

1937

# Liability and Compensation for Automobile Accidents

Francis Deak

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Deak, Francis, "Liability and Compensation for Automobile Accidents" (1937). *Minnesota Law Review*. 1303.  
<https://scholarship.law.umn.edu/mlr/1303>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# MINNESOTA LAW REVIEW

*Journal of the State Bar Association*

---

VOLUME XXI

JANUARY, 1937

No. 2

---

## LIABILITY AND COMPENSATION FOR AUTOMOBILE ACCIDENTS\*

A SURVEY OF FOREIGN LEGISLATION

By FRANCIS DEAK†

IN this article I shall briefly review the methods employed by some foreign countries in order to make it easier for the increasing number of victims of automobile accidents to obtain compensation. I shall also attempt to evaluate the results accomplished in so far as I have been able to ascertain what they are, in relation to the objective sought to be attained.

The United States, which from the outset assumed leadership in the automobile industry, felt perhaps earlier and with greater intensity than any other country the impact of the legal and social problems which arose with the appearance of this novel and dangerous instrument of locomotion. As early as 1919, Professor Carman pointed out the unsatisfactory state of affairs, in an article published in this REVIEW.<sup>1</sup> His summary of the evils is as accurate today as it was almost twenty years ago: the vast number of litigations which clog court calendars; the wasteful expenses in-

---

\*The author wishes to express his sincere appreciation to Dr. Erik Kjelstrom and A. W. D. Gronningsater, Esq., (LL.B., '36, Columbia University) through whose kindness valuable information was obtained concerning the Swedish and Norwegian legislation respectively, and to A. S. Keller, Esq., for assistance in translating some of the Scandinavian texts. The author is also deeply indebted to his colleague, Professor Jerome Michael, for many valuable suggestions for the improvement of this study.

†J. D., 1925, University of Budapest; S. J. D., 1927, Harvard University. Assistant Professor of Law, Columbia University School of Law. Adviser on foreign laws to the Committee to Study Compensation for Automobile Accidents. Member of Committee of Experts appointed by the League of Nations Institute at Rome for the Unification of Private Law. Author of *The Hungarian-Rumanian Land Dispute* (1928), and of numerous articles on international law and comparative law in American and foreign periodicals; co-author with Philip C. Jessup of *Neutrality: Its History, Economics and Law*, Vol. I, (1935).

<sup>1</sup>Carman, *Is a Motor Vehicle Compensation Act Advisable?* (1919) 4 MINNESOTA LAW REVIEW 1.

curred by both the litigants in the course of these litigations; the difficulty and often the impossibility of proving negligence; the effect of contributory negligence, however slight; and last but not least, the frequency with which, after lengthy and expensive litigation, the victim is faced with a judgment-proof defendant.

What has been done in this country to remedy these admitted social evils? The question how best to distribute the losses resulting from automobile accidents has recently been subjected to a searching examination by a committee working under the auspices of the Columbia University Council for Research in the Social Sciences. This investigation, which resulted in a wealth of information,<sup>2</sup> focussed attention on the problem, and stimulated penetrating discussion in interested circles.<sup>3</sup> From the practical point of view, however, comparatively little has been accomplished in bringing our laws more in harmony with the exigencies of modern conditions. True, the State of Massachusetts has taken the bold step of introducing universal compulsory insurance against liability for damage caused by the use of automobiles.<sup>4</sup> The Massachusetts statute, however, solves only one aspect of the problem, namely, the guaranty of a solvent judgment-debtor; the unfortunate victim must still face the hazards of a common law action for negligence. Even less effective are the so-called financial responsibility laws enacted by some eighteen states of the Union.<sup>5</sup> They insure the horse after the stable has burned down. The requirement imposed in most of our States on public service vehicles to insure against liability must also be regarded as a partial remedy only, since private cars vastly outnumber buses and taxis.

---

<sup>2</sup>Report by the Committee to Study Compensation for Automobile Accidents (1932). Reviewed by Professor Ralph H. Dwan in (1933) 17 MINNESOTA LAW REVIEW 235.

<sup>3</sup>See Symposium on the Report by Dean Young B. Smith, Professor Noel T. Dowling of Columbia Law School and Mr. Austin J. Lilly in (1932) 32 Col. L. Rev. 785. See also French, The Automobile Compensation Plan (1933); reviewed by Professor Dwan in (1934) 18 MINNESOTA LAW REVIEW 896.

<sup>4</sup>Massachusetts, Acts 1925, ch. 346; amended, Acts 1926, ch. 368. For a detailed analysis of the Massachusetts statute see Blanchard, Compulsory Motor Vehicle Liability Insurance in Massachusetts, (1936) 3 Law and Contemporary Problems 537.

<sup>5</sup>These statutes require, in substance, proof of financial responsibility following the non-payment of a judgment or following conviction for the violation of certain traffic rules. For an excellent analysis of such statutes see Braun, The Financial Responsibility Law, (1936) 3 Law and Contemporary Problems 505. See also the Report cited *supra* note 2, ch. VI, p. 97.

To present another aspect of the problem, we should take cognizance of the various steps taken by federal, state and municipal authorities to reduce the number of accidents. These consist of the strict supervision (in some states at least) of drivers' qualifications; of issuing detailed traffic rules; of installing traffic control and safety devices; of building better roads; and of intensive educational campaigns. The automobile industry has participated indirectly in these efforts by steadily improving the mechanism of cars. But, apart from these isolated and not always effective indirect measures, no attempt has been made in this country to face the problem frankly and to deal with it on a broad and comprehensive basis.

The same indictment can be levelled against the majority of civilized nations, all of which have been confronted with the same issue. Most of these foreign countries, like the states of our Union, have taken legislative or administrative measures of one kind or another, designed to reduce the number of accidents. They have also sought to facilitate the recovery of damages by the victim, by treating violations of traffic regulations as *prima facie* evidence of negligence, or by changing their procedural law so as to permit the victim to sue at the place of the accident instead of requiring him to sue at the defendant's domicile. Also, in many foreign countries, public service vehicles are subject to the obligation to insure against damages caused by their operation. This article is not, however, concerned with partial reforms of these kinds. Our interest at present is focussed on those foreign countries which have enacted comprehensive legislation aiming to deal effectively with one or both of the two fundamental issues involved, namely, the legal liability and the financial responsibility of the owners or users of motor vehicles for damages caused by the operation thereof.

