

Critical analysis of the concept of fault in
motor third party liability and possible measures aimed at
improving and facilitating the operation of this system

by

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In most countries of the world, motor insurance covers a "third party liability" based on the concept of tort, or operates in a system in which the fault (e.g. the victim) plays a role. If we take the situation in Europe, the liability is based on the fault ("tort") in Great Britain; on the Continent, the liability is more "objective" (based on the risk), but the victim will receive no compensation if the car driver can prove that he could not avoid the accident caused by the fault of the other party. The two systems differ principally by the fact that the burden of proof is shifted from the victim to the driver.

In colonial times, both systems were introduced by the European countries in their colonies. In the former British colonies, the "tort" system is applied; in the former French colonies, the rule is directed more towards an "objective" liability, but both systems have in common the principle that not every victim receives compensation.

The "third party liability" systems, until some years ago, were applied in practically all countries of the world, and in the last decades, and especially after world war II, "third party liability" insurance was made compulsory for motorists in many of them.

The systems in which the "third party liability", coupled with compulsory insurance, is applied, have usually the following characteristics:

1. The victim who, by his own negligence, is fully responsible, gets no compensation at all; if he is partly responsible, he will recover only a proportional part of his loss.
2. The victim receives a compensation from the insurer of the driver, not from his own insurer; so the relationship between the victim and the insurer who has to pay is that of antagonism.
3. The compensation depends on the actual loss: if the loss is high, the amount which the victim will receive will be high. For losses of an economic character (damage to property, e.g. the car, loss of earnings), the rich people will normally receive more than the poor: if a man who earns a high income is deprived of it, he will get a high compensation.
4. Not only economic loss, but also some non-economic losses are compensated; this moral damage can be high.
5. For compensation for bodily injuries takes the form of allocation of a lump sum, or of periodical payments.

6. Sometimes, a close relative of the driver cannot claim against his insurance company.
7. The insurance which covers this "third party liability" in most countries is unlimited. In other countries there is a limitation, either per victim, or per accident.
8. If the driver who caused an accident is uninsured or unidentified, the compensation comes out of a "Guarantee Fund" which is set up by the Government, and financed by funds from all motor insurance companies.
9. The settlement of claims may be protracted, because in many cases court action must be taken.

For a long time now the shortcomings of the system based on "third party liability" are quite obvious. The criticisms of all systems based on the concept of "tort liability" relate to two basic approaches:

(a) The discrimination amongst persons prejudiced by the accident, who from now on will be referred to as "victims": some of these victims are not indemnified at all, even though the consequences of the accident may be as distressing to them as to the "innocent" victims. The penalty, which could involve the loss of all income, or a relatively large pecuniary loss, is out of proportion to their negligence, since all drivers, even the most prudent ones make mistakes when driving. Furthermore, some "innocent" victims receive no indemnity whatsoever (e.g. victims of accidents caused by vehicles which are not identified, drivers at fault but whose fault is not proven, members of the family of the driver who is at fault).

(b) The delays and the cost of indemnisation: since it is necessary to establish the fault of one of the parties involved in an accident, this could give rise to disputes which involve high expenditure. Obviously, the sums of money put at the disposal of the insurers by the insured are meant to be used for compensating victims and not for covering such expenses. This is why the idea of an insurance based on "no fault", under which the responsibility for traffic accidents be abolished, has been advocated. These systems will be examined in detail in my second paper. Others have attempted to improve the functioning of the traditional system. The measures which are adopted or advocated to this end will be explained later.

Preliminary remark: in the context of the social security schemes: payment by the social security of certain basic benefits in respect of bodily injuries.

Social security schemes are widely applied in Europe. We can safely assert that most of the population is covered under these schemes. Social security covers some of the basic needs of victims of accidents: payment of a part of medical fees incurred; payment of an indemnity for incapacity to work. These payments made by social security apply to all accidents, be they a road accident, or an accident occurring in the private life of the victim.

Since the victim of a traffic accident receives basic payments from the social security, it can be argued that traffic insurance covers only the complementary needs, and as such, the "third party liability" motor insurance is merely a complementary cover to that of the social security, and therefore the opinion of the public and that of the jurists on the question of the necessity to reform motor insurance may differ considerably - depending on how well the social security plan is established and developed in a given country.

Nevertheless, we have to note that often there is no coordination between the legal framework governing the social security on the one hand, and the private insurance on the other. This is why in some countries, private insurance pays only the additional indemnity not covered by the social security, while in other countries the social security, upon payment of compensation to the victims, obtains a right of subrogation against the motor insurers. Such procedure involves high expenses which are considered wasteful, since this entails in fact burdening those insured in motor with charges which should normally be incumbent upon the insured under the social security schemes.

