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AUTOMOBILE NO-FAULT PLANS: A SECOND LOOK AT FIRST PRINCIPLES*

RICHARD A. EPSTEIN**

INTRODUCTION

We are now at the end of the first decade of our experience with automobile no-fault plans. Beginning in 1970 and continuing into the middle years of this decade, such plans have been enacted in some twenty-five states.1 While the enacted plans differ amongst themselves in important detail, they all introduce some system of compulsory first party insurance that provides compensation for the driver and occupants of any given vehicle, regardless of the circumstances which led to the occurrence of the accident in question.2

At the time of their introduction, the automobile no-fault plans were hailed as a major advance over the traditional tort principles

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1. For a recent compilation, see Note, No-Fault Automobile Insurance: An Evaluative Survey, 30 Rutgers L. Rev. 909, 910 & n.1 (1977) (Nebraska has no such plan).
2. Some of these differences concern the level of benefits that are provided by the plan, and the persons who are entitled to obtain them. Also of importance in this connection is the distinction between the “add-on” plans and the “modified tort” plans. By the first the no-fault benefits are simply “added on” to the tort recovery otherwise available. By the second the plaintiff must cross a distinct threshold, be it measured in dollar or verbal terms, in order to be able to maintain a tort action. For a discussion of these two variations, see Keeton, Compensation Systems and Utah’s No-Fault Statute, 17 Utah L. Rev. 383, 386 (1973).

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* This article was prepared in connection with the Dean Louis J. TePoel Lecture delivered by Professor Epstein at the Creighton University School of Law on October 10, 1979.
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that they were designed to supplement, if not to replace.  

They were praised for the speed and cheapness of their operation and the comprehensiveness of their coverage. At the same time, they were subject to sharp attack, especially by lawyers who defended the moral values implicit in the traditional tort system. In the years that have followed, the no-fault plans have not had the glowing results predicted by their supporters but, by the same token, they have not led to the kind of moral or economic catastrophe that had been darkly predicted by their more vehement detractors.  

At present the legislative attitude to the no-fault plans roughly parallels the success of the plans themselves. After the initial burst of activity, the last several years have witnessed a kind of political standoff. Since 1975 or so there has been no new enactment of a state no-fault system, and repeated efforts to introduce some automobile no-fault plan at the federal level, be it through direct enactment or by the creation of minimum standards for state plans, have met with no success, notwithstanding the support that such proposals have received from the Carter administration. On the other hand, while there has been some modification of the early no-fault plans, only Nevada has seen fit to repeal its system in its entirety.

It is not inopportune therefore to use the current lull to take stock of the automobile no-fault plans and the premises upon which they rest. In order to do more than restate the statistics commonly cited for or against automobile no-fault plans, it seems necessary, even at this late date, to take a second look at the first principles by which these no-fault plans should be judged, both on their own merits and in comparison with the tort system. The approach adopted here is both historical and analytical. First by looking at the development of nineteenth century tort law, both in England and the United States, I hope to identify the full range of tort and nontort alternatives that can be brought to bear in cases of

3. For what has proved to be an exceptionally influential endorsement of the no-fault system, see U.S. DEP’T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (1971) [hereinafter cited as U.S. DEP’T OF TRANSPORTATION]. See also R. KEETON & J. O’CONNELL, BASIC PROTECTION FOR THE ACCIDENT VICTIM (1965), where the early case for no-fault was forcefully argued.


5. The Illinois statute was declared unconstitutional in Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). The Massachusetts statute originally embraced both bodily injury and property damage, but the property damage provisions were repealed shortly after the statute was enacted. (Chapter 266, Acts of 1976). For a discussion of the history of the Massachusetts statute, see C. GREGORY, H. KALVEN, JR., R. EPSTEIN, CASES AND MATERIALS ON THE LAW OF TORT 868-75 (3d ed. 1977).
highway accidents. Thereafter I shall evaluate these alternatives for their relative strengths and weaknesses.

THE EMERGENCE OF NEGLIGENCE IN HIGHWAY ACCIDENTS

It is perhaps the most striking feature of the traditional tort law that the leading cases have offered little, if any, reasoned account as to why negligence principles should govern responsibility for highway accidents, or indeed physical harms generally. In England, for example, the early rise of the negligence principle was intimately bound up with the procedural complications inherent in the old system of the forms of action.6 These forms of action were marked by a distinctive “jurisdictional” character which required the plaintiff, upon pain of possibly fatal consequences, to commit himself to the right original writ—trespas or action on the case—long before he could gather the very facts upon which that original choice depended.7 In practical terms the root of the difficulty was that the writ of trespass lay only for the defendant’s direct infliction of physical harm against the person or property of the plaintiff, which (as was solemnly decided) precluded the use of the writ against a master whose servant in the course of his employment had in fact run down the plaintiff.8 Yet, if unbeknownst to the plaintiff, the owner himself had driven the carriage, then the writ had to be trespass and not case, for the defendant was now liable for the direct consequences of his own actions, and not those of his servants. To make matters still worse the division between the writs made it impossible to join both master and servant in a single case, as different forms were appropriate for the two separate actions.

In their effort to escape this indefensible procedural morass, the English courts did not find it within their institutional powers to scrap the venerable writ system on their own motion. Blocked therefore from the direct method of cure, they took, after much hesitation and no little confusion, the next best course of action: they changed the substantive conditions on which the action in the case was available. In particular they announced that if the acci-

7. For the classical account of the forms of action, see F. Maitland, THE FORMS OF ACTION AT COMMON LAW (1936 ed.). Most modern systems have long done away with the ancient writs, see, e.g., Fed. R. Civ. P. 2.
dent was not deliberately caused—or what they may have thought to be the same thing—was caused by the defendant's negligence, the plaintiff could sue under case, even where the harm was direct. As case was made available for both direct and indirect accidental harms, it quickly outstripped its trespass alternative. It alone permitted joinder of master and servant, and it alone eliminated the risk (except for the infrequent cases of wilful harm by the servant alone) that the plaintiff with a good cause of action would be thrown out of court for choosing the wrong writ.