Legislation of this sort is at present in force in Austria, Germany, Norway, Sweden, Finland, Denmark, New Zealand, Great Britain, Switzerland and Czechoslovakia. The statutes of these ten countries fall into three categories:

(1) Legislation imposing a strict liability (i.e. liability irrespective of fault or negligence) for damage resulting from automobile accidents, without in any way providing for the solvency of the judgment debtor. In this category belongs the German statute of 1909.<sup>6</sup>

---

<sup>6</sup>Statute of May 3, 1909, (*Gesetz über den Verkehr mit Kraftfahrzeugen*)

(2) Legislation providing for compulsory insurance to guarantee a solvent judgment-debtor without in any way altering the basis of liability which continues to be predicated upon the affirmative proof of negligence. In this category belong the New Zealand Act of 1928<sup>7</sup> and the British Road Traffic Acts of 1930 and 1934.<sup>8</sup>

(3) Legislation imposing a strict liability and providing also for the judgment-debtor's solvency by compulsory insurance. In this category belong the statutes of Austria,<sup>9</sup> Norway,<sup>10</sup> Sweden,<sup>11</sup> Finland,<sup>12</sup> Denmark,<sup>13</sup> Switzerland<sup>14</sup> and Czechoslovakia.<sup>15</sup> It may be noted that in some of the countries in the third category,—namely, Austria, Czechoslovakia and Sweden—the imposition of strict liability preceded by several years the requirement of compulsory insurance.<sup>16</sup> The only country which, prior to 1920, pro-

Reichsgesetzblatt 1909, 473; amended by the Acts of July 21, 1923, *ibid.*, 1923, Pt. I, 743, and of December 12, 1933, *ibid.*, 1933, Pt. I, 1058.

<sup>7</sup>Motor Vehicles Insurance (Third Party Risks) Act 1928, 19 Geo. V (N.Z.) No. 52. See also the Motor Vehicles Insurance (Third Party Risks) Regulations 1929 (Order in Council of March 18, 1929) New Zealand Gazette 1929, 763; Regulation 1934 (Order in Council of April 14, 1934) *ibid.* 1934, 1136.

<sup>8</sup>Road Traffic Act 1930, 20 & 21 Geo. V, c. 43; Road Traffic Act 1934, 24 & 25 Geo. V, c. 50. See also Third Parties (Rights Against Insurers) Act 1930, 20 & 21 Geo. V, ch. 25. It may be noted that the same method was adopted in the Massachusetts Act of 1925, *supra* note 4.

<sup>9</sup>Statute of August 9, 1908 (Gesetz über die Haftung für Schäden aus dem Betriebe von Kraftfahrzeugen) Reichsgesetzblatt 1908, 581, No. 162; statute of December 20, 1929 (Bundesgesetz über das Kraftfahrwesen) Bundesgesetzblatt 1929, 1791, No. 437, and Executive Order of May 12, 1930 (Kraftfahrverordnung) *ibid.*, 1930, 647, No. 138.

<sup>10</sup>Statute of June 21, 1912 (Lov om Bruk av Motorvogn), Norsk Lovtidende (2 den avd.) 1912, 232; statute of February 20, 1926 (Lov om Motorvogn), *ibid.*, 1926, 66 and Executive Order of December 20, 1926.

<sup>11</sup>Statute No. 312 of June 30, 1916 (Lag ang. Ansvarighet För Skada I Följd av Automobiltrafik) Svensk Författningssamling 1916, 843; statute No. 77 of May 10, 1929 (Lag om Trafikförsäkring å Motorfordon) *ibid.*, 1929, 133.

<sup>12</sup>Statute of April 28, 1925 (Laki Moottoriajoneuvoliikenteesta Johtuvan Vahigon Vastuusta) Suomen Asetuskokoelma 1925, 527, No. 148, and Executive Order of May 5, 1929, *ibid.*, 531, No. 149.

<sup>13</sup>Statute No. 144 of July 1, 1927, (Lov om Motorkøretøjer) Lovtidende for Kongeriget Danmark 1927, 657; amended by statute No. 131 of April 14, 1932, *ibid.*, 1932, 917.

<sup>14</sup>Statute of March 15, 1932 (Bundesgesetz über den Motorfahrzeug-und Fahrradverkehr), 48 (N.F.) Eidgenössische Gesetzsammlung, 513, No. 41.

<sup>15</sup>Statute No. 81 of March 26, 1935 (Gesetz über den Verkehr von Kraftfahrzeugen), Sammlung der Gesetze und Verordnungen des Tschechoslovakischen Staates 1935, 217; and Executive Order No. 203 of October 19, 1935, *ibid.* 580.

<sup>16</sup>In Austria, strict liability was imposed by the 1908 statute, while insurance was introduced by the 1929 statute only. *Supra* note 9. The 1908 statute was of course in force in those parts of present-day Czechoslovakia which were Austrian territory until the end of the World War. It remained in force after Czechoslovakia became an independent nation in 1918,

vided for both strict liability and the tort-feasor's solvency, was Norway.<sup>17</sup>

It is obvious that legislation of either the first or of the second sort affords the victim only partial protection.

The imposition of strict liability without a guaranty of solvency merely relieves the victim of the burden of proving negligence. To this extent his position is improved, and this improvement is not to be lightly dismissed as unimportant. In view of the rapidity with which automobile accidents occur, it is indeed unreasonable to demand that the victim establish the driver's negligence as a condition of recovery. The victim or a bystander generally cannot know and does not know the particular negligent act or omission causing the accident. On the other hand, it must be equally obvious that to make it easy for the victim to obtain a judgment remains an empty gesture so long as there is no assurance that his judgment will be paid. It should be pointed out that at the time when this type of legislation was enacted in Austria, Germany, Norway and Sweden, circumstances were such that the imposition of absolute liability was of greater importance to the victims of an automobile accident than securing the solvency of the judgment-debtors would have been. Prior to the 1920's, automobiles were, in European countries at least, decidedly a luxury. Only a person with considerable means could afford to own one; therefore, the likelihood that a victim would be faced with a judgment-proof defendant was very slight indeed.<sup>18</sup> The *de minimis maxim* is perfect justification for the absence of pre-war legislation in this respect. But today, and for some years past, that justification no longer exists. The ownership of automobiles (to say nothing about motorcycles) is no longer restricted to the wealthy, even though their use is not so universal and widespread in Europe as in the United States. It has therefore become much more probable that the owner of a car which has injured some person or property will be unable to satisfy a judgment against him or will be able to do so only at the cost of his own ruin. Hence, the utility of legislation which does no more than impose

---

until it was replaced by the Czechoslovak statute of 1935. *Supra*, note 15. In Sweden, strict liability was imposed by the 1916 statute, but the insurance requirement was added only by the 1929 statute. *Supra* note 11.

<sup>17</sup>Under sec. 9 of the 1912 statute, *supra* note 10, owners of automobiles were required to deposit a security of 1000 Norwegian crowns.

<sup>18</sup>The Norwegian statute of 1912, *supra*, note 10 requiring from automobile owners the deposit of a security in the slender sum of 1000 Norwegian crowns is illustrative of this point of view.

strict liability has diminished in proportion to the increasing number of persons of modest means who own or operate automobiles. The correctness of this reasoning is best proved by the fact that three of the countries which at the outset were satisfied with legislation imposing strict liability—namely, Austria, Sweden and Czechoslovakia—have found it desirable to complete their legislation by requiring compulsory insurance.

