

\(^{14}\) Social Security Act §§ 401 ff. (42 U. S. Code §§ 401 ff.)
before other benefits attach, and to supplement the meager levels of subsistence supplied.\textsuperscript{15}

Tort settlements are measured in part by lost wages, and are therefore designed in part to supply a fund which would include subsistence, but they become direct sources of subsistence to a very limited extent. Between the time of injury and the time of the tort settlement, the tort settlement is obviously unavailable; it is too uncertain even to furnish a base of credit.\textsuperscript{16} After the settlement, it might conceivably furnish subsistence for the remainder of the time needed, but other studies of lump sum settlements indicate that they are often spent in a lump sum, just as they are received.\textsuperscript{17} That does not mean that they are wasted; they may be well spent in buying a home or a chicken farm, but they are seldom used to supply directly the amounts needed to feed and clothe a family week by week, or to purchase annuities.

3. \textit{Loss Equalization}

After every effort has been made to restore an injury victim to effective living, and to supply subsistence to his family, huge losses still remain uncompensated. The function of making up these losses so as to render the victim as \textquotedblwell off\textquotedbl as he was before will be called \textquotedblloss equalization\textquotedbl.

The most obvious among the losses which call for equalization is wage loss above subsistence levels. For a worker at a very low wage, loss beyond subsistence would be small; as the wage rises,

\textsuperscript{15}The U. S. Railroad Retirement Board study of railroad injury victims concluded that \textquotedbl{}It is clear that on the whole, the reliance on sources of income that imply critical situations is not very great. It is estimated that about two thirds of the employees or survivors . . . are able to manage either entirely or principally on savings, insurance, and related sources.\textquotedbl{} Work Injuries in the Railroad Industry, 1938-1940 (Chicago, 1947), Vol. 1, p. 166. For some case studies of how injured workmen and their families adjusted to reduced income, see James N. Morgan and others, Lump Sum Redemption Settlements, pp. 82-100.

\textsuperscript{16}On time intervals between injury and settlement, see Chapter 6 of this report.

\textsuperscript{17}For case studies of dispositions of lump sum settlements, see U. S. Railroad Retirement Board, Work Injuries in the Railroad Industry, 1938-1940, pp. 166-76;
the loss beyond subsistence becomes progressively greater. Other economic losses may be suffered through destruction of clothing and property which are not necessary for work. Again, the magnitude of the loss is likely to rise with the income level of the accident victim.

In addition to these easily measured economic losses, there are others which certainly exist, but are just as certainly immeasurable. A disabled salesman loses customers, or opportunities to make new ones; his sales will be less even after he is fully "restored" to serviceability. A workman loses an opportunity for promotion. A child loses education, and the opportunities for prospective advancement which education would have conferred.

Even more problematic than the economic losses beyond subsistence are the psychic losses: the pain and suffering of the injured persons; the loss of companionship felt by a family member when another member is lost; the loss in example and guidance suffered by a child who loses a parent. There is no known scale for transmuting these losses into money, yet juries are somehow supposed to do it.

A remarkable feature about these losses is that they are so generally neglected by reparation systems other than tort law. A small part is cared for by voluntary direct loss insurance. Collision insurance will buy the victim a new car. In rare cases, accident insurance (such as a musician’s insurance of his hands) may reimburse a part of the earnings loss, and could even exceed it. Life insurance could be carried to such an extent that it would eliminate any economic loss to survivors. But it is obvious that the amount of insurance carried by most people is inadequate to provide even subsistence, and merely provides a slender supplement to social security or public assistance. The only important exception occurs among retired wage earners, where death occu-

James N. Morgan and others, Lump Sum Redemption Settlements, pp. 100-104.

18 See Life Insurance Fact Book, 1961 (New York: Institute of Life Insurance), p. 11, showing that the average amount of life insurance per family is between one and two times the average annual disposable income per family.
sions no loss of earnings. Although death in such cases usually triggers the termination or diminution of a pension, it is not improbable that life insurance benefits may equal the loss.

Loss equalization remains therefore the virtual monopoly of tort law. To abolish the tort system without radical expansion of other systems would leave the injury victim with little more than restoration and subsistence.