What was overlooked in the transformation, however, was that English courts had, at the very moment they broadened the scope of the action on the case, changed as well the substantive principles upon which traditional trespass actions were brought. While the point lacks the clarity for which we might have hoped, it does seem probable that trespass actions rested upon strict liability principles, which in essence made it immaterial why the defendant had run down the plaintiff, so long as he had in fact run him down. Now from this tangle of writs came the ascendancy of negligence principles which had previously been kept out of these running down cases. Negligence in a word just emerged, wholly apart from any conscious or systematic justification of its use, and without clear understanding of its implications, either in theory or in practice.

The transformation that took place in the English courts caught hold in time in the American cases as well. Although by no means the first of the modern negligence cases, Brown v. Kendall is generally credited with firmly establishing the negligence principles on this side of the Atlantic. The plaintiff was struck in the eye after coming too close to the defendant, then in the process of separating two fighting dogs (one owned by each party) by beating at them with a stick. The case might have been decided for the defendant on the very orthodox ground of assumption of risk, given that it was easily arguable that the plaintiff voluntarily exposed himself to the blow in order to get a better view of the action. But Chief Justice Shaw, perhaps sensing larger is-

10. See, e.g., Weaver v. Ward, Hobart 134, 80 Eng. Rep. 284 (1616). "[Y]et in trespass, which tends only to give damages according to the hurt of loss, it is not so, [i.e. that mens rea is required]." Id. Yet the point is clouded because of the admission of an undefined defense of "inevitable accident" to which the question of antecedent negligence by the defendant may be relevant. For a later statement of the strict liability position in trespass, see Leame v. Bray, 3 East 583, 102 Eng. Rep. 724 (1803).
11. 60 Mass. (6 Cush.) 292 (1850).
issues, used the occasion to announce the broad principle that the defendant's negligence—on which the jury had not been instructed—was a necessary prerequisite to the plaintiff's cause of action, which could in turn be barred by the contributory negligence of the plaintiff. In spite of the enormous influence that the case had on American law—an influence that to be sure spilled over to highway cases—Brown v. Kendall contains not a single word designed to justify the tort principles that it had so confidently announced. "Fault" was treated as the basis of liability, and no effort was made to distinguish between fault in the sense of responsibility and fault in the very different sense of negligence. Where the second—negligence—was present, then and only then, could the first—responsibility—be found as well.

This universal adoption of the negligence principle had, however, at least one more important doctrinal hurdle to surmount. In the great English case of Rylands v. Fletcher, decided some 18 years after Brown v. Kendall, water from the defendant's mine flooded the plaintiff's mine. In deciding for the plaintiff the court endorsed a broad principle of strict liability for those cases in which the defendant "brings, keeps or collects" dangerous substances upon his own property that are likely to do mischief if they escape. In essence the decision represented a peculiar inversion of the old distinction between trespass and case, which by this time had passed out of the law of civil procedure. Now the indirect harms were governed by strict liability, even as the plaintiff who was run down by the defendant was burdened with the more stringent requirements of the negligence theory. The oddness of this peculiar inversion was not lost upon the unhappy defendant, who urged upon the court the sensible point that if negligence principles were good enough in highway cases, they should be good enough for cases of neighboring landowners as well. Faced with this challenge, there were three alternatives open to the

12. The issues are those concerned with the use of negligence rules to subsidize infant industries in their effort to gain general respectability. Yet the point is by no means clear at either of two levels. First, if these concerns were indeed dominant, they could have received explicit expression somewhere in the opinion. Second, it is not clear that the negligence rules really gave any subsidy to the group of parties that are now thought to be favored by the rule. As all firms may be either plaintiffs and defendants, they may under negligence lose qua plaintiffs protection from the harms inflicted by others. See generally Roberts, Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein, 50 Cornell L.Q. 191 (1965).

13. 1 Ex. 265 (1866). The reference to "bring, keep and collect" comes of course from Blackburn, J.'s opinion in the exchequer chamber, to which Lord Cranworth added "accumulates" in the House of Lords. See Rylands v. Fletcher, 3 H.L. 300, 340 (1868).

court. First, it could have rejected the negligence principle in highway cases, restoring in essence strict liability rules, which themselves were not fully developed. Second, it could have accepted the negligence rule in highway cases and carried it over to all cases between neighboring landowners, not only to those on all fours with *Rylands v. Fletcher*, but also to typical nuisance and trespass actions. Third, it could have decided that the two types of cases were governed by wholly different principles, but only by offering some explanation as to why the proposed distinction made sense. In essence the court chose this last line of argument, and sought to justify the distinction in the following terms:

. . . But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger . . .; or where a person in a dock is struck by the falling of a bale of cotton which the defendant’s servants are lowering . . .; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near the warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same principle, viz., that the circumstances were such as to shew that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the
defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.\textsuperscript{15}

I have already argued elsewhere that there is good reason to think that these arguments will fail.\textsuperscript{16} At the one level the opinion fails because it construes the defense of "assumption of risk" so broadly that it can be used to defeat any tort action whatsoever. Not only is it the case that all persons venture into the world with knowledge that they are thereby exposed to wholly accidental injury, but it is also the case that they so venture knowing the risk of injury by negligence as well. Accept therefore this uncritical version of assumption of risk, and the defense quickly swallows the basic cause of action. It may well be, as we have occasion to consider in connection with the no-fault programs, that there is good reason (at least with regards to highway accidents) to abolish the tort system in its entirety, but surely it should be done so in an explicit fashion, and not in consequence of some misguided extension of the assumption of risk defense.