Somewhat similar reasoning can be applied to legislation concerned with the solvency of automobile owners without imposing a strict liability. It is true that such legislation relieves the victim of the fear that he will obtain an unsatisfied judgment in lieu of cash. But he has to travel a long and painful road before he can collect his damages. It is noteworthy that this type of legislation can be found only in common law countries: Great Britain, New Zealand, and Massachusetts. The reason for this curious fact may be either that the rule of negligence as the basis of tort liability is stronger and more inbred in the common than in the civil law tradition;<sup>19</sup> or that the guaranty of financial solvency is considered more important in view of the greater number of automobile owners of modest means in these countries than in Continental Europe.

It follows from the preceding analysis that only legislation of the third category solves the problem fully and satisfactorily. Therefore, I shall be primarily concerned with foreign legislation which both imposes strict liability and provides for compulsory insurance,—namely, that of Finland, Norway, Denmark, Sweden, Austria, Switzerland and Czechoslovakia.

The list of these seven countries which have gone the full length of the path of legislative reform is in itself illuminating. The first four are Scandinavian countries, all of which are commonly regarded as leaders in progressive social legislation. The three Central European countries are also generally known to recognize the needs of modern mechanized society and to have striven to meet them by legislation which has proved to be more or less adequate. The great powers—and some of them claim to be the standard-bearers of civilization and of progress—are conspicuous by their absence.<sup>20</sup>

---

<sup>19</sup>Yet, the negligence rule is a much more serious handicap in common law countries where these cases are tried with a jury than in civil law countries where juries in civil suits have been long abolished.

<sup>20</sup>What legislation France, Italy, the Netherlands, Belgium and Soviet Russia have on this subject, does not go even so far as the half-way measures enacted by Germany, Great Britain and New Zealand. None of these coun-

The content of these statutes will now be surveyed as they relate, first, to the question of legal liability and, second, to the problem of financial responsibility. They are by no means uniform; on the contrary, they show considerable differences in detail which correspond to differences in legal tradition and in national temperament.<sup>21</sup> Yet, they are based on certain fundamental principles common to all; and my purpose is to examine these common foundations rather than to analyze divergences of minor importance or of a merely technical nature.

# I. LEGAL LIABILITY.

The statutes of Austria, Norway, Sweden, Finland, Denmark, Switzerland and Czechoslovakia—and also of Germany—impose liability irrespective of fault or negligence for injuries or damages resulting from the use<sup>22</sup> or operation<sup>23</sup> of motor-vehicles on the public highways. This liability is imposed primarily on the owner<sup>24</sup> or the lawful possessor (*Halter, détenteur*)<sup>25</sup> of the car and as a

tries requires compulsory insurance except by public-service vehicles. As far as legal liability is concerned, if special legislation exists at all, the victim has at best a *prima facie* case, the automobilist's negligence being presumed. It should, however, be pointed out that in some of these countries the unresponsiveness of the legislature has induced the courts to come to the aid of the victim. The most conspicuous and interesting example is the judicial law-making in France whereby, in the case of automobile accidents, the courts have re-interpreted the presumption of fault contained in art. 1384, sec. 1 of the Civil Code to mean a presumption of liability rebuttable only by proof of an act of God or of the fault of a third party. See as to this judge-made law reform, Deák, *Automobile Accidents; A Comparative Study of the Law of Liability in Europe*, (1931) 79 U. Pa. L. Rev. 305.

<sup>21</sup>The League of Nations Institute for the Unification of Private Law at Rome is engaged in a study of this subject with a view to the preparation of a uniform statute. In connection with this study the Institute has compiled a great deal of statutory and informational materials. See: S. D. N.-V. D. P. 1935.—*Études XVIII. Responsabilité civile des automobilist*. Doc. No. I. (April, 1935): *Étude préliminaire*; Doc. No. II (May, 1935): *Documents communiqués par l'Association internationale des Automobile-Clubs reconnus*. (Both mimeographed). The author wishes to make unreserved acknowledgment to this useful compilation of materials which rendered accessible to him statutes written in languages intelligible only to the chosen few.

<sup>22</sup>Austrian statute of 1908, *supra* note 9, sec. 1; Norwegian statute of 1926, *supra* note 10, sec. 30; Danish statute, *supra* note 13, sec. 38, par. 1; Swiss statute, *supra* note 14, art. 37; Czechoslovak statute, *supra* note 15, sec. 45, par. 1; German statute, *supra* note 6, sec. 7.

<sup>23</sup>Swedish statute of 1916, *supra* note 11, sec. 2; Finnish statute, *supra* note 12, sec. 2.

<sup>24</sup>Austrian statute of 1908, sec. 1; Swedish statute of 1916, sec. 2; Finnish statute, sec. 2; Norwegian statute, sec. 31; Czechoslovak statute, sec. 45, par. 1.

<sup>25</sup>Danish statute, sec. 38, par. 1; Swiss statute, art. 37; German statute, sec. 7. The Swiss statute expressly stipulates in art. 47 that this strict lia-



rule covers injury to person and property not transported in the vehicle.<sup>26</sup> The owner or the lawful possessor may be exonerated fully of this strict liability by proving that the accident was caused by: (a) the exclusive negligence of the victim or of a third party;<sup>27</sup> (b) an act of God (*force majeure*) or an "inevitable event" exclusive of defect in the car;<sup>28</sup> (c) the unauthorized use of the car provided such use was not made possible by the owner's negligence.<sup>29</sup> Partial exoneration (i.e. mitigation of the amount of damages) is provided for in case of contributory negligence of the victim or of a third party.<sup>30</sup> In case the injury is caused by the collision of two or more cars, the owners or possessors are jointly liable to third parties and the damages to be borne by each are apportioned by the court on the basis of their respective fault.<sup>31</sup>

liability is imposed also on the federal government as a "possessor" of motor-vehicles.

The civil law concept of *Halter* or *détenteur* designates the person who has actually the right of control or disposition over an object. This person is, of course, not necessarily the owner.

<sup>26</sup>Austrian statute of 1908, sec. 4; German statute, sec. 8; Swedish statute of 1916, sec. 2; Finnish statute, sec. 2; Danish statute, sec. 38, par. 2. The Norwegian statute, sec. 30, and the Czechoslovak statute, sec. 49 impose strict liability with respect to persons or goods in the car unless they are gratuitously transported. The Swiss statute goes even further: art. 37 extends the liability also to gratuitous transportees and merely gives power to the court to reduce the damages if the accident was not caused by any fault of the possessor.

<sup>27</sup>Austrian statute of 1908, sec. 2; German statute, sec. 7; Czechoslovak statute, sec. 47, par. 1. The Swiss statute, art. 37, requires for full exoneration that the victim's exclusive fault should be gross negligence; while the Norwegian statute, sec. 30, and the Danish statute, sec. 38, par. 1, permit full exoneration if the victim's exclusive fault consisted of either a deliberate act or gross negligence. Several of the statutes specify that employees of the owner or persons concerned with the operation of the car cannot be considered "third parties."