Without deciding at this point whether loss equalization is or is not a sound public policy, it is appropriate here to note the unevenness with which losses are equalized even under tort law. The fact of loss is not enough to call for loss shifting; the victim must be innocent, there must be a guilty causer of the loss, and the victim must have means of proving the guilt and the causation. Hence many injury victims receive no tort settlement and no reparation beyond restoration and subsistence. Other victims, who are more favorably situated with respect to proof of negligence, receive compensation which exceeds not only their medical treatment and lost wages, but their total economic loss. These variations were sharply outlined by results of the Michigan automobile accident survey.19

B. ALLOCATING THE BURDENS OF REPARATION

In the welfare-minded society of today, it is easy to rationalize the conferring of benefits; it is harder to find satisfying reasons for the allocation of burdens.

One of the ideas that will first come to mind (at least, after abandoning "justice" and "fairness") is "placing responsibility," which may be further identified as "moral responsibility," or "social responsibility." All these terms seem to be susceptible of further definition, and further analysis will be attempted under the headings of:

1. Punishing the guilty
2. Deterring negligent conduct

19 See Chapter 6, infra.
1. **Punishing the Guilty**

It is hard to get far in a discussion of injury law without meeting the idea that the wrongdoer who caused the loss should somehow be made to suffer. To a few, this proposition is self-evident and requires no further explanation. Others will ask, "why punish"?

One answer lies in the direction of revenge. It may be said that society demands vengeance; that the injury victim and his friends feel the need that the wrongdoer should suffer just as keenly as they feel the need that the innocent victim should be cured and rehabilitated.  

Certainly this state of mind is observable in many litigants, although it is not easily separated from a desire for monetary compensation. Perhaps the same phenomenon could be made more acceptable to a modern conscience by giving it the name of "commiseration." Something in human nature demands that if one person has been made to suffer, others (and particularly the causes of it) should be made to suffer with him.

Whatever may be thought of the punishment objective, it is one which has known better times. Historical studies have revealed that tort law grew out of criminal measures whose sole object was to punish, and the principles of primary and contributory negligence seem to have arisen from a desire to make the guilty pay, and to prevent the guilty from collecting any payments.

On the other hand, it is clear that the law has moved consciously and unconsciously away from the goal of punishment. Most damages are not punitive, but compensatory; they are measured not by the offensiveness of the defendant's conduct, but by the amount of the plaintiff's loss. It is widely acknowledged that many negligent

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claimants succeed in collecting tort settlements, thus escaping the forfeiture which the tort law designed for them.\textsuperscript{21} Guilty defendants are likely to escape financial punishment either by carrying liability insurance, or by being judgment-proof. States such as New York and Massachusetts, which require every driver to insure,\textsuperscript{22} seem determined to take the punishment out of tort.

The punishment objective of tort claims is served only in the rare cases in which a defendant with assets from which to pay carries inadequate insurance, or in which by reason of deliberate wrongdoing insurance coverage is unavailable.\textsuperscript{23}

Leaving tort law behind, one finds no vestige of the punishment theme in other reparation regimes. Workmen's compensation laws, for example, require insurance (or evidence of ability to self-insure) on the part of everyone who is made liable, so that liability can never be punitive.\textsuperscript{24} The role of punishment for causing personal injuries is now virtually separated from reparation systems, and persists chiefly in fines and jail sentences.

2. \textit{Deterrence of Negligence}

An objective which is closely related to punishment but which appeals more to the modern mind is the deterrence of negligence. Tort law may well be viewed as a negligence deterrent. It purports


\textsuperscript{22} Mass. Gen. Laws ch. 90, § 34 A-B (1949). N. Y. Vehicle and Traffic Law (McKinney, 1960) § 312. "No motor vehicle shall be registered in this state unless the application for such registration is accompanied by proof of financial security which shall be evidenced by a certificate of insurance. . . ."


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to impose burdens only on those who are found guilty of negligence, and to confer benefits only on those who are free from it. 25

Without quarreling with the validity of the objective, one must recognize a number of current doubts about how far tort law achieves it. One set of doubts relates to the extent to which defendants' states of mind cause accidents. If accidents are caused by conscious indifference, threats of liability may make a difference. Some accidents may be caused by excessive nervousness or panic, which would be increased rather than diminished by threats of liability. Some accidents are probably caused by poor coordination and reaction time, or by irrational responses to emergency; such accidents are totally unaffected by imposing liability. Other accidents probably result from peculiar coincidences which are bound to produce a certain number of collisions per million car-miles even between careful drivers. 26

Conceding that fear of liability may not affect the conduct which immediately precipitates accidents, the possibility remains that fear of liability may have an effective role in inducing "safety practices" which would make accidents less likely. It might, for instance, influence persons against taking trips on New Year's Eve, Independence Day, or Labor Day, and probably reinforces many owners' unwillingness to loan cars to less careful friends, or to inexperienced youths. But even here, the fear of liability is likely to be overshadowed by the owner's desire to save himself and his


car from harm, and by his horror of being an instrument in causing tragedy to another human being.