Once, moreover, assumption of risk is confined to narrower grounds, then it is difficult to argue that the plaintiff upon the public highway is \textit{never} entitled to the prima facie protection that strict liability provides to the landowner. Thus the plaintiff who is injured while sitting in a parked car, or while waiting for the light to change, or while proceeding at a proper speed through an intersection under the protection of a green light, surely has done nothing "wrong" if struck by some other driver. If the plaintiff owning land is entitled to protection on strict liability principles where (as is almost always the case) his conduct is purely passive, then the same principles should apply as well to passive plaintiffs in the highway case. There remain of course those important cases in which the accident is the result of misconduct by \textit{both} the plaintiff and the defendant, but these cases do not necessitate the introduction of a "no negligence" defense to protect the deserving defendant. As was possible in \textit{Brown v. Kendall} it is quite sufficient to recognize a robust set of affirmative defenses based not, as it were, on contributory negligence, but on contributory causation.\textsuperscript{17} In essence the \textit{operation of the entire system can be made to turn upon the single question of whether either or both parties have complied

\textsuperscript{15} Fletcher v. Rylands, 1 Ex. 265, 286-87 (1865).
with the applicable rules of the road. Where the defendant has violated those rules then a prima facie case is made out against him. Where the plaintiff has violated them as well, an affirmative defense exists, which can be used either as a complete bar or as a plea in mitigation. Whether we speak of plaintiff or defendant (and indeed any given party may be one in the direct action and the other in the counterclaim), the whole host of personal excuses that are let into negligence cases—infancy, insanity, sudden dizziness, emergency, etc.—are strictly barred from the case. In short, it is worth our consideration to develop a system of strict liability and strict defenses for road accidents, a possibility missed in Rylands v. Fletcher.

ANALYSIS OF ALTERNATIVES TO NO-FAULT PLANS

With the completion of our discussion of Rylands v. Fletcher it is now possible to isolate at least four different sets of rules that might be used to govern highway accidents. In addition to the commonly understood choices of (1) the tort action of negligence and (2) their no-fault alternatives, it is possible to have (3) a system of strict liability in tort and (4) the more radical alternative of complete abolition of all tort remedies, without the introduction of any compulsory system of first party benefits.

This simple no-liability position conforms quite well to the no-fault system in its negative aspect, differing from it only in that the abolition of the tort law is not coupled with the implementation of mandatory first-party benefits. The use of the strict liability system, on the other hand, bears many strong global resemblances to the negligence system, from which it differs in the treatment of many important particulars. Both negligence and strict liability rely upon some conception of individual responsibility for the consequences of individual actions. Both systems distinguish between Acts of God and human actions, and both recognize and act upon the distinction between innocent and guilty parties. Both rely upon case by case determinations of liability and may, if desired, be coupled procedurally with the use of the jury system. Both permit all parties to insure themselves against loss, wholly without regard to their rights and duties under the tort system. Both systems operate independent of state subsidy and require no comprehensive legislation to secure their introduction. Last, and perhaps, most importantly, both systems do not regard it as necessarily unjust that an injured plaintiff is left uncompensated by the

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defendant on the facts of any given case. In other words neither system regards the breadth of the compensation as a sound measure of the health of the system as a whole. In short whatever the differences between them, both negligence and strict liability are tort systems that at bottom differ in structure and assumptions from the no-fault automobile plans systems that have been both urged and adopted in recent years.

The question now arises, how is it possible to sort out the relative rankings of the various possibilities that in fact arise? In this connection it is useful again to return to the distinction between accidents on the highway, and those between neighboring landowners, which caused such trouble to the court in Rylands v. Fletcher. Here, however, the purpose is to identify a point of principle that does render highway cases a fit subject for special treatment. The point is this. In suits between neighboring landowners the state is involved only in its regulatory capacity. Each of the parties is a private owner of land, blessed with the benefits and subject to the duties associated with that status. The only role that the state has with respect to their disputes is to enforce their relative entitlements. Under these circumstances I think that the very conception of ownership places upon all individuals the strict duty, defeated only by the misconduct of the complaining party, not to enter or otherwise invade the property of any other person.

Matters, however, stand quite differently with respect to accidents that occur on the highway. Here it is settled that the state not only has the rights of governor, but—subject to the constraints of equal treatment—the additional rights of proprietor as well. By virtue of these ownership powers the state can do much to manipulate the private tort rights of individual parties. To make the

19. This point is one often taken up in the criticism of the traditional tort system. See, e.g., Shavers v. Kelly, 402 Mich. 554, 621 n.46, 267 N.W.2d 72, 97-98 n.46 (1979) ("only 37% of persons injured in automobile accidents in Michigan received tort recovery"); U.S. DEP'T OF TRANSPORTATION, supra note 3, at 94. For a discussion of the extent of compensation provided in the tort system, see A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBERG, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS ch. 5 & 6 (1964) [hereinafter cited as AUTOMOBILE ACCIDENT COSTS].

20. It is clear that some limitation of this sort is needed in order to prevent the state from acting in ways which, to take only the extreme case, place different obligations upon various motorists based upon their religious or political beliefs. The precise limits of the problem are enough to generate a full scale examination of the equal protection clause, but they are not necessary in this connection, for there is no suggestion let alone possibility that the state in designing damage compensation rules for the highway is trying to do anything other than develop a sensible set of rules for the governance of traffic accidents, a matter surely within its sphere of appropriate powers.
private analogy explicit, the owner of a private road can set the conditions upon which all are allowed to use his road. By a network of contracts, not wholly dissimilar to the rules governing restrictive covenants running with land in a planned development, he can provide that his rules govern the disputes between different users of his roads even if they have no direct contractual relationships with each other. One possible consequence of this contractual versatility is that the owner of the system could impose upon his parties the duty to compensate in accordance with the strict liability system appropriate to harms between neighboring landowners. On the other hand that owner could adopt the current rules of negligence. Still a third possibility is that it could explicitly abolish all actions for relief. Still a last is that it could couple the entrance to the highways only if each user first acquires some limited first party protection. Under these regimes, we can reproduce by consensual means the full array of alternatives that we have already canvassed as a matter of first principle in our overview of tort theory. The system that in fact would appear most attractive to the private road owner is by no means easy to divine, although there is no doubt that he would, perhaps only by hit and miss, try to pick that set of rules that would maximize his benefits from the operation of the system by, correspondingly, minimizing its costs.