<sup>28</sup>German statute, sec. 7; Danish statute, sec. 38, par. 1; Swedish statute of 1916, sec. 2; Swiss statute, art. 37. The Austrian statute of 1908, sec. 2; the Finnish statute, sec. 2; and the Czechoslovak statute, sec. 47, par. 1 qualify the "inevitability" of an event as a cause of exoneration by requiring proof of due diligence on the part of the driver.

<sup>29</sup>Austrian statute of 1908, sec. 1; German statute, sec. 7; Swedish statute of 1916, sec. 6; Finnish statute, sec. 7; Norwegian statute, sec. 31; Swiss statute, art. 37; Czechoslovak statute, sec. 45.

<sup>30</sup>Austrian statute of 1908, sec. 2; German statute, sec. 9; Norwegian statute, sec. 30; Danish statute, sec. 38, par. 1; Czechoslovak statute, sec. 47, par. 3. The Swedish statute of 1916, sec. 2, and the Finnish statute, sec. 5, give power to the court to exonerate the owner fully or partly from liability, depending upon the degree of the contributory negligence. The Swiss statute, art. 37, permits only partial exoneration in case of slight contributory negligence. As the liability also extends to gratuitous transportees (*supra* note 26), the court may, in its discretion, regard the contributory negligence of such gratuitous transportees as a ground of total or partial exoneration.

<sup>31</sup>Austrian statute of 1908, sec. 3; German statute, sec. 17; Swedish statute of 1916, sec. 5; Finnish statute, sec. 6; Danish statute, sec. 38, pars. 4, 7; Swiss statute, art. 38; Czechoslovak statute, sec. 48.

Liability for injury or damage inflicted on each other by colliding cars is, as a rule, determined by the general principles of tort law (the comparative negligence rule).<sup>32</sup>

It is noteworthy that except in Germany and Finland, the imposition of strict liability was not accompanied by a limitation of the amount of damages recoverable;<sup>33</sup> the determination of this amount is left to the general tort law.<sup>34</sup> In this connection some interesting provisions of the Finnish and the Swiss statutes deserve mention. The Finnish statute provides, in sec. 12, for modification of the amount of damages payable in the form of annuities if circumstances warrant. The Swiss statute empowers the court, in case the victim has an exceptionally high income, to reduce equitably the amount of damages. (Art. 41) On the other hand, in case of gross negligence the court may impose punitive damages in addition to compensation. (Art. 42.)

The imposition of liability irrespective of fault and the consequent reversal of the burden of proof constituted in all these countries a departure from the general principles of tort-law; for, in the civil law as in the common law, liability is generally predicated upon the affirmative proof of negligence.<sup>35</sup> As has been indicated above strict liability is predicated upon risk—i.e. the risk created by the use or operation of the automobile.<sup>36</sup> The question may be raised whether there is any justification for singling out the owners or users of automobiles and holding them

<sup>32</sup>Austrian statute of 1908, sec. 3; German statute, sec. 17; Swedish statute of 1916, sec. 5; Finnish statute, sec. 6; Norwegian statute, sec. 30. The Swiss statute, art. 39, goes so far as to apply the strict liability even to personal injuries (not property damage) inflicted upon persons in the colliding cars.

<sup>33</sup>The German statute limits, in sec. 12, the maximum compensation for personal injury or death to 25,000 Goldmarks capital or an annuity of 1,500 Goldmarks per victim or 75,000 Goldmarks capital or an annuity of 4,500 Goldmarks per accident. Property damage may not exceed 5,000 Goldmarks. The Finnish statute limits, in sec. 10, the maximum compensation for personal injury or death to an annuity of 4,000 Marks per person and of 12,000 Marks per accident (this annuity may, at the court's discretion, be paid in a corresponding capital) and for property damage to 25,000 Marks.

<sup>34</sup>Austrian statute of 1908, sec. 3; Swedish statute of 1916, sec. 8; Norwegian statute, sec. 32; Swiss statute, art. 41; Czechoslovak statute, sec. 46. The absence of such a limitation is not of practical consequence in countries requiring compulsory insurance, since the minimum coverage is generally determined in the light of average awards.

<sup>35</sup>See e.g. French, Civil Code, arts. 1382, 1383; German, Civil Code, sec. 823; Austrian, Civil Code, secs. 1294, 1295; Swiss Code of Obligations, art. 41; Spain, Civil Code, art. 1902; Italian, Civil Code, art. 1151.

<sup>36</sup>See *supra*, p. 129, and notes 22 and 23. The Swedish statute of 1916, sec. 2, and the Finnish statute, sec. 2, base liability, in addition to risk, on the driver's presumed negligence.

to such a strict accountability. When the German Government proposed, in 1906, to impose a stringent liability for automobile accidents, the report accompanying the bill which ultimately became the statute of 1909<sup>37</sup> sought to justify the departure from the negligence rule of the "common law" as follows:

"While prior to the enactment of the Civil Code [1896] automobile traffic on the public highway was infrequent, such traffic has considerably increased recently in Germany. However gratifying the development of this promising means of communication and of the industry connected with it may be, it is accompanied by a substantial increase of accidents caused by automobiles. The civil law in force [sec. 823 of the Civil Code] proved to be inadequate to protect against and to secure compensation for such accidents. . . . The proof of negligence in case of injuries caused by automobiles is often particularly difficult. The speed with which the accident occurs, the excitement of the injured party in the moment of the accident as well as the fact that besides the participants no witnesses are present, make it often impossible to determine the exact circumstances in such a way as necessary to support a claim according to the law now in force. . . . The law now in force is utterly ineffective in cases wherein the accident is caused by no negligence whatever but by the dangers inherent in automobile traffic.

"The imposition of a more stringent liability seems to be in the interest of the safety of traffic. It is also equitable that the person engaged in an enterprise which has inherent dangers shall be held liable for damages resulting from such enterprise irrespective of any negligence of his own. . . . The dangers of automobile traffic result from the fact that motor-vehicles are capable and are indeed intended to develop extraordinary speed. . . . Apart from this it may be hoped that a more stringent liability will result in greater care and, consequently, in a decrease in the number of accidents."<sup>38</sup>

Somewhat analogous reasoning was given by the Swiss government in support of various bills submitted by it in the course of the past fifteen years aiming at the same objective. The enactment of the Swiss statute of 1932<sup>39</sup> marked the end of a sustained struggle for this legislative reform in face of an opposition by a people devoted like the American people, to "rugged individualism" and, perhaps, even more conservative. The history of this struggle is of sufficient interest to justify a brief digression.

American lawyers will be particularly interested to know that

---

<sup>37</sup>Supra note 6.

<sup>38</sup>Quoted in Müller, *Automobilgesetz* [Stilke's Rechtsbibliothek, No. 44] (5th ed., 1929), 199-200.

