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MORE THOUGHTS ON LOSS DISTRIBUTION

JOHN G. FLEMING*

I

The "new learning" about torts focuses attention on, and brings within the scope of discourse, the manner in which accident losses are in the last resort actually absorbed or borne, not content merely with the superficial appearances of a game in which injurer and injured alone appear as candidates for the prize of who should pay the bill. It lends a new perspective by bringing into the picture other interests, institutional arrangements and devices which actually play a vital role in this process of absorbing the cost of accidents. In the vast bulk of tort cases, sometimes plaintiffs, but most often defendants "of record" are parties to the claim in only a nominal sense. Not only do they not conduct their own cases, quite often indeed cooperation clauses in their insurance contracts compel them to become parties to litigation against their own wishes. Moreover, although suffering judgment, the bill is going to be paid by somebody else. While not exactly engaging in a charade, they remind one of ancient actors with masks — except that here the mask does not have the purpose of evoking reality, but rather of obscuring it.

This touch of realism bears down on at least two major facets of the problem of accident losses. Most attention has been given to the first, what might be called (in the fashionable jargon of sociologists) the "vertical" aspect of loss allocation: how is the loss in the last resort absorbed after first being charged against, let us say, the defendant? Another aspect, which for the sake of symmetry one might call the "horizontal", arises from the fact that, instead of tort liability being the sole source of potential compensation (as it was throughout most of our history) it is now but one of several such sources, and (at that) carrying an ever deminishing share of the economic burden of compensating the injured.

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An understanding of both these phenomena is not only essential for a realistic view of how the community is actually coping with the social and economic problem of accident casualties; it is also bound to influence legislative and judicial judgment of how in particular cases the burden ought best to be borne. In one sense, it converts torts from a private into a semi-public law area by more deliberately admitting the public interest to audience and by owning up to what Polanyi would have called the "polycentric" nature of tort adjudication (in other words its repercussions—much as a pebble thrown into a pond — reaching far beyond its immediate impact). It has made torts into a branch of *social security*.

I wish to say a few words about each of these facets, bearing in mind that they cannot be kept apart in airtight compartments, but are in reality rather closely intertwined. First, then, about the functioning of tort liability itself as a mechanism for absorbing losses, aside altogether from its relation to collateral regimes of compensation.

The conventional image of tort adjudication was one where the eventual loss either remained where it happened to fall (judgment for defendant) or where it was shifted from one party to another (judgment for plaintiff). What happened beyond that point nobody took the trouble so much as even to deign with interest. That was understandable enough because until only yesterday (seen in the aspect of eternity) the effect of legal adjudication was indeed fully spent once the burden had been allotted to one side or another. Its absorption beyond that point was neither a matter of interest nor one that would have repaid concern.

What has overtaken this traditional view is the realization that tort law can, and often does, perform the function not merely of shifting but also of spreading the loss; that the defendant instead of having to foot the bill single-handed is in actual fact more often than not only a conduit through which the cost is channeled so as eventually to be disseminated in minute and almost imperceptible fractions among the whole or an appreciable section of the community. This occurs whenever the defendant, by virtue of the position which he occupies in the economy or through the additional device of liability insurance, is able to pass on the outlay in the manner suggested. A manufacturer, for example, will treat expenditures incurred in meeting injury claims by third parties, no less than those by his own work force, as part of the inescapable overhead of his operations—a cost item, albeit small, that will enter into the calculation of the price he will charge for each unit of his product and that will eventually be defrayed in negligible amounts by all ultimate consumers of the particular line of merchandise.

Further spreading of the cost may be achieved through insurance. Very large enterprises, notably governments, their subdivisions, agencies, and some public corporations, consider it economically

preferable to operate as self-insurers and absorb the cost of compensation claims, with reference to certain kinds of risks, from current revenue or special reserve funds maintained for the purpose. Most others, however, have recourse to professional underwriters who are in the business of indemnifying the insured against their legal liability to third parties. Indemnity insurance has made tremendous strides since its modest beginnings in the declining years of the nineteenth century, gradually permeating the economy to the point where today it is widely looked upon as an indispensable prerequisite for doing business or for engaging even in many private activities like driving the family car. As somebody once said, the manufacturer would no more think of dispensing with insurance than with not wrapping up his goods. Moreover, in an increasing number of instances, insurance has become compulsory, or at all events virtually so through indirect compulsion like "financial responsibility laws" as you have in Ontario where the cover is close to 98% (a much finer record than California's where coverage is hardly above the 90% mark). Most important, then, for the present context is the fact that insurance, besides offering a relatively inexpensive hedge against the risk in question, performs the vital social function of spreading it—spreading it among those engaged in the same kind of activity and hence paying premiums against the same type of risks, thereby making it possible for the cost to be widely and painlessly absorbed even in regard to hazard-creating activities like private motoring, pursued by most of us who, unlike purveyors of goods and services, are not in a position to "pass the buck".