Now it is quite true that the state does not (invariably) charge tolls for the use of the public highways: indeed it is the major reduction upon use brought about by such monopolistic tolls that in large measure justifies the public road system in the first place. Yet the state does have, by analogy to the private owner—always subject to constraints of equal treatment—the power to pick and choose free of constitutional constraints the appropriate set of general rules to bind all for the benefit of all who use the highway system. The promulgation and publication of the rules of the road are a cheap and easy cost substitute for the many sided contracts needed in the private road cases, and the use of the roads with knowledge of the conditions attached thereto functions as acceptance thereof. Within this framework there is no doubt that the state can justify the licensing of private drivers, the creation of the rules of the road, and the requirements of financial responsibility or of compulsory insurance. By the same token it can set and determine the rules under which compensation is provided or withheld, wholly apart from any limitations that bind the state when it

acts solely in its regulatory capacity.\textsuperscript{22}

The presence of the state as the proprietor of the highways thus makes the choice of any given system of accident law much less secure than it would otherwise be. In particular we can no longer take general tort principles and insist that they must of necessity carry over to highway cases. What is involved instead is an ultimate question of public choice: freed of any set of constitutional constraints, which set of rules do we want to govern this set of accidents. Here it must be added immediately that characterizing a question as one of public choice is not the same thing as answering that question, especially in light of the formidable difficulties, fully recognized today, in aggregating individual preferences. The best that can be done therefore in the face of these problems is to indicate the relevant advantages and disadvantages of the four alternative systems of accident law for highway cases that have emerged from our discussion of the common-law rules of tort liability. In general my own cautious overall ranking of preferences is in the following order: the strict liability system comes first; the total abolition of the tort law without a substitute compensation system comes second; the no-fault alternative comes third; and the traditional negligence system comes last.

In order to make, however tentatively, the necessary comparisons amongst these alternative systems, it is perhaps best to see how the objections that the supporters of no-fault raise against the negligence system fare when they are applied to the two other alternatives—strict liability and total tort abolition—that suggested themselves in the historical overview. In this connection therefore it is useful to organize the discussion around three separate types of issues, all of which have been at the center of the traditional debates. These objectives are: (1) the administrative costs of running the compensation system, (2) the effectiveness of the system in controlling the number and severity of accidents, and (3) the general equity of the different arrangements, both as it relates to the distribution of costs and benefits, and to our basic sentiments about questions of legal responsibility.

\textbf{Administrative Costs}

The matter of administrative costs has long troubled critics of the tort system who believe that negligence rules simply cannot do a good job of controlling the costs of deciding tort cases.\textsuperscript{23} The

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\item \textsuperscript{23} For the treatment of these points, see AUTOMOBILE ACCIDENT COSTS, supra note 16; U.S. DEP'T OF TRANSPORTATION, supra note 3, at 13-21.
\end{itemize}
point is not of course meant to be made in black and white terms. Indeed if the total elimination of administrative costs was the only objective of the law, then clearly the second alternative—the total abolition of the tort system—would be the first choice. Instead what is argued is that the negligence system, primarily because of its elaborate rules for setting the appropriate standard of care, quickly leads to such far ranging and expensive inquiries as: did the defendant properly maintain his vehicle; did he put it to a proper use on the highway; did he adjust his driving to take into account the various weather and traffic conditions; was he entitled to some special dispensation on account of youth, old age, or undiscovered illness or personal weakness. The inquiry naturally tends to remove us further from the immediate circumstances to the accident and thereby places greater strain on the causal theories that link up the occurrence of harm with the culpable conduct of the various parties. The broadening of the inquiry can, moreover, only be accomplished at some considerable cost, as is shown by the not uncommon cases in which inquiries are made into events that are separated by years and miles from the accident in question. Hammontree v. Jenner,\(^24\) to take one instructive example, involved a situation in which the parties litigated the cause of the defendant's blackout behind the wheel by examining the treatment that he had received for his epileptic condition over the entire fifteen year period prior to the accident.

All of these complicated questions are, to be sure, ousted from the no-fault system, but for these purposes it is crucial to note that most of these costs are ousted from the strict tort liability alternative as well. Indeed, with strict tort liability the focus is very narrow indeed as the only question of relevance on the matter of responsibility of each party is whether his conduct conformed to the rules of the road. Hammontree v. Jenner is a directed verdict for the plaintiff given that it was never disputed that defendant drove his car through the plate glass window. Matters of private necessity, personal incapacity, third party excuses, and the like are wholly irrelevant, as the system reduces its inquiry into the more readily measured matters of time, space, motion, and rights of way, all of which are usually verifiable from the public facts that surround any accident. Before such a system is placed into operation, it is difficult to estimate the full measure of the savings involved; and there is a real danger that the gymnastics necessary to work out its internal complications might generate costs that could be avoided in a more perfect world. Notwithstanding these difficul-

\(^24\) 20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (1971).
ties, there still appears to be good reason to believe that this truncated system of responsibility will constitute a genuine improvement over the present set of rules. Indeed there is already good evidence that rules similar to those advocated here are followed in routine claims administration that stops short of litigation. Further, possibly substantial savings could be expected by any elimination of the tension between the requirements of the formal liability rules on the one hand, and the set of informal claims practices on the other.

One area of persistent concern in the strict liability system will of course center upon the questions of causation that arise after the relevant violations of the rules of the road are established. While some of these difficult questions (to what extent were the injuries of the plaintiff avoidable if the defendant had not been speeding while the plaintiff was on the wrong side of the road?) are neatly avoided by the no-fault system, it is clear that others are not. A rearends B, and 10 days later B dies from a cerebral aneurysm. Only a total abolition of all tort and no-fault remedies can escape the question of whether the death is attributable whole or in part to the prior collision. The no-fault system must answer the causal question in order to determine whether the insurer of B’s auto must respond to the claim. The negligence system must answer it to determine the causal component of B’s prima facie case, and the strict liability system must answer it to determine that prima facie case in full. But although the purposes differ, the inquiry remains indispensable.

Yet we must be careful here in passing on the institutional implications of the example. Questions of this sort are not likely to occur with any high degree of frequency, for, in contrast to the problems associated with the delayed manifestation of occupational injuries (e.g., asbestosis), most injuries become evident at the time of the collision or almost immediately thereafter. The systematic soundness of the tort system, or of any of its rivals, does not depend then upon their success in dealing with such exotic examples, however vital they might prove to the success of individual claimants. That systematic success, rather, depends upon the ability to deal with the vast run of typical cases. Here no-fault may have an advantage over tort systems, but strict liability rules reduce the extent of that advantage.