Measures which tend to improve the functioning of the system based on the concept of fault

After this introductory remark, we shall consider the development which took place over the last few years, aiming at improving the situation of victims, to reduce the expenses incurred in the settlement of claims, and to apply more equity in the allocation of charges among the insured through adaptation of premiums.

I. Measures which tend to improve the situation of victims

The present tendency prevailing in many countries is to maintain the system based on the concept of "tort", but in the meantime to remedy some of its shortcomings.

A. Extension of insurance cover to certain people who are not indemnified

The scope of motor insurance cover was gradually extended to include categories of victims who were often excluded.

1. General measures applicable to both bodily injuries and property damage: introduction of the concept of objective liability

Several countries of Europe are increasingly aware of the plight of some categories of victims, especially pedestrians and cyclists who are often victims of serious accidents for which they are theoretically "responsible", but where the severity of damage they sustain is not commensurate with their "negligence", e.g. children guilty of carelessness due to their tender age; elderly people whose eyesight and/or hearing diminish with age. A 1973 convention of the Council of Europe introduced a presumption of negligence on the part of

the driver who causes an accident, yet permitting him to prove that the victim is exclusively responsible, and to attribute to him all the consequences arising out of the victim's negligence. Nevertheless, this measure results in a considerable improvement of the situation of the victims in cases where their negligence cannot be proven.

2. Measures applicable to bodily injuries exclusively

(a) This refers to the prohibition to exclude from the indemnisation, due from the insurer, of the members of the family of the driver who were being transported by him. Initially, several laws providing motor compulsory insurance prohibited the family of the driver from exercising the right of suing his insurer. This measure was being justified on the basis of possible fraud or collusion, and in the case of a married couple, of their joint - patrimony - which makes it inconceivable that a wife could demand damages from her husband, since their property jointly constitutes a single patrimony. This clause of exclusion was abolished in several countries taking into consideration that the members of the family of the driver are innocent victims of his fault, and thus should be indemnified.

(b) Taking out personal accident cover for passengers

This type of insurance, which is not compulsory, is very popular in some countries. It covers death, temporary or permanent invalidity and medical expenses. The amounts generated by such cover are not very high, yet it is very useful since it enables the victims to receive a payment without too much delay. Moreover, it covers the driver of the vehicle himself, who - under all systems based on the concept of tort - is excluded, if he is considered responsible for the accident.

3. Measures applicable to property damage: extension of the scope of Guarantee Fund to include property damage

The Guarantee Fund, the scope of which was initially confined to bodily injuries, has been extended in certain countries to include property damage. This extension of scope is not yet generalised because of the risk of fraud, since it is often impossible to verify the declaration of the owner that his vehicle was damaged by another vehicle.

B. Measures which tend to introduce better forms of indemnisation:
Indexation of benefits

In the case of serious permanent invalidity (for example, more than two-thirds), victims of motor accidents should receive a regular income which permits them to cover their needs. Instead of a lump sum indemnity, in some countries benefits are paid on a monthly basis. In order to avoid the unfavourable effect of the loss of power of purchase of money, these benefits are tied to an index and the amount of the benefits paid fluctuates according to the movements of the index chosen (e.g. cost of living index, retail prices, etc.). Since indexation is an unknown factor to the insurance company at the time when it must constitute the reserves serving the payment of periodic benefits, all differences resulting from indexation are charged to the

Guarantee Fund, or any other body in charge of compensation, constituted by all insurance companies or even the State.

II. Measures which tend to ensure the financial equilibrium of the system

A. Measures related to insurance

Various measures have been introduced to limit the expenses of the insurers, or to increase premiums of those who cause more accidents than is statistically normal.

1. Indexation of premiums

In order to meet the constantly increasing cost of losses, which follows the increases in salaries, the insurers endeavoured to obtain approval of the principle of indexation of premiums either commensurate with the increase in the cost of living, or with the movements of industrial prices which also reflect the level of salaries. These efforts were often thwarted by governments which do not welcome any abrupt rise in motor insurance premiums.

2. Personalisation of premiums

We all know that accidents are mainly due to human factors (the character of the driver, his physical condition, the number of kilometers he drives within a year, etc.). Insurers have tried to influence the drivers' behaviour by at least obliging those with bad accident records to pay more premiums, thus personalising the premiums. In the United States, tariffs are extremely complicated and take into consideration a great number of factors: age, sex, profession of the driver, age of the youngest child allowed to drive, the whereabouts of the garage (rural - urban) and, as far as practicable, the number of kilometers driven, etc. Generally, in Europe the rating factors are limited to three or four criteria: the type of vehicle, the power of its engine, or weight, the usage (private or for business) and the number of accidents in which it was involved. These factors can be divided into two groups: (a) factors related to the vehicle, and to the personality of the driver, apart from the number of accidents caused. This method is called "pre-personalisation"; (b) factors related to past experience, where the system of "malus" or eventually "bonus-malus" is applied. This method is called "post-personalisation". According to this system a driver who causes one or several accidents during one year will be penalised by his premium being increased for the following year (malus). In some countries the no-claim bonus is applied entailing a reduction in the premium for the following year if no accidents occur for which the driver was responsible. In all cases the reduction in the premium in case of no-claim bonus is smaller than the increase in the premium in case of malus. At present, the general feeling is that the bonus-malus system as a preventive measure has little effect, since each driver tries to avoid accidents irrespective of any changes in the premiums. However, the "bonus-malus" system is in keeping with the rules of equity which require that "the good drivers should not pay for the bad ones". Moreover, it deters the insured from filing small claims which involve proportionally high expenses for their management.