A second set of doubts about deterrence by tort law relates to the effect of insurance on the tort deterrent. Approximately 85 percent of America's automobile owners appear to be covered by liability insurance; presumably, they carry as much insurance as they consider necessary to cover their risks. Since the increased cost of higher policy limits is relatively slight, it seems more probable that persons would increase their insurance coverage than that they would change their driving habits if fear of liability were their motive force. It would seem that the liability fear could furnish a safety incentive only for those who are too poor to insure. Many of such persons must also be too poor to have much to lose by liability.

On these assumptions, few if any drivers think of their driving habits as exposing them to liability. But the 85 percent who carry insurance may think of their driving habits as exposing them to higher insurance costs. Since insurance companies are likely to refuse to renew policies, or to charge higher rates for accident frequency, drivers may have a desire to avoid accidents in order to keep their insurance in force at minimum rates. This fear would seem to be much less compulsive than the fear of a ruinous liability for damages; it would not necessarily be less effective in reducing accidents.

If tort law does encourage care in driving, it evidently does not, in the minds of the legislators, exhaust the possibility of putting pressure on drivers. The suspension of drivers' licenses for repeated violations and for failure to pay judgments (under "financial re-

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27 This figure is a rough median of the proportions insured according to report of the sub-committee appointed to study the proposed automobile accident commission plan to the automobile insurance law committee of the American Bar Association, Aug. 30, 1960, Appendix A. In the Michigan Auto Injury Survey, reported in Part II, 14 percent of serious injury victims reported that the person responsible for the accident was uninsured.
responsibility laws") have been added as additional incentives.\textsuperscript{28} Among the students of accident prevention, the possibilities of strengthening these types of pressure are generally valued a good deal higher than the possibilities of strengthening the tort weapon.\textsuperscript{29} It is perhaps significant that the Michigan Highway Department posts road signs saying "Drunk Drivers Go To Jail," but never yet "Drunk Drivers Pay Damages."

This does not mean that tort law is valueless. In fact, it is normally the tort law which triggers the license suspension under financial responsibility laws.\textsuperscript{30} If tort actions were abolished or severely diminished, the license suspensions which result from unpaid judgments would also fall by the wayside, and a presumed deterrent to negligence would be lost.

Even the license suspensions which result from repeated traffic law violations (without any tort action) may be indirectly aided by tort law. It is widely known or believed that police records have a great deal to do with the terms of settlement of injury claims.\textsuperscript{31} A ticketed defendant is virtually sure to make some sort of settlement


\textsuperscript{31} The report itself is not ordinarily admissible in evidence, but the police officer who made it may be called as a witness, and may use it to refresh his recollection. C. T. McCormick, Handbook on the Law of Evidence (1954) § 149. Note, "Admissibility of Contents of Police Officer's Accident Reports," Minn. Law Review, Vol. 36 (1952), p. 540. Insurance officials have told the writer that in practice accident claims in Michigan are generally settled in reliance on the police report as to cause of the accident and negligence of the parties.
in favor of an unticketed plaintiff. Therefore, an innocent party to an accident has a private incentive to supply police with any information which would tend to throw fault upon other parties. In the absence of the tort claim incentive, many motorists might think it more sporting to have no memory of fault-implying aspects of the accident. How many motorists draw such sophisticated distinctions is not known.

From these considerations, it appears that tort law probably furnishes important incentives to avoid involvement in accidents involving injury to others, and to avoid conduct which will be charged as negligent, even if it does not unfailingly punish the guilty and limit its reward to the completely innocent.

None of the other reparation systems appears to furnish an equal incentive in this direction. Workmen's compensation doubtless furnishes an incentive to employers to minimize injuries to their own employees, but their incentive to minimize injuries to others by their employees must reside elsewhere. As for life insurance, social security, and public assistance, the effect of injuring another on one's own taxes or insurance premiums is infinitesimal.