26. For this fact situation, see Mahoney v. Beatman, 110 Conn. 184, 147 A. 762 (1929).
It might be said, however, against the strict tort liability alternative (though surely not against total abolition) that the simplification of the relevant substantive issues of liability only reaches part of the administrative problem associated with the traditional tort system. Thus it could be noted that there is still a long delay between the occurrence of the accident and the payment of compensation, and that in some definite percentage of cases, the entire matter will be in suspended animation until it is resolved by a tension-ridden lawsuit, complete with its protracted discovery and expensive jury trial.

Yet here the criticisms of the older tort systems do seem misplaced. There is nothing which says that the adoption of either negligence or strict liability principles on substantive issues commits us to the procedures that are today used to try cases. It is, of course, easier as a matter of practical politics to introduce sound procedures when writing on a blank slate. Only then is it possible to make sensible innovations without having to contend with the mass of petty detail encrusted upon an ongoing system that has had to bear the scars of incessant use. Yet given that automobile no-fault systems require some legislative innovation, we might be well-advised to divert the energies now spent in the cause of ousting the tort system into improving its operation. Thus, some tightening of the pleading and discovery rules is clearly required in civil trials, as is the introduction of a sensible system of costs that requires the loser to compensate the winner for his pains. So too the civil jury could easily be dispensed with in most if not all civil actions, as is done today even in England. All of these reforms should reduce the costs of deciding cases, and hence of the overall system as a whole, without sacrificing the tort principles upon which these traditional rules rest.

The point can perhaps be put in a more general form. It is of course appropriate to make comparisons between the no-fault systems and the tort systems that they are designed to supplement or replace. Yet it is imperative not to make this comparison between apples and oranges, between the no-fault system as we should like it to be and the tort system as it in fact is. There is no question that the no-fault system—like workers’ compensation before it—will over the years of its operation involuntarily accumulate the types of scars that may be roundly and properly condemned by the very persons who fought most vigorously for its adoption.

One example helps illustrate the point. In many of the partial exemption systems of automobile no-fault insurance, the plaintiff acquires a tort action only if he can show that the accident in ques-
tion has put him out of pocket some fixed dollar amount. The idea behind the dollar threshold was to keep the small cases out of the tort system because of the administrative costs that they generated. If after the introduction of the dollar threshold, injured parties had continued to incur expenses in the same manner that they had done before, then the threshold might have proved an effective way to sort out big from small claims. Yet there was (and is) nothing in the automobile no-fault system to prevent private parties (with the aid of their tort lawyers) from "padding" their medical expenses in order to purchase not only medical care, but an ordinary negligence action within the tort system. This unfortunate feature of the mixed tort and no-fault system might be eliminated, or at least controlled, by a rule which deducted all no-fault benefits from the plaintiff's tort recovery. Yet if it turned out that this defect remained within a no-fault system, then it must be treated in exactly the same way as the wasteful procedures that are now routinely in use for the resolution of tort claims. It must be treated as a real, if undesirable, administrative cost. 27 Whether we deal with negligence or strict liability, then, administrative costs should be compared either between systems as we would like them to be or systems as they are.

There is, lastly, one set of administrative costs that the no-fault system will not be better able to control than any tort alternative. Quite simply the introduction of automobile no-fault does not remove the obligation to determine all the damages that flow from the occurrence of the compensable event. The no-fault systems do promise one advantage in that it is no longer necessary to make a determination of nonpecuniary damages for pain and suffering. But there still remains the substantial question of what medical expenses and lost wages that occur thereafter are attributable to the compensable event, as opposed, for example, to some prior existing condition, some subsequent accident, or to simple malingering by the accident victim. There are moreover no general rules that allow these determinations to be made quickly and cheaply, and none which avoid the costs of an individualized award for each particular case. Since the no-fault system tends to increase the total number of claims, it may increase therefore the costs of total claim resolution beyond what they are in a tort system. The exact estimate of costs depends of course upon the specific structure of the compensation system, the quality of the personnel that runs it, and the attitudes of the individuals who can avail themselves of it.

27. For yet another instance of an unwanted, but nonetheless real administrative cost, see text accompanying note 37 infra.
While any estimate of these costs will necessarily differ from state to state and plan to plan, it can be said with confidence that advantages on the no-fault system in determining coverage do not carry over into the determination of its extent. We need only look at the very mixed performance of workers’ compensation systems to recognize that the determination of damage awards in individual cases is an expensive (a physician’s time never comes cheap) and oft litigated even if the vast bulk of cases do not give rise to coverage disputes. No-fault might therefore be preferable to strict liability, and a fortiori to negligence, but it seems inferior on administrative grounds to the simple abolition of the tort law, which eliminates the administrative costs associated both with the determination of liability and the extent of auto-related damages. The ranking thus far is: (1) total abolition, (2) no-fault, (3) strict liability, and (4) negligence.

**Incentive Effects**

Another common index of suitability of alternative compensation systems seeks to measure their relative capacity to avoid highway accidents. As a theoretical matter the test is, administrative costs being held constant, which system of accident rules will create the incentives that minimize the costs of accidents and the costs of their prevention.\(^2\) The criterion of judgment is, however, much easier to state than to apply.\(^2\)

One problem that arises even in an ideal world concerns the interaction of the various compensation rules with the direct constraints upon highway driving, whether in the form of the rules of the road, or the enforcement of criminal sanctions against dangerous forms of conduct, such as speeding or drunken driving. Indeed it is here that many tort theorists, particularly those who support the economic approach to the subject, can be clearly faulted for placing far too much weight upon the precise form of the liability rules as determinants of the level of accidents. Thus whatever the differences amongst negligence, strict liability, and automobile no-fault plans, it may well be that the erection of a stop-light at a dangerous intersection, or the straightening of a sharp curve will have

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\(^2\) Yet even here there are formidable complexities that need be resolved before an accurate reckoning of the appropriate costs can be made. In particular someone must have some sense of the costs imposed upon other administrative systems, such as disability insurance, by the removal of a particular system of automobile no-fault insurance.