<sup>39</sup>Supra note 14.

federal legislation in this matter was first impossible on account of constitutional limitations.<sup>40</sup> The Swiss federal constitution is, like our own, one of delegated powers, the cantons (corresponding to our states) having retained all powers not expressly delegated to the federal government. A motion to amend the constitution enabling the federal government to legislate on automobile traffic and liability for accidents caused by motor-vehicles was made as early as 1908. After considerable wrangle between the Bundesrat and the Ständerat—the legislative organs of the Swiss Parliament—as to the necessity and wording, such an amendment was finally adopted by referendum on May 22, 1921.<sup>41</sup> The amendment, incorporated as Art. 37b of the constitution, reads:

“The Confederation has power to legislate concerning motor vehicles and cycles. . . .”

Following the amendment of the constitution, the federal Department of Justice submitted a bill in 1922 which was extensively discussed by the legislature and experts for three years and finally enacted on February 10, 1926,<sup>42</sup> but which was rejected on May 15, 1927, by a referendum held upon request under the constitution.<sup>43</sup> Undaunted by the hostility manifested against strict liability and compulsory insurance and encouraged by wide and, on the whole, sympathetic discussion in juristic circles,<sup>44</sup> the government proceeded to prepare another bill. After an expert commission had favorably passed upon the bill prepared by the Department of Justice,<sup>45</sup> the government introduced it in the legislature and after slight modifications it became the statute of March 15, 1932.

The annotation to the bill which was thus enacted contains the

---

<sup>40</sup>A bill prepared by the Department of Justice imposing strict liability on automobile owners was rejected by the Bundesrat in 1910 on the ground of lack of constitutional authority.

<sup>41</sup>Bundesblatt 1921, III, 657; Eidgenössische Gesetzessammlung 1921, 739.

<sup>42</sup>The bill when introduced in Parliament was accompanied by a message setting forth in detail the reasons which induced the government to propose this legislation. The careful study of this document (Message du Conseil fédéral à l'Assemblée fédérale, Doc. No. 1672, November 3, 1922) is recommended to every serious student of this problem.

<sup>43</sup>Bundesblatt, 1927, I, 752.

<sup>44</sup>Liability for automobile accidents was the chief topic at the meeting of the Swiss Lawyers' Association in September, 1930. See the comprehensive reports of two prominent Swiss lawyers: Dr. A. Homberger, *Haftpflicht ohne Verschulden*, and Professor Max Petitpierre, *La responsabilité causale*, in *Verhandlungen des Schweizerischen Juristenvereins*, 1930, Heft 1.

<sup>45</sup>See the instructive annotations to the bill in *Avant projet* issued on September 15, 1930.

following summary of facts justifying the imposition of strict liability:

"For a considerable time, the tightening of rules of liability of automobile owners has been urged. This is the reason why the practice of our courts—as is the case in other countries as well—and especially that of the federal Supreme Court (which is most important in this connection), approaches so closely the principle of causal liability. Through this evolution, which was by no means accidental, the Court has shown the legislature the direction which ought to be followed. Whether or not consciously, the reasons are the same as they were in case of liability for industrial and railroad accidents. There, the development of industry, here the development of traffic have created new dangers. Statistics have shown that economic progress is bought by human life and health, without its being always possible to establish tangible fault on the part of individuals. Should this increase of risk created by traffic be supported by the injured party alone? No. The person who first should assume part of this burden is certainly he who caused the increase of the risk: the automobile owner."<sup>46</sup>

It is to be noted from the above quotation that the imposition of strict liability in Switzerland was not as revolutionary a reform as the opposition to it would seem to indicate. The decisions of the Swiss courts and, particularly, those of the federal Supreme Court had in fact accomplished the same result by accepting, on the one hand, almost any proof as evidence of negligence, and, by raising, on the other hand, the standard of "due care" so high that it was tantamount to imposing absolute liability.<sup>47</sup> The statute did indeed little more than codify in perhaps somewhat more precise terms and give legislative sanction to case-law.<sup>48</sup>

The American lawyer or legislator may, however, not be impressed by changes brought about in civil law countries. In our insularity of thinking and outlook, we are prone to disregard

<sup>46</sup>Similar reasoning has been set forth in the message of November 3, 1922, accompanying the first bill. See the document cited *supra* note 42, esp. pp. 15 ff.

<sup>47</sup>The study of Swiss case-law in this field would be another illuminating illustration of judicial legislation in a code-country,—perhaps even more interesting than the study made by the author in a similar evolution in French law, cited *supra* note 20.

<sup>48</sup>Despite its comparatively short existence, the literature of the Swiss statute is already respectable both in quality and quantity. The more important books and studies are the following: Dr. J. Strebel, *Kommentar zum Bundesgesetz über den Motorzeug-und Fahrradverkehr* (Zürich 1934-36); Dr. Emil Heuberger, *Der Tier-, Automobil-und Flugzeughalter im schweizerischen Haftpflichtrecht*, [Abhandlungen zum schweizerischen Recht, (N.F.) No. 101]. (Bern, 1935) 26-85; Schärer, "Die neue Automobilhaftpflicht," (1933) 69 *Zeitschrift des Bernischen Juristenvereins* 305; Kindler, "Die Haft-und Versicherungspflicht des Automobilhalters" (1933) 52 (N.S.) *Zeitschrift für schweizerisches Recht* 125.

entirely or, at least, to view with suspicion any legal system not akin to our own. Also, we are still somewhat disdainful of statute law and inclined to consider legislation as mere restatement of judge-made law and, therefore, as inferior to case law. For this reason, it is of special interest to call attention to an endeavor recently initiated in Great Britain to change by legislation the common law rule of negligence in the case of automobile accidents. In England, whence we inherited the common law tradition, the inadequacy of the negligence rule in such cases has been felt the same way and for the same reasons as in the continental civil law countries. Following the enactment of the British Road Traffic Act of 1930 which, as has been indicated, provided for compulsory insurance,<sup>49</sup> a bill was introduced in the House of Lords proposing, in substance, the abolition of the negligence rule in automobile accident cases and substituting for the contributory negligence rule, which completely bars recovery, the comparative negligence rule which—as in the civil law countries—would go merely to the mitigation of damages. The debate which took place upon the second reading of the bill is very illuminating; indeed, it should be made compulsory reading in every legislature, law school and bar association in this country.<sup>50</sup> After the bill was amended by a select committee, it was passed by the House of Lords in May, 1934, as the Road Traffic (Compensation for Accidents) Bill and referred to the Commons where it now rests.<sup>51</sup> Although, according to information given to the writer, there is little chance of this bill being passed by the Commons and thus becoming the law of the realm in the immediate future, a beginning at least has been made by focussing attention on the inadequacy

<sup>49</sup>Supra, p. 126.

<sup>50</sup>Hansard, Parliamentary Debates, (House of Lords), Vol. 84, pp. 543 ff. See especially the motivation of the bill by the proponent (Lord Danesfort) and the comments of the Lord Chancellor (Viscount Sankey).