Therefore, any proposal to eliminate the tort remedy from any area of accidents would call for a close examination into the sufficiency of the other incentives to injury avoidance. At the same time, it cannot be said that minor changes in the tort pattern, by increasing or decreasing the damages, or by relaxing or tightening the negligence standards, are likely to affect significantly the pressure which the ordinary citizen presently feels to avoid injuring others.

3. Social Cost Accounting

Since the edge of deterrence has been blunted by liability insurance, a new rationalization of liability for reparation has come into view—the idea that each consumer good should bear the true price of its production, including the human carnage which it has caused. This idea was first advanced in connection with
workmen's compensation laws, when it was said that "the price of the product should bear the blood of the workers."\textsuperscript{32} More recently it has been invoked to show that automobile drivers should pay the price of automobile driving, including the costs of accidents caused.\textsuperscript{33}

This is not the place to question the soundness of the objective (which is explored in the next chapter), but merely to see how the function is performed in existing reparation systems. It is best observed in workmen's compensation law, where the losses of the workers are shifted to the employers and by them, presumably, to the consumers of the products made by the covered workmen. Industries with higher injury rates will naturally make allowance in their prices for higher workmen's compensation payments (or for higher premiums on workmen's compensation insurance), so that the consuming public may choose cheaper goods, which cause less human carnage; or, if they prefer goods whose manufacture occasions more injuries, must pay more for them.

With the aid of liability insurance, tort law seems to work similarly. Automobile owners pay insurance premiums which are used to pay the losses of automobile victims—pedestrians and passengers. Owners of vehicles such as business cars and trucks, which cause a particularly large amount of damage, pay particularly large premiums. In this way the ownership of a car is made to reflect the losses which vehicles of its class are likely to inflict on others. Although the system involves some waste motion in collecting money from the same people to whom losses will be paid (e.g., family car owners), it also has considerable success in mak-


ing auto owners as a group pay for the injuries of pedestrians as a group, and in making those whose cars are driven more (the business car owners) pay for the injuries of those whose cars are driven less (the family car owners). The geographic differentiation of rates also serves to put a higher price on car ownership in urban areas, where injuries per car are more numerous than in rural areas.34

A more limited form of social cost accounting is observable in most systems of voluntary direct loss insurance such as life, accident, hospital and medical, and automobile collision. In these systems, the recipients are those who have voluntarily paid premiums (or those named as beneficiaries by the premium payers), and the only contributors are those who expect that they or their appointed beneficiaries will receive benefits. To the extent that underwriters charge different premiums for different classes of risk these systems also tend to place a price on more dangerous activities. People who spend most of their time in airplanes pay higher life insurance premiums, and certain types of cars presumably pay more for collision insurance. But these effects are very limited. The underwriters cannot place any greater burdens on premium payers than they will voluntarily assume by buying high-priced insurance. This fact limits the underwriters to pricing up activities in which

34 To illustrate the wide differences in liability insurance rates for cars used in different ways and different places, one may compare the following rates stated in the Manual of Automobile Insurance Rules and Rates (New York: National Bureau of Casualty Underwriters, 1960, with 1962 supp.):

<table>
<thead>
<tr>
<th>Class 1A</th>
<th>District 18 (Brooklyn)</th>
<th>District 49 (Niagara County, excluding city of Niagara Falls)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$147</td>
<td>$47</td>
</tr>
<tr>
<td>Class 2C</td>
<td>$352</td>
<td>$182</td>
</tr>
<tr>
<td>Public livery</td>
<td>$790</td>
<td>$179</td>
</tr>
</tbody>
</table>

"Class 1A" refers to passenger cars not used for business nor for driving to and from work, and not driven by a male under 25.

"Class 2C" refers to passenger cars, regardless of use, of which an unmarried male under 25 is an owner or a principal driver.

These rates are for personal injury liability limited to $5000 per person injured and $10,000 per accident, plus property damage liability limited to $5000 per accident.
their customers habitually engage, and excludes the possibility of their shifting burdens to excavators, fireworks manufacturers, and reckless drivers whose activities may unpredictably bring loss upon a policyholder whose normal life is a model of circumspection.

A complete departure from the aim of social cost accounting is seen in the survivors’ and disability benefits of the social security system. Here there is no upward pricing of the greater risks, but on the contrary a design to let the lesser risks share the burden of the greater. Instead of raising the cost of hazardous activities, it raises everybody’s cost of living and of doing business.