3. Measures applicable only to property damage

These measures are aimed at limiting the cost of indemnifying property damage.

(a) Choice of agreed repairers

Insurance companies often use selected garages for effecting repairs of damaged vehicles where prices are subject to their control. In some cases they even set up their own garages where the insured can have their cars repaired.

(b) Direct payment of damage to insurers' own policy-holders

Instead of the victim turning to the insurer of the tort-feasor for obtaining redress, in the case of minor losses (e.g. up to 2,000 dollars), he goes to his own insurer. In this way the antagonistic relationship and suspicion between the victim and the insurer who should indemnify him is obviated, while a rapid settlement of the claim is achieved.

(c) Double evaluation

The survey report of the damaged vehicle provides two figures: the first represents the cost of repair in a garage which gives certain guarantees, and the other represents the indemnity which the insurance company is prepared to pay if the owner does not repair his car, or if he has it repaired in another garage. This system avoids the possibility of the car owner receiving a high indemnity and repairing his car at a lower price and pocketing the difference.

B. Measures related to the procedure aiming at the acceleration of claim settlement

In every system based on the concept of fault, claim procedure should start with the determination of responsibility. This procedure is beyond the control of insurers, however they can hasten the settlement of claims once the responsibilities are determined and the damages adjudicated by the Courts. Insurers can also manage the claims in a way that results in a large proportion of cases being settled out of court. All these possibilities depend on the good functioning of justice. This has been the subject of several in-depth studies carried out by the European Economic Community, among others.

C. Loss prevention

Some measures prescribed by insurance laws seem to fall short of being effective means of loss prevention. It is therefore necessary to resort to other measures which have the desired effect:

(a) Improvement of the road network and increase in traffic and road signs. In general, serious accidents often occur in the same spot, therefore it is imperative to eliminate these "black points".

(b) Effectiveness of the traffic police: traffic police should use their powers to control and discipline drivers in order to prevent speeding and drunken driving, which are the two factors most frequently responsible for serious accidents.

- (c) Inspection of motor vehicles: vehicles for professional use and vehicles above a certain age should undergo regular inspection.
- (d) Compulsory wearing of safety belts. This measure considerably reduces the gravity of bodily injuries.

D. Restricted cover under compulsory insurance

Another method used to insure a financial balance in the motor insurance account is setting up a limit for the amount covered by insurance, either per person or per accident:

- (a) For property damage: many countries have an upper limit for cover, others altogether exclude property damage from the obligation to insure.
- (b) For bodily injuries: in most countries in Europe and in the ex-British colonies, there is no upper limit for cover. In other countries limits are set either per person or per accident, and obviously the proportion depends on the extent of these limits. The cover can become absolutely insufficient due to money depreciation, yet some countries seem very reticent about increasing the limits, even when these are fixed at a low level.

A scrutiny of the above measures indicates that the trend over the past few years, in countries where motor insurance is still based on the concept of fault, is towards protecting the victim in doubtful cases, and avoiding their being faced with insolvent debtors. These measures have resulted in the increase of cases of indemnification, also an increase in the burden of claims. However, these trends did not put an end to the rule that anyone who, through his own negligence, causes an accident will not be indemnified for the damage he suffered. The responsibility for one's own acts is considered in conformity with the principle of equity, even if the fault was unintentional, or if it is a mere breach of traffic regulations. No remedy was brought for this anomalous situation, a matter which warranted fundamental criticism of all systems based on the concept of responsibility.

If we try to limit the cost of insurance, these limits should result in reduction of the cost of operation. We are not meddling with the principle of full responsibility for all types of losses, be they economic or not. Also, the principle that an innocent victim has the right to obtain redress for the whole of his loss is considered as a requirement of equity.

The measures taken to prevent or minimize losses, and to settle a great number of claims quickly and at minimum cost, have been successful: in spite of the increase of number of cars on the roads, the number of serious accidents as well as their consequences tends to decline in most of the industrialized countries. In the motor branch, though the results are not brilliant, yet they are more or less balanced.