\(^2\) For a discussion of the use of these criteria in connection with the law of nuisance, see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 688-91 (1973).
more to do with the elimination of accidents than any liability rule that we might care to mention. Witness only the tendency of accidents to concentrate at certain times and places. In a similar vein the proponents of no-fault are surely upon sound ground when they argue that, even if little by way of accident deterrence is explicitly built into the typical no-fault plan, the slack can be picked up by a more vigorous enforcement of the criminal law. A good example is the Swedish system that combines its pure no-fault system with very harsh and certain penalties against the various dangerous forms of driving, such as drunkenness.  

The proponents of the no-fault system can bolster this first point with yet another. One clear advantage of a system of criminal sanctions is that they can be raised or lowered wholly independently of the extent of the harm caused in a given accident. Thus in a serious accident brought about by the drunken driving of two parties, heavy criminal sanctions can be brought to bear against both, wholly without regard to the amount of damages caused or suffered by each. Within a tort context, however, the range of possible sanctions is limited by the total amount of damages that have in fact been suffered. Manipulation of the tort rules may shift this burden back and forth between the parties, but it cannot increase or decrease it in accordance with the broader needs of accident prevention.

The point can be quickly generalized. Any shift in the various rules of liability of necessity will create offsetting incentives. Thus a shift from the current negligence system to the strict liability alternative that I have proposed will, as a first approximation at least, leave the aggregate level of incentives for accident prevention roughly constant. To give a concrete example, if defenses based upon plaintiff's misconduct are broadened in any appreciable degree, plaintiffs as a class may be induced to take some greater steps for their own safety. But by the same token, that same shift in liability rules may induce defendants as a class to take somewhat less care for the protection of others. Indeed the

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30. The details of and the justifications for the Swedish system have been developed at length in a paper by Jan Hellner, Schadenersatz durch Versicherungsschutz (Compensation of Injuries through Insurance Protection) delivered by him at the recent Congress for Comparative Law held in Lausanne, Switzerland in September 1979. The proceedings of the Conference have not as yet been published. For a skeptical account of the Scandinavian experience, see Ross, The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway, 4 J. Legal Stud. 285 (1975).

31. For some sense of the mindboggling complexities associated with an effort to take these effects rigorously into account, see Diamond, Single Activity Accidents, 3 J. Legal Stud. 109 (1974).
effects of the shift are apt to be very minimal, as it is never clear until the dust has settled whether a given party will be cast into the role of plaintiff, defendant, or both, in any given accident. As the roles of the parties are not well-defined in advance, the parties will have to guess, as it were, which role they will assume. Their temptation will be therefore to hedge their bets so as to respond at the same time to the incentives directed both towards persons as plaintiffs and as defendants.

The point applies with equal force to the no-fault alternatives as well. Thus by parallel argument, the wholesale abandonment of the tort remedies may reduce the incentives upon individuals to take care to prevent harm to others, but they are apt in very real ways to increase the incentive upon all to take measures of self-protection. In many cases the actions necessary for self-protection (i.e., slower driving) will in some degree protect others as well. There will of course be some instances in which this is not so, as with driver-pedestrian accidents, and there we might predict that (if the tort rules are abolished) there will be more cases of drivers running down innocent pedestrians than before. Yet with this caveat the central point remains: a shift in the liability rules is apt to shuffle incentives around in some minor degree, but, owing to the fact that most parties assume both the roles of injurer and injured, not to make much difference in the overall level of accidents.

The point as made then can be construed as an argument to show that the no-fault system deprives us of little in desirable incentive effects. But by the same token it can be used with equal force to bolster our more radical alternative, the total abolition of the tort system without the introduction of any first party automobile insurance. Thus the no-liability system, like the no-fault system, can appeal to the sanctions of a robust criminal law. It draws strength too from the same enduring incentives for self-preservation that survive the abolition of tort sanctions. Indeed, in the absence of guaranteed payment from the state, the incentives created by the total abolition of all tort and compensation systems will if anything be superior to those that are generated by the no-fault system, as individual losses are no longer dampened through a compulsory insurance system.

There are, however, further complications of the argument which in turn point to the greater attractiveness of the strict liability system, in a practical if not an ideal world. Thus whatever the situation elsewhere, there is in most American states (unlike Swe-

den) an arguable underenforcement of criminal sanctions in highway cases. Under these circumstances a tort system, which is designed to achieve the same end of accident prevention, is no longer an occasional supplement to a well functioning criminal law. Instead it becomes the primary means of the enforcement of the publicly announced rules of the road. In this regard the negligence system, which also insists upon some violation of the rules of the road as a precondition to liability, surely tends towards the proper sort of incentives. Yet as the question of liability under negligence is quickly entwined with questions of personal culpability, its commands will be less clear and less certain than those of the strict liability system, which makes compliance with these rules of the road the sole determinant of liability in accident cases.

In essence, therefore, the strict liability system can be defended as the best system for the private enforcement of public norms. The state through its traffic ordinances sets the norms of proper behavior which are then enforced by injured persons through a decentralized system of private actions. As it is clear that the injured party is the sole possessor of the claim against the wrongdoer, there are no problems—as with, say, the private enforcement of economic regulations against monopolistic behavior—in deciding who amongst the clamoring many is a proper plaintiff in any individual suit. As the rules of enforcement are sufficiently clear, it also follows that the costs of enforcement are not unduly high. It may well be that the system of private enforcement is, all things being equal, superior to the criminal sanctions on which the Swedish system relies. In any event it seems that the strict liability rules are on this count superior to the other alternatives as well. On the count of incentive effects, then, the overall ordering seems to be as follows: (1) strict liability, (2) total abolition, (3) no-fault, and (4) negligence. The gaps between the first three are quite small, but negligence (with its uncertain incentive structure) is clearly in last place.