If social cost accounting is the end to be served, the liability systems of tort and workmen’s compensation are the systems to be most preferred. But they should not be allowed to carry off the blue ribbon without some notes on their imperfections as social accounting mechanisms. One group of imperfections relates to the measurement of the losses which are accounted for, and the other to the identification of the people who are supposed to be particularly prone to cause losses.

For the purposes of social cost accounting, the loss which should be borne by the hazardous activity is the social loss, which rarely if ever conforms to the amount of the reparation awarded. In workmen’s compensation, reparation is arbitrarily limited to medical benefits and subsistence, leaving unrequited a large residual income loss in the case of average or high wage earners. Under tort law, a large amount of loss goes unrequited either because of the negligence principle, or because of lack of insurance, or other factors, so that the total aggregate loss never gets into the accounting.

The other big shortcoming in reparation systems as instruments of social cost accounting relates to the identification of loss causers. Liability insurance for an automobile belonging to a young bachelor in Brooklyn costs approximately $350 a year, which is the insurance company’s average cost for such an owner. As a

35 See preceding note.
result, it is probable that many poor laborers who would cause very little damage are prevented from owning cars. This happens because insurance companies cannot tell in advance which drivers will cause large amounts of damage, and which will not. They have made bold efforts to identify accident-prone classes, such as unmarried men under 25, but these efforts only increase the unfairness of the system for a person who is not accident prone, but belongs to a class most of whose members are. An interesting attempt to recognize safe classes within unsafe classes is illustrated by the practice of one insurance company which raised premiums for most cars driven by high school students, excepting high school students with high grades. A similar example is the lower rate for those who have completed a driver training course.

Even if workmen's compensation benefits were unlimited, and if tort law ignored negligence, reparation under these systems would fall short of social loss for other reasons. One of these reasons is that the systems focus on individual loss and ignore social loss. When a workman is disabled, his individual loss is the reduction in his take-home pay, but the social loss includes also what he would have contributed to the common good by the income tax. His individual loss also excludes the social cost of training a new workman to take his place, or of putting up with an inexperienced workman until the replacement is as skilled as his predecessor. Another reason is that the losses for which reparation is paid must be those of identified losers. If a young bachelor is killed, the demonstrable individual loss is minute, because no one knows which woman would have benefitted from his survival; yet the social loss includes what he would have contributed to her.

Despite all these efforts, it remains obvious that the social cost accounting functions put a high cost on driving, without adequate allowance for the actual differences in accident probabilities. A comparison might be drawn with a cost accounting system for General Motors which would attribute an average manufacturing cost to each car, whether it were a Corvair or a Cadillac. Yet even
if the system is imperfect, it does not follow that social cost accounting be rejected. That would be comparable to giving away both the Corvairs and the Cadillacs for lack of ability to apportion the costs between them.

4. Loss Redistribution

Another distinctly modern objective advanced for allocating the burdens of reparation is that they should be imposed on almost anyone who would suffer less than the original victim would. Two arguments are advanced to explain why one man might wince less than another at a given loss. The first is that one man might be richer, and involves the assumption that the millionth dollar means less to its owner than does the hundredth. A second argument is that people would rather suffer regular losses which are small and predictable than large and unpredictable ones which would be less frequent. For this reason, people buy hospital insurance or collision insurance.

According to the first argument, redistribution confers a benefit by shifting wealth from the rich to the poor, as did Robin Hood. But it would be difficult to defend any of the reparation systems as a Robin Hood, even if one regarded this as an unchallengeable objective. As already noticed, most reparation is paid not by individual tort feasors, but by insurance companies, which collect their premiums from a very large percent of automobile owners, most of whom belong to the same class as do most of the injured. Therefore reparation probably causes redistribution from the poorer to the richer about as often as it causes redistribution from the richer to the poorer.

It is true that reparation of injuries to pedestrians, including children, often fits well under the concept of “redistribution” in favor of the poor. So also does reparation of injuries occasioning major permanent disability, which make a

30 Observations on differences between serious automobile injury victims and the Michigan population as a whole may be found in Chapter 5.
poor man of one who was well situated before. Unfortunately, in this last group of cases the system does not work very well because the victim's losses are frequently above the capacity of the system to pay. The failure of all systems of reparation to redress really large losses is discussed later, in Chapter 5.