<sup>51</sup>Hansard, op. cit. supra note 50, Vol. 93, pp. 144 ff. The bill, as passed by the Lords, provides in Sec. 1:

"Where bodily injury to a person is caused by or arises out of the use of a motor vehicle on a road or in a place to which the public have a right of access damages shall be recoverable from the owner of the motor vehicle thereof without proof of negligence or intention or other cause of action as though the injury had been caused by his wilful act, neglect or default, except where the injury was solely due to the negligence of the injured person:

"Provided that—

"(a) where the injury was contributed to but not solely due to the negligence of the injured person there shall be taken into account in computing the damages the degree in which the negligence of such person contributed to the accident; . . ."

of the common law. If they did nothing more, the extensive debates in the House of Lords made it clear that there is need for legislative reform. It is to be hoped that some of our state legislatures will soon give earnest attention to the desirability of legislation imposing strict liability for automobile accidents along the lines of the statutes in force in several European countries or the legislative proposal pending in Great Britain.

## II. FINANCIAL RESPONSIBILITY<sup>52</sup>

In addition to imposing strict liability on the owners or possessors of automobiles, the legislation of Austria, Norway, Sweden, Finland, Denmark, Switzerland and Czechoslovakia also seeks to guarantee their solvency by requiring them, as a condition of obtaining a license to use a car, to carry insurance.<sup>53</sup> As has been indicated above the legislation of Great Britain and of New Zealand also requires insurance without, however, changing the common law liability.<sup>54</sup> By some of these statutes the deposit of security is permitted in lieu of insurance.<sup>55</sup> The duty to insure or to put up security is imposed upon the owner of the car in every country with the exception of Switzerland, where it is imposed upon the

---

<sup>52</sup>For an exhaustive analysis of this problem see a series of articles published in the October, 1936, issue of *Law and Contemporary Problems* (Vol. 3, No. 4) under the title "Financial Protection for the Motor Accident Victim." The author wishes to acknowledge the courtesy of Professor David F. Cavers, Editor of *Law and Contemporary Problems* for his courteous permission to use here parts of the author's article on the British Road Traffic Acts published in that symposium.

<sup>53</sup>Austrian statute of 1929, *supra* note 9, sec. 2, par. V; Norwegian statute of 1926, *supra* note 10, sec. 11; Swedish statute of 1929, *supra* note 11, sec. 1; Finnish statute, *supra* note 12, sec. 13; Danish statute, *supra* note 13, sec. 39, par. 1; Swiss statute, *supra* note 14, art. 48; Czechoslovak statute, *supra* note 15, sec. 56.

For an excellent study of the compulsory insurance problem from the continental lawyer's point of view see Dr. Bernhard Peyer, *Die Haftpflichtversicherung des Motorzeughalters*, (Aaran, 1935) [*Zürcher Beiträge zur Rechtswissenschaft* (N.F.) No. 40].

<sup>54</sup>British Road Traffic Act 1930, *supra* note 8, sec. 35; New Zealand Act 1928, *supra* note 7, sec. 3 par. 1. See the author's study *Compulsory Liability Insurance Under the British Road Traffic Acts of 1930 and 1934*, (1936) 3 *Law and Contemporary Problems* 565.

<sup>55</sup>Norwegian statute, sec. 11; Czechoslovak statute, sec. 56; British statute, sec. 35. The British statute requires the deposit of £15,000 in cash; the Norwegian statute, (sec. 11) requires a security consisting of cash, bankbook, bonds or negotiable securities to the full amount of the minimum amounts for which the car-owner's liability must be covered; the Czechoslovak Executive Order issued in pursuance of the statute (*supra* note 15) provides (sec. 120) that security may consist of cash, bonds, bank deposit books, etc., and may be 10 per cent less than the minimum amounts which the insurance must cover.

possessor.<sup>58</sup> Most of the statutes exempt from the duty to insure, the government and other public authorities and foreign diplomats and consuls.<sup>57</sup> The insurance must be obtained from an insurance company approved or authorized by the state to engage in this business;<sup>58</sup> the approval usually being subject to compliance with certain conditions either specified in the statute itself<sup>59</sup> or contained in the general insurance law.<sup>60</sup> With the exception of the Finnish statute and the British Act of 1930, every statute or an executive order issued in pursuance thereof, determines the minimum sums which the insurance must cover, these minima being severally stated with respect to injury to, or the death of, one person, or injuries to, or the death of, several persons caused by the same accident, and to property damage.<sup>61</sup> This limitation or

<sup>58</sup>Swiss statute, art. 49.

<sup>57</sup>The exemptions in the various legislations are as follows: Finnish statute, sec. 13: The head of the state, the government and municipalities, heads of foreign states and members of ruling houses; Norwegian statute, sec. 11: the government and municipalities; Danish statute, sec. 39, par. 3 and the Swedish statute of 1929, sec. 4: The King, members of the royal family, heads of foreign states and members of foreign ruling houses, the government, municipalities, and public institutions; Austrian statute of 1929, sec. 2, par. V: federal, state and county governments and municipalities with more than 20,000 population; Swiss statute, art. 48: federal and cantonal governments; Czechoslovak statute, sec. 57: the government and autonomous county and municipal authorities. With the exception of the Swiss statute, foreign diplomats and foreign consuls (provided they are not nationals of the local sovereign) are also exempt from the duty to insure; but the Norwegian statute limits this exemption to the heads of foreign missions, while the Czechoslovak statute conditions such exemption upon reciprocity. On the other hand, the New Zealand Act, sec. 18 provides that the Crown, in its capacity of car-owner, is also subject to the duty to insure.

<sup>58</sup>Finnish statute, sec. 13; Danish statute, sec. 39, par. 1; Swedish statute of 1929, sec. 6; Austrian statute of 1929, sec. 2, par. V; Swiss statute, art. 53; Czechoslovak statute, sec. 56.

<sup>59</sup>E.g. New Zealand Act, sec. 4, requiring every insurance company willing to insure such policies as prescribed by the Act, so to notify the Registrar of Motor Vehicles; Finnish Executive Order issued in pursuance of the statute *supra* note 12, sec. 3, requiring the type of insurance companies designated in sec. 2 to notify the Ministry of Social Questions of their intention to issue policies under the statute; British Act 1930, sec. 36, par. 3 defining "authorized insurer" as an underwriter complying with the Assurance Companies Act 1909 as amended by sec. 39 of the present Act.

<sup>60</sup>E.g. Swiss statute, art. 53.

<sup>61</sup>Norwegian statute of 1926, sec. 11: 10,000 Norwegian crowns per victim, 20,000 crowns per accident, 5,000 crowns for property damage; Swedish statute of 1929, sec. 11: 20,000 Swedish crowns per person, 60,000 crowns per accident, 10,000 crowns for property damage; Austrian Executive order issued in pursuance of the 1929 statute, *supra* note 9, sec. 47: 10,000 shillings per person, 40,000 shillings per accident, 2,000 shillings for property damage; Swiss statute, art. 52: 50,000 Swiss francs per victim, 100,000 francs per accident, 5,000 francs for property damage. The Czechoslovak statute, sec. 56, empowered the government to determine the minima to be covered by insurance not to exceed 100,000 Czech crowns per person,



the amount which must be covered by insurance is obviously intended to lighten the burden which the statutory duty to insure imposes on the automobile owner, by permitting the underwriter to calculate premiums on the basis of definite risks. It may be noted parenthetically that the minimum amounts required by the various statutes, while not necessarily adequate in all instances, to satisfy justifiable claims for compensation, are nevertheless large enough to take care of the most pressing needs of an injured party. The certainty that the victim's claim will be satisfied to some extent at least is doubtless a great improvement over the uncertainty of any satisfaction from the uninsured defendant and should outweigh any dissatisfaction with the inadequacy of the insurance required.