The combined rankings on these first two counts is difficult to make as amongst the first three choices, even if negligence is a clear last. Nonetheless, my own ordering is: (1) total abolition, (2) strict liability, (3) no-fault, and (4) negligence, with the gap between strict liability and no-fault being at this moment wafer thin. It seems clear then that the final ordering will depend crucially upon the question of relative equities.

EQUITIES

Matters of equity and fairness are perhaps the hardest to dis-
cuss in any evaluation of competing regimes for highway accidents. The traditional negligence system, for example, certainly defended itself on the grounds that its rules were designed to single out for compensation only those cases in which the plaintiff deserved to collect and in which the defendant deserved to pay. The strict liability system often demands results that differ from those required under the negligence rule, but nonetheless, it too accepts the basic proposition that universal compensation is not a necessary prerequisite for a sound and just system of accident law. While therefore it is possible for defenders of the traditional tort view to meet arguments about administrative costs and incentive arguments head on, by showing that their systems can be designed to have the very properties desired by no-fault advocates, such is simply not the case with respect to this point of controversy. If universal compensation is a proper goal of a highway accident system, then the no-fault system will continue to have its strong intellectual attraction over any tort system, and of course over the fourth alternative of tort abolition without a no-fault substitute. It is not, however, such a goal.

One way of making the argument is as follows: once universal compensation of injured parties as such is admitted as a proper goal of the system, there is no reason whatsoever to tie the award of such compensation to the occurrence of an accident upon the highway. Individuals are injured from all sorts of events, both within and beyond their control. If the fact of injury is itself the justification for compensation then there is really no good theoretical reason to single out highway accidents for special treatment even if it is constitutionally permissible to do so. Instead the better approach would be to treat the individual person as the appropriate unit around which to organize the compensation system. Health and disability insurance are widely available, and the same is true of first party property insurance, especially for automobiles. These systems could be extended to cover the personal injuries or property damage resulting from the use and operation of an automobile. If it is thought inappropriate to commit all protection to this type of scheme, the benefits recoverable under the auto system could be reduced by the benefits paid from other plans, leaving in effect the automobile insurance the marginal role as excess coverage.

Once we are committed, moreover, to look at the problem of victim compensation in ways that extend beyond the narrow focus of the tort law, two points quickly become important. The first of these is that it is simply improper to talk about the completeness of accident compensation on the assumption that only tort pay-
ments should be taken into account. Instead it is both necessary and proper to look to the whole host of possible benefits that are available to accident victims from all first party sources, both public and private, after the accident takes place. If, as is doubtless the case, the vast majority of individuals have some form of protection for the accidents they suffer, then it is wholly inappropriate to attack a tort system for not doing a task that is now better discharged by other instrumentalities. It is, in a word, wholly improper to compare the number of individuals who receive compensation under the tort system with those who would receive it under the automobile no-fault plans.\footnote{See U.S. Dep't of Transportation, supra note 3, at 94.} Instead we must compare the number of persons who receive compensation from any source when the tort rules are in place with the number of persons who receive compensation from any source when they are supplemented with, or replaced by, the automobile no-fault system. The first comparison might show dramatic differences. The second, in all likelihood, will not.

The second point is perhaps of even broader significance, for it concerns the very soundness of the automobile no-fault plans when set in opposition to their nontort rival, the total abolition of the tort system without any substitute compulsory first party protection. In this connection the benefits of the no-liability system must be stressed. One of its great attractions is that it neatly avoids the troublesome question of how to make a collective determination of the level of payments for certain injuries, and the corresponding question of how to distribute the premium burden amongst those who will be conscripted to finance the system. To the contrary, it is a little noticed but important feature of most automobile no-fault plans that they achieve their universality of coverage by the compulsory purchase of the benefits in question, thereby committing all individuals to take a certain set of benefits in accordance with a predetermined set of coverage formulas.\footnote{For the best discussion of these issues, see Blum & Kalven, Ceilings, Costs and Compulsion in Auto Compensation Legislation, 17 Utah L. Rev. 341 (1973). Much of my discussion of the point is a distillation of their insights.} As I have in general a strong basic preference for voluntary markets, both on efficiency and liberty grounds, I think that there is much to be said for the system that allows individuals to choose the nature and type of benefits in light of their own estimation of the personal circumstances and needs. Those who wish to buy deep coverage with high deductibles should be allowed to do so, while those who want first dollar coverage with shallow protection should be free to do so as well. Those who want group coverage are free to explore
that possibility. It may well be that the case is made for the abolition of all tort liability, but it does not follow that those same arguments require instituting compulsory first party insurance. The real quid pro quo for losing the benefits of being a tort plaintiff is being freed from the burden of being a tort defendant. It is not the surrender of a tort claim for the receipt of a set of benefits that are not requested, and which perhaps ill suit the needs of the party to which they are provided.

Nor is this concern with compulsory benefit levels simply one of theoretical interest. In calling for the introduction of a no-fault system, one of the points most frequently voiced is that the current rules on tort damages are seriously defective in practice because they result in the general undercompensation for serious accident victims.\textsuperscript{35} Putting aside the possibility that such undercompensation is a result of compromises on the liability issues of the case, this objection to the tort system seems to require the institution of a no-fault system with a high deductible and high limits. Yet instead we see plans that typically have low ceilings and low deductibles, which must if anything tend to increase the overcompensation of minor injuries, the very vice that the no-fault plans were intended to correct.\textsuperscript{36}

The dangers of compulsion run further. Although the temptation generally has been resisted, the Michigan Supreme Court in its recent decision of \textit{Shavers v. Kelly}\textsuperscript{37} noted that the compulsory features of the Michigan no-fault law rendered the statute constitutionally suspect because it did not provide for sufficient “protections” for the individual drivers who had to purchase insurance in the private marketplace. In particular the court, without any factual record of any sort, found that the consumer had a constitutional right under the due process clause to a system without excessive insurance rates, to a breakdown of premium calculations, and to individualized protection against unfair policy termination and cancellation.