The second view of redistribution—that frequent little losses are preferable to infrequent big ones—furnishes a somewhat better basis for justifying contemporaneous reparation systems. Following this view, one may regard "redistribution" as the function of pulverizing the losses and sprinkling them on everybody, instead of letting them fall in heavy chunks on a few unfortunate victims. This is the effect of the social security system, as it operates on injury victims. The burden of the reparation is spread over the entire working population, without any regard to whether those who bear it are more or less likely to participate in the system either as losers or as loss-causers. Life insurance is also a pulverizer of loss, although its burdens are sprinkled only on those who choose to participate.

Collision insurance also operates as a loss pulverizer, spreading losses equally among large numbers of automobile owners through the premium device. But since collision losses are fairly low (compared with personal injury losses) it is probable that very few policyholders eventually take out any more than they pay in over a period of years. For them, the spreading effect is more of a spreading over the years than a spreading among persons. But collision insurance is more selective than social security, because only automobile owners (and not all of them) contribute, and because they are rated to contribute in very different amounts, varying according to their supposed risks.

The tort law system, in spite of its objective of placing loss on the guilty cause, in fact operates partly as a pulverizer of loss, when placed in tandem with the liability insurance system. A great deal of what goes on is simply the payment of losses to one premium payer from the funds contributed by other premium
payers of the same class; for instance, when a man's automobile liability insurer pays a claim to a neighbor who buys insurance at the same rate. But this is not all that happens. There are a great many classes of premium payers, paying different premium rates, and for this reason tort law coupled with insurance achieves several objectives beyond loss-spreading.

In the absence of insurance, tort law rarely effects pulverization. Most frequently, it effects no shift at all, because most uninsured tort feasors are too poor to pay from their own pockets. When one uninsured individual does compensate another, the primary effect is merely a shifting of loss in a large chunk. But when the person compelled to pay is a corporation, there is a sharing of the loss at least among all the shareholders. And if the liability is regarded as recurring, there will probably be a more diversified shift by adding the payment to the costs of production, raising the price of the product, and collecting more from the ultimate consumers.

Workmen's compensation has been so carefully designed as an instrument of social cost accounting that it seems reproachful to accuse it of mere loss-pulverization. However, it probably "pulverizes" to a limited extent, where insurance premiums do not reflect the full costs of protection. This may occur when insurance funds —state or private—accept risks at less than their true costs, through erroneous rating or in response to political or social pressures.

5. Linking Benefits and Burdens

In addition to all the ideas that exist about why some people should receive reparation, and why others should pay damages, there is a popular idea that the two should be linked together. What one pays, the other should get, and vice versa. This corresponds to the common sense rule that a child who breaks another's toy should give the other one of his own to replace it. It
corresponds also to the judicial formulas of tort law, which order one person to pay another a certain amount. Workmen's compensation law also goes through the motions of linking benefits to burdens, since employers are made "liable" to pay the benefits to which their employees are entitled.

A complete departure from the linkage idea is presented by all of the voluntary direct loss insurance systems (life, accident, collision, hospital and medical). Under these regimes, people pay premiums without knowing who will benefit from them, while others draw benefits from the fund without regard to who has paid them (except that they themselves must have paid enough to qualify as participants).

But the difference between the liability and the loss systems is not so great as the theory would suggest. Since most of what is paid under tort law and workmen's compensation is paid by liability insurers who have collected from a large group of policy holders, the linkage is more apparent than real. Nevertheless, the claimants must go through the form of proving that some particular defendant ought to pay, and this leads to characteristics of the system which many people would regard as desirable. One of these is that the system tends to be self-propelling. The desire of victims to be paid leads them to force defendants to bear their share of the burdens. At the same time, the defendants or their insurers have a chance to resist payment of exaggerated amounts, and they police the reasonableness of claimants' demands with commendable tenacity.

In social security, on the other hand, the imposition of burdens requires the interposition of a government tax-collector; in voluntary direct loss insurance, an effort of salesmanship is required to induce the public to accept the burdens of paying premiums. In both, it is arguable that the disbursing agents lack the same incentive to resist excessive payments which are met in the liability insurance systems. The civil servants who administer social security might lack motivation to fight claims. While private
insurance companies would have a pecuniary interest in doing so, this would be mingled with their desire to please their customers, who are the same as their beneficiaries.

Another possible merit of the direct linkage of benefits and burdens is the possibility of punishment, deterrence, and social cost accounting, all of which work (if at all) through the direct linkage. In contrast, the social security and voluntary direct loss insurance systems have little or no punishing, deterring, or cost accounting effects. But this does not have to be so. One can imagine a system in which contributions to the fund were levied in relation to the experience rating of an automobile owner, but benefit payments would be made directly from the fund to injury victims. The federal-state unemployment insurance systems work on such a plan, and so does workmen’s compensation under a compulsory state fund, as in Ohio or Ontario.