A further—though perhaps not very significant—provision contained in several statutes, intended to lighten the car-owner's burden of insuring, exempts the claims of certain categories of persons from the coverage. Thus, in Sweden the insurance need not cover the owner or the driver;<sup>62</sup> in Switzerland, claims of the possessor's family, including ascendants and descendants, need not be covered by the insurance.<sup>63</sup> With the same end in view, sometimes the insured's liability within certain limits is not covered by the insurance.<sup>64</sup>

As the primary objective of the compulsory insurance is to secure compensation for the victim,<sup>65</sup> the statutes contain pro-

---

350,000 crowns per accident and 50,000 crowns for property damage; the Executive Order issued in pursuance of the statute, *supra* note 15 sets, in sec. 119, the following sums: 50,000 crowns per person, 200,000 crowns per accident, 10,000 crowns for property damage. The New Zealand Act, sec. 6, par. 2 limits the insurer's liability to £20,000 for all claims of passengers, but otherwise does not limit liability. Several of the statutes specify, in addition to the above stated sums applicable to passenger cars, smaller and larger minima, respectively, for motor-cycles on one hand and for public-service vehicles and buses on the other hand.

It may be noted that the Finnish statute by limiting the recoverable amounts (*supra* note 33) in effect determined, without specific provision, the amounts which must be covered by the policy. See Finnish Executive Order *supra* note 12, sec. 8.

<sup>62</sup>Swedish statute of 1929, sec. 17.

<sup>63</sup>Swiss statute, art. 48.

<sup>64</sup>E. g., Czechoslovak statute, sec. 59, and Executive Order, sec. 121, providing that the insured himself must pay damages up to 400 Czech crowns and, in case of more serious accidents, 10% of the damages not to exceed 20,000 crowns.

<sup>65</sup>See annotation to Art. 41 of the Swiss bill submitted by the Federal Dept. of Justice in 1930 *supra*, note 45 (this became art. 48 of the statute): "The primary purpose of [compulsory liability insurance] is to guarantee the satisfaction of the victim's claims, and not to cover the insured." Cf. also the remarks of the Minister of Transport (Mr. Herbert Morrison) in the

visions calculated either to facilitate the enforcement, or to preclude the defeat, of the victim's claim. Thus in some statutes the victim is given a right of direct action against the insurer;<sup>66</sup> in others breach of conditions by the insured is denied any effect on the victim's claim or its effect is limited—<sup>67</sup> without, however, affecting the insurer's right of recourse against the policy-holder in case of such breach.<sup>68</sup> In this category also belong provisions aiming to maintain the insurer's duty intact irrespective of transfer of ownership.<sup>69</sup>

debate during the second reading of the British Road Traffic Bill on February 18, 1930, 235 Hansard, Parliamentary Debates, (Commons) 5th Ser., p. 1203.

<sup>66</sup>Norwegian statute, sec. 11; Swedish statute, sec. 23; Swiss statute, art. 49. Under the Finnish Executive Order issued in pursuance of the statute, sec. 10, the insurer remains liable to the victim even if payment was made to the insured but the victim received no compensation. The absence of such a provision in several of the automobile statutes here considered does not mean of course that the victim has no direct recourse; this procedure may be available to him under the general insurance law. Thus, in Great Britain, the Third Parties (Rights Against Insurers) Act 1930, 20 & 21 Geo. V, ch. 25, enacted shortly before the passage of the Road Traffic Act gave the victim a right of direct action against the insurers but only in case of the insured's insolvency. (sec. 1, par. (1). As to the right of direct action against the insurer from the continental lawyer's point of view see the study of Dr. Walter Cassani, *Das direkte Forderungsrecht des Gerschädigten gegen den Versicherer des Automobilhalters*, (Bern, 1935) [Abhandlungen zum schweizerischen Recht, (N.F.) No. 105].

<sup>67</sup>The Finnish Executive Order, sec. 8, and the Swiss statute, Art. 50, deny any effect to a breach of conditions by the insured upon the victim's claim; under the Swedish statute of 1929, secs. 18, 19, even a policy obtained by fraud or misrepresentation remains enforceable by the victim against the insurer. The British Act of 1930, sec. 38 provided that the claims of third parties shall not be affected by the breach of any condition in a policy which relates to something which the policy requires to be done or omitted to be done after the accident. This provision still permitted the insurer to repudiate liability for breach of conditions prior to the accident—a loophole sufficiently broad to escape payment frequently, and necessitating an amendment to narrow this loophole. Sec. 10 of the Road Traffic Act of 1934 imposes on the insurer the duty to pay the victim even if he would be entitled to avoid or cancel the policy as against the insured. Moreover, the avoidance on the ground of misrepresentation or nondisclosure of a material fact, recognized by the common law, is made more burdensome by placing upon the insurer the burden of bringing, under this Act, a separate action for a declaratory judgment rather than permitting him, as theretofore, to raise such issues as a defense in an action on the contract.

<sup>68</sup>Of course, the insurer may have recourse against the policy holder for reasons other than breach of conditions. Thus, for instance, the Danish statute gives a right of recourse if the accident was caused by the insured owner's gross negligence or deliberate act (sec. 39, par. 7). It is interesting to note that the Danish statute as amended in 1932, provides that the owner may not insure against this right of recourse in case of gross negligence (sec. 39, par. 8). Several of the statutes also give the insurer a right of recourse against the person who caused the accident; see e. g. the Finnish statute, sec. 17.

<sup>69</sup>E. g. Finnish Executive Order, sec. 9, providing that the policy remains effective irrespective of change of ownership; Swiss statute, art 48,

The most important problem in this connection arises with respect to injuries caused by unidentified automobiles (hit-and-run cases) or by cars whose owners escape the vigilance of the law and operate their cars without having taken out an insurance policy.<sup>70</sup> Only four of the statutes have made provision for compensation in such cases. The Swedish statute of 1929 provides, in sec. 21, that where the owner of a car causing injury or damage cannot be identified, the insurance companies issuing this kind of insurance are jointly liable to indemnify the victim. The Swiss statute, in Art. 55, directed the federal government to conclude a contract with insurance companies for the payment of personal injury claims caused by the use of a car by an unauthorized person (when such use is made without fault on the possessor's part). The premium of this special insurance is defrayed by the government from duty on gasoline.<sup>71</sup> The Czechoslovak statute provides, in sec. 64, for the establishment of a fund for the payment of damages for personal injuries caused by unidentified cars. This fund is to be supported, partly, by fines to be paid by owners not complying with the insurance requirement (sec. 62) and, partly, by the yearly contribution of insurance companies consisting of 1 per cent of their net income from premiums (sec. 65). Finally, on October 27, 1931, in New Zealand, the Minister of Transport concluded an agreement with the insurance companies which—like the Swiss agreement—provides for the settlement of claims for personal injuries caused by unidentified automobiles.<sup>72</sup>

While there is undoubtedly a great deal of difference between the law in books and the law in action, the belief seems to be justified that the requirement of compulsory insurance has not produced the undesirable results which its opponents in this and in other countries have habitually prophesied.