Here is not the place to mount the attack against this particularly ill-conceived form of consumer protection, and I will content myself with these two observations. First, even if a consumer is compelled to obtain first party no-fault insurance, it does not follow that he is compelled to obtain it from any given insurer. The existence of the legislative compulsion to buy is therefore consistent with the existence of competitive markets in the supply of the

\textsuperscript{35} U.S. DEP’T OF TRANSPORTATION, \textit{supra} note 3, at 39-40.
\textsuperscript{36} Id. at 94-100; Blum & Kalven, \textit{supra} note 34, at 346-50.
\textsuperscript{37} 402 Mich. 554, 267 N.W.2d 72 (1978).
product in question. All persons may have to eat food, but such necessity (if anything stronger than the legal compulsion involved with first party automobile no-fault plans) hardly justifies the massive form of government intervention. Second, the case rests upon a well nigh incomprehensible view of the proper relationship between the courts and legislature. There seems no principled way to require "remand" to the legislature of a complicated piece of legislation, even if it were possible to attach constitutional status to principles of consumer protection.

Yet the central point here does not go to the constitutional issues but to the lurking institutional dangers, as state legislatures on their own initiative might require the same degree of unneeded regulation for any compulsory no-fault plan. Systems that begin life as models of administrative efficiency can quickly be burdened with constraints that threaten to increase their costs and run their effectiveness. No-fault in practice may fall short of its theoretical potential for reasons that have nothing to do with any possible unsoundness of its basic protection.

Although the spectre of state compulsion is presented with especial vividness with first party compensation plans, it is an issue that must be confronted as well by any traditional tort system, whether based upon negligence or strict liability principles. In this connection there is, at least at first approximation, a rough and ready distinction between requiring persons to take out insurance to protect themselves and requiring them to take out insurance in order to respond to the claims of others. First party compulsory insurance smacks of paternalism. Compulsory third party insurance may well have its difficulties, but it is in principle defensible on at least this ground: it is appropriate for the state to demand of any defendant found liable under its rules to have the financial wherewithall to satisfy the plaintiff's valid judgment. There is no moral argument which allows the defendant to force the deserving plaintiff to rest content with a worthless remedy.

The total abolition of the tort system avoids of course the issue of coercion that confronts both the no-fault system and the ordinary tort rules. While the absence of coercion seems a clear benefit when total abolition is compared with the no-fault rules, it is this absence of coercion that makes total abolition unattractive when measured against either tort system. Indeed the very argument of the tort system is that there are many circumstances in which the infliction of harm, actual or prospective, justifies the use of coercion against another. Within this context it remains proper, moreover, to insist upon the maintenance of the high level of tort
damages. The person who destroys the property of another could be viewed as the person who has taken it for his own use. If full compensation is required when property is taken, then so too if it is destroyed. In this regard therefore the great weakness of the no-liability system is precisely the same as that of the no-fault system. It says that within the confines of highway accidents we have adopted a system which has abandoned all sense as to what counts as right and wrong in human conduct. It may well be that the old negligence system got the boundaries between right and wrong conduct in the improper place, but at least it thought that the distinction was worth drawing.

If, therefore, a sensible set of strict liability rules can properly readjust the border between right and wrong, then there may be much to be gained, and little to be lost, by carrying over the general rules of tortious liability in stranger cases to highway actions, even if there is no constitutional compulsion to do so. One clear benefit of the approach is that it eliminates the need to set the proper domains for the two systems, as with troublesome accidents that involve automobiles striking pedestrians walking on private property near the street. It also reinforces the general sense of individual responsibility that rests at the root of a civilized, flourishing society: accidents do not “just happen”—they have assignable, responsible causes. The negligence system may well have lost its hold upon lawyers and scholars through the very abstract way in which it stated the general requirements of liability, especially those going to proximate cause: witness only the language of proximate, efficient, material, formal, and adequate causation that so frequently graces the academic literature. Yet when the matter is made more concrete, is it so odd to say that A is responsible for the harm to B, not because he, A, violated a duty of care based upon reasonable foresight, but because he barreled into B at fifty miles an hour? Placed in terms of time, space, and motion, the traditional categories of tort law can be given far more sense than they receive in the obscure formulations of proximate cause in the decided cases and the standard treatises.

There is, of course, some administrative price to be paid for the maintenance of a collective sense of responsibility, but it is a price that can be kept within bounds by sensible procedures, and one which in my view is well worth paying. In essence what we should do is say that while the extended contract arguments are in principle available, common sentiment has it that individuals on

38. For one such scholastic discussion, see Wright, Contributory Negligence, 13 Mod. L. Rev. 2 (1950).
the highways are as strangers to each other, bound to comply with the applicable rules of the road. The state therefore in its special capacity establishes those rules that are then vindicated by strict tort liability actions brought in the usual way. In essence, therefore, I think that the first line of inquiry should be reform of the tort law from within rather than dismantling it from without. The order of preference on this question of equities seems therefore to be: (1) strict liability, (2) negligence, (3) total abolition, and (4) no-fault. No-fault is the least desirable because of its dependence upon the compulsory pooling of risks in order to achieve universal coverage.

CONCLUSION

We are now in the position to give a summary of all that has gone before. Here the first call is again one for caution because the ultimate tally depends not only upon a preference for one ideal type as against another, but the whole host of subsidiary questions and practical difficulties that will have to be confronted and resolved before any system is converted into a living and working reality. Still it seems unwise to travel all this distance without giving some sense of the priorities that I should like to set if granted the power to set them. As my final ordering reveals, I believe that the debate has been held in the wrong arena when the available choices are restricted to the automobile no-fault systems on the one hand, and the traditional negligence rules on the other. While I think that the negligence system has appeal on grounds of equity simply because it is a tort system, it clearly falls short on both administrative and incentive grounds. The automobile no-fault system for its part seems to do somewhat worse as the analysis progresses; it does its best on administrative grounds, average on incentives, and worst on equity. The strict liability system and the total abolition of tort law fare equally well on administrative and incentive counts but strict liability is clearly preferable for reasons of equity. The final orderings here are not, to be sure, simple mathematical summations of what has gone before. But equivocation will not do forever. My final overall order therefore is: (1) strict liability, (2) total abolition, (3) no-fault, and (4) negligence.