Granting that the direct linkage of benefits and burdens in “liability” systems of reparation yields certain advantages, one must recognize that it is accompanied by certain inconveniences and inconsistencies. One of these is the adversary aspect which permeates each step of the proceeding. The defendant, or his liability insurer, attempts to settle each claim for as little as possible, while the claimant demands as much as possible, since each finds that he will certainly achieve less than he seeks. The more loosely linked system of social security seems to result in more harmonious settlement of cases.

A related inconvenience is that the reparation received on the one hand and the burden borne on the other may be far off the mark because of the inability or indisposition of one of the parties to defend or prosecute his case effectively. The “self-propulsion” of the system tends to vary with the litigious potency of the injury victim.

A third difficulty, or set of difficulties, flows from the fact that under such a directly linked system, the amount which any particular victim can receive is limited by the amount which a par-
ticular defendant can be asked to contribute. In legal theory, these are exactly the same. That is, courts and commissions determine how much a victim should receive; and if they find a defendant who fulfills the conditions of a contributor, they order him to pay that amount.

This creates great difficulties, for a variety of reasons. On the one hand, there are a large number of victims who cannot prove that some other person is chargeable with the loss. There are also a large number of cases in which the social loss occasioned by the injury (especially in fatal cases) is much greater than the amount which can be claimed by any identifiable victim.

A further set of difficulties is introduced by operating expenses of the system. The amount which the court or commission sets as right for the victim to receive and for the defendant to pay is almost invariably much greater than what the victim actually receives, and much less than the defendant actually pays; the difference is the injured person's collection expense. The Michigan survey, fully corroborated by many others, showed that automobile injury claimants receive aggregate amounts which are less, by more than a fourth, than the amounts which are agreed on as settlements. It is also demonstrable that automobile owners pay (through insurance premiums) aggregate amounts which are very much greater than the aggregate amount of settlements. Instead of burdens equaling benefits, as the rules of law provide, the former are approximately double the latter. 37

C. ECONOMY OF OPERATION OF REPARATION SYSTEMS

One of the characteristics of reparation systems which is of greatest popular interest is the cost of operation. One part of this is the "cost of justice," a notorious subject of controversy from time immemorial to the present day. The costs involved in some of the principal systems have been shown in the preceding chapter.

37 Chapter 1, Table 1-4.
These figures are presented with certain caveats. The first caveat is that these figures do not, and cannot, include all the costs. In public programs, there are concealed costs involving the earning value of the capital invested in the program, which would appear in a private program as dividend or interest costs. In all kinds of programs, there are concealed costs involving money which is paid to the wrong people. A recent news report stated that an investigation of welfare payments in three West Virginia counties showed that 11 percent of the recipients were ineligible.\(^{38}\) Other investigations have revealed fakery in collection of damage claims under tort law.\(^{39}\) No reparation system can be assumed to be immune from costs of this kind, none of which can be accurately measured.

The second caveat is that the figures cannot present all of the benefits, some of which are not even susceptible of quantification. This is particularly true of the liability systems—tort and workmen's compensation—which have the functions not only of providing reparation to injury victims, but also of deterring dangerous activities and (in the case of tort law) deterring negligent conduct. The social benefits of tort law are not only the cash which injury victims receive—as shown in Figure 1-2 (supra)—but also potential losses which are prevented from occurring because tort law has increased the price of owning an insured automobile and has warned drivers who can afford one to drive carefully and follow safety practices.

A third caveat is that each of the various "systems" involves a myriad of variations. In voluntary loss insurance, for example, an overall expense rate of about 28 percent is indicated. This is made up of programs of group medical insurance in which the operating expense rate is under 5 percent, and programs of in-

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individual insurance of various types where the operating expense rate is over 50 percent. Likewise the tort system embraces individual cases in which reparation was received without any expense at all, as well as cases in which the expense of obtaining the reparation consumed all of the reparation received.

Despite these limitations on data, there are important lessons to be learned from a consideration of system operating expenses. One lesson is that every reparation system has costs, so that the dollars which are disbursed are less than the dollars paid in. Whenever the law decrees reparation by A to B, the aggregate amount received by people like B will be materially less than the amounts paid out by people like A, because each of them will have legal or insurance costs; the only escape is through making people like C (who have nothing to do with the case) contribute the administrative expense as taxpayers or as philanthropists.