---

providing that when the car changes hands, right and duties under the policy pass to the new possessor.

<sup>70</sup>The enforcement of the insurance obligation is usually accomplished by conditioning the issue of license to use the car upon the production of a certificate from the insurance company; see e. g. Finnish Executive Order, sec. 11; Norwegian statute, sec. 11; Swedish statute of 1929, sec. 24; Austrian Executive Order, sec. 49; New Zealand Act, sec. 5, par. 2. In addition, the violation of the obligation to insure usually entails the penalty of fine and imprisonment; see e. g. Finnish Executive Order, sec. 12; Czechoslovak statute, secs. 62, 80.

<sup>71</sup>This contract was concluded on December 31, 1932. *Bundesblatt*, January 11, 1933. Persons transported in the car cannot claim damages from the insurer if they knew that the use of the car was unauthorized.

<sup>72</sup>New Zealand Gazette, 1931, 3023.

It is important to note, first, that no one of the countries which have adopted the compulsory insurance idea has deemed it necessary to take this insurance out of the hands of private business and administer it through a state insurance fund. This does not imply any preference for or against state insurance; it indicates, however, the error of those who assert that universal compulsory insurance can be carried out only by the state. In every country where compulsory insurance is in force, private companies have found it possible to assume the risks and make profits (otherwise they would not have remained in business) although the government has, under some of the statutes, the power to control or determine premium rates<sup>73</sup> and although the insurer is, under some of the statutes, denied the right to refuse to issue a policy.<sup>74</sup>

Second, it does not seem that the burden imposed on the owners or users of automobiles through the insurance requirement has been so heavy as to affect the automobile industry adversely. On the contrary, information received from Switzerland, Austria, Norway, Sweden and Great Britain is to the effect that the number of automobiles has steadily increased despite the introduction of compulsory insurance. The amount paid out for premiums is not great in proportion to the total expenditure involved in the acquisition and the upkeep of a car. It may be urged that this question should be viewed from a different angle in the United States since the relative cheapness of automobiles in general and of the second-hand cars in particular, widens considerably the margin between the cost of owning and operating a car with insurance and without it; hence the requirement of insurance may be too onerous for a great many people who cannot afford to add premium payments to the operating expenses. It is submitted however, that the inconvenience of those who could not afford a car if they were required to carry liability insurance would be found to be substantially less than the hardships suffered by those victims of automobile accidents who, in the present state of affairs, are faced with judgment-proof tort-feasors. Certainly their inconvenience is negligible if balanced against the burden borne by society in caring for these uncompensated victims in one way or another.

---

<sup>73</sup>Swedish statute of 1929, sec. 9; Czechoslovak statute sec. 58, par. 2; New Zealand Act, sec. 16. No provision for control of premium rates is contained in the Finnish, Norwegian, Danish, Swiss, Austrian and British statutes. Of course, the government presumably always has means to exert indirect pressure on private insurance companies.

<sup>74</sup>Such provision is contained in the Finnish Executive Order sec. 4 and in the Swedish statute of 1929, sec. 6.

Third, it does not seem that compulsory insurance has generated recklessness—a result often predicted for it on the theory that a car-owner or user will regard his duty of care discharged by the payment of premiums for his insurance, and on the belief that liability insurance is primarily for the benefit of the policy-owner. It has been pointed out, however, that these statutes seek, above all, to better the position of the victim. We have seen that however elaborate the provision for the victim's protection may be, the insurer's liability to the policy-holder is too limited to create in the latter the feeling that whatever he does, his liability is covered by the insurance. In this connection reference may be made to the provisions above discussed which give the insurer a right of recourse against the policy-holder in case of breach of conditions, or of gross negligence, and to those requiring the payment of a certain amount of the damages by the car-owner without the insurer's assistance. Account should also be taken of the fact that while the majority of the statutes require the car-owner to insure against liability in minimum amounts, they do not limit the extent of liability. The inclination to recklessness may well be checked by the fear that the damages awarded may exceed the coverage and by the knowledge that the excess will have to be paid by the insured. Information has come to me from several countries that compulsory insurance has not had any adverse effect on the care with which automobiles are operated, and the increase of accidents is uniformly attributed by my informants to the increase of traffic rather than to increased carelessness.

On the other hand, there can be no question that the victim's position is infinitely better under the compulsory insurance system,—especially when it is accompanied by the imposition of strict liability. That this improvement of the individual victim's lot is also beneficial to society is obvious if we consider the appalling number of such individuals. The question seems to come down simply to this: if there is a cost to be paid for what is believed to be progress in a mechanized society and an important part of that cost consists of human life and health, how can that cost be best and most fairly distributed? What are the equities which determine the proportion in which various social groups—those who create the risk by using a machine; those who innocently or by inadvertence suffer in consequence of such use; and, finally those who neither create the risk nor suffer from it, but who

benefit, directly or indirectly, from industrial development—should be called upon to defray this cost? The requirement of compulsory insurance and the imposition of a strict liability are attempts to answer this question.

Whether or not they constitute the best answer, it is difficult to say. Certain it is that at least in some of the countries where this scheme is in force, interested circles—representatives of the government, of the insurance business and of automobile clubs and lawyers—concur in the view that the situation has been improved. Criticism is directed at administrative details rather than at the fundamental principles. It may be asked to what extent these criticisms are justified. It may be urged that the objective could be attained by a different, or by improving the present, device so as to lighten the car-owner's burden on the one hand and to further smooth the victim's road to compensation on the other hand. These questions cannot be answered without a more penetrating study of the administration of the statutes surveyed. Such a study is, of course, far beyond the scope of this article, though I hope to conduct such an investigation in at least one or two countries where the compulsory insurance scheme seems to operate particularly successfully. However, I believe that even this cursory survey should be sufficient to induce thoughtful students of law and of social problems to consider whether the time has not come to revise our own laws relating to liability and compensation for automobile accidents. Perhaps it may be too much to expect of some of our more conservative state legislatures to overcome the tradition of *laissez faire* and to consider proposals for such a reform. But why could not some of the Middle Western states which, like Minnesota or Wisconsin, have in the past repeatedly assumed leadership in progressive social legislation, take the lead once more and find a remedy for an admitted social evil? The initiative in this direction was taken more than a decade ago by Massachusetts, and the time seems to be ripe for another forward step.