The second lesson is that rather substantial numbers of individuals and enterprises are dependent upon the administration of present reparation systems. To put the matter bluntly, if one could abolish overnight the reparation of personal injuries through tort law, one would not only deprive injury victims of about one and a half billions of compensation, but one would also deprive workers and investors in the insurance business and the legal professions of more than one and a half billions of income.40

The third lesson is that there are very great differences in the expense rates of the different systems, if viewed merely as ways of distributing money. In the tort system, operating costs appear to exceed the net amount of cash benefits distributed.41 In the social security system, the operating costs appear to be less than 5 percent of the distributed benefits. Although the aggregate figures presented do not show it, a survey of Blue Cross in Michigan indicated that it also distributed benefits at a cost of less than 5 percent.42

40 Chapter 1, Tables 1-2 and 1-3.
41 Chapter 1, Table 1-4.
42 Walter J. MacNerney and staff, Hospital and Medical Economics (Chicago: Hospital Research and Educational Trust, 1962), Vol. 2, p. 1051.
There are obvious reasons for these differences, in addition to the fact that the tort system attempts to perform many functions besides distributing money. The social security system distributes with virtual disregard of individual needs or circumstances, thus awarding some people nearly as much when disabled as they could earn if able; it is said that the program of aid to dependent children pays some mothers more than they could possibly earn as full-time workers. To others, the social security system awards only a fraction of their lost earnings. The tort system, on the other hand, undertakes a completely individualized reparation.

D. SATISFYING "THE POPULAR SENSE OF JUSTICE"

Many readers of the foregoing pages will be annoyed by the concentration on objectives of "social engineering," and the ignoring of more mystical values known as "fireside equity," or more bluntly as "gut justice." These considerations have been left until last because there is no way of determining just what their demands are; they may arise from a mingling of somewhat conflicting aims, which have already been identified as restoration, subsistence, loss equalization, punishment, deterrence, social cost accounting, and redistribution.

Any attempt to analyze popular preferences on these matters may well start with Edmond Cahn's observation that the perception of justice is much more difficult to register than the perception of injustice. The survey has disclosed a number of specific matters which participants in the reparation process are particularly likely to identify as "injustice."

Among these, probably the delay and uncertainty of a tort settlement stand first. Of almost equal prominence is dissatisfaction of claimants with their lawyers, which probably stems from the same causes. A large number of injury victims felt that lawyers charged too high fees, but this did not seem to be so

much an objection to the rate of pay as to the small amount of aid and comfort which the claimant received in exchange for it. 44

From other evidence, one could conclude that there is a widespread popular revulsion against failure to care for the economic loss of injured persons regardless of negligence and contributory negligence. This is not particularly identified with the idea that the causers of loss should pay; on the contrary, the feeling seems to be that it should be taken care of by "insurance," without regard to what kind. 45

The feeling that negligent drivers should suffer or be kept off the road was rather faintly echoed in the comments of persons interviewed.

If one wishes to relate these comments to existing reparation systems, one will note that the social security and voluntary hospital insurance systems for supplying wage loss and medical care (respectively) seem to meet the popular demand as well as the workmen's compensation and tort methods, which allocate the burden more meticulously. The tort way seems to evoke a number of popular repulsions because of its delays, uncertainties, and expense.

**SUMMARY ON FUNCTIONS**

No valid evaluation of reparation systems can be made which measures them by a single dimension. Some are better than others for procuring medical treatment, some for maintaining subsistence, some for compensating total loss, some for deterring negligence, some for raising the price of hazardous activities, some for spreading broadly the pain of loss, some for economy of operation. If any of the major elements in the scheme is knocked out, some important function will remain unperformed.

44 See Chapter 8.

In the Michigan survey, the most frequent "reform" suggestion of injury victims was compulsory liability insurance. See Chapter 8.
This does not mean that nothing in the picture can be changed. In fact, a great many elements in the picture are quite recent. Workmen’s compensation entered about fifty years ago; social security was added about twenty-five years ago for survivors’ benefits and within the last ten years for disability benefits; hospital and medical insurance is largely a growth of the last fifteen years. It seems probable that further changes will be made in reparation systems, which might include the shifting of functions from one system to another, and altering the linkage between benefits and burdens. When such changes are made, they should be made with a clear perception of the plurality of functions to be performed, and of the plurality of systems now performing them.