This change of emphasis from loss-shifting to the loss-spreading function of tort law is bound to modify much of the conventional thought concerning the so-called attribution of legal responsibility, and this in at least three respects. First, it saps most of the strength from the argument, once so appealing, that the burden of an adverse judgment would have a crushing and debilitating effect on enterprise generally and the defendant in particular, now that it has become apparent that the cost can usually be absorbed without in the least impairing his competitive position or otherwise discouraging the activity that produced the hazard. This has already borne fruit in the quite dramatic disappearance of a number of immunities, those of the state and its subdivisions, the familial immunities and, in the United States, those of charities. Indeed, realism has come to the fore in these instances to the point where the spousal immunity is nowadays mostly defended not on the tattered argument of old that to abolish it would undermine familial harmony, but that to the contrary it would leave insurance companies no protection against collusion between husband and wife.

Secondly, it radically challenges the long-accredited argument that, in order to justify the trouble and expense of shifting the loss, only misconduct by defendant manifestly deserving society's disapproval would be sufficient. For, if it be true that it is socially

beneficial in itself to compensate the injured, when this can be accomplished without correspondingly impoverishing another individual, we should be much readier to countenance a plaintiff's verdict that would not so much connote disapproval of the defendant as an opportunity for financially assisting an accident victim's rehabilitation by drawing on the resources, not of society as a whole, but of that particular section alone which participated in the benefits of the risk-creating activity. This then looks towards an erosion of the fault requirement, a move towards strict, or at any rate, towards stricter, liability. This is not the time and place for probing that aspect in greater detail. I once wrote a whole book about it.

Thirdly, it will increasingly divert attention from social deficiency as the paramount criterion for legal responsibility to a quest for who of the parties concerned occupies the most strategic position for distributing the compensation cost in the fairest and most economical manner. All the better, of course, if he also happens to be the one best able to prevent accidents and susceptible to such pressure as insurance rating can exert in order to make him fulfill that function. Among pertinent examples there immediately springs to mind the modern manufacturer's obligation to answer for the safety of his product. This, as you know, has made tremendous strides within the last decade in the United States whose many "forward looking" jurisdictions now assure recovery, without proof of negligence, or so much as *res ipsa loquitur*, to any "ultimate consumer" who suffers injury in his person or property as a result of a defective product unreasonably dangerous to the consuming public. But even if this is not yet being recognized as a principle of tort liability under the English law, the actual gap separating the two systems is in reality not very great. This is so because, for the last half century now, the implied warranty of merchantability imports a strict or guarantee liability for personal injuries and property damage no less than for economic loss suffered by purchasers. This only leaves out of the orbit of protection persons outside the chain of purchase, such as other members of the purchaser's family, his friends or just bystanders. More significantly left out in the cold, however, used to be those purchasers who had foolishly, and more often quite unwittingly, given up their protection by so-called disclaimer or exemption clauses. Legislation in most jurisdictions, by outlawing such clauses at least in the most significant areas of consumer credit sales, has now closed this gap.

Probably the most telling instance of "enterprise liability" in the common law is the vicarious liability of an employer for the torts of his servants, which is singularly fitted for the dual task of at once deflecting recourse from the culpable yet all too vulnerable servant and, leeching on to the "deep pocket" of the master, exploiting the latter's superior ability for spreading the cost as a fraction of the price he charges to his customers. Legislation, because less constrained than judicial power in breaking new ground, has repeatedly in modern

times invoked the technique, in implementing a policy of attaching strict liability to a particular type of enterprise, of consolidating the duty to procure compulsory insurance and respond to damage claims in someone, like the owner of aircraft, or the operator of a nuclear installation, who occupies a position administratively most suited for discharging the crucial function of insuring allocation of the cost burden to the risk-creating enterprise and its beneficiaries.

This overriding objective comes into even sharper focus when, with a view to avoiding the economic waste entailed in unnecessary proliferation of insurance and perhaps blocking undesirable reallocation of the burden through subrogation or indemnity, recourse against all other persons is forthwith proscribed. Such, for example, is the domestic and international legislative pattern for coping with nuclear incidents, which has selected the operator of a nuclear installation or ship as the sole lynchpin for administering the insurance scheme, to the exclusion of all liability of carriers, suppliers of equipment, operators of conventional vessels, and so forth.¹ A modern, judicially inspired departure in the same direction, so far confined to America, is to hold the manufacturer of defective products liable for consumer injuries but at the same time to excuse the maker of any component part, on the ground that the fairest and most economic disposition is for the loss to be absorbed exclusively by the manufacturer of the completed product who, through advertising, has focused consumer reliance on his own trade name and is better able to calculate the cost into the eventual sales price.²

For the sake of maintaining a balanced viewpoint, it is also needful to sound a note of caution in this context against the all too facile assumption that this new perspective provides a magical blueprint for promoting plaintiff's recovery. In the first place, there are many situations where the defendant does not meet the critical qualifications because he does not occupy a position in the economy which would permit him to pass on the loss for eventual distribution and the risk in question is not so typical that indemnity insurance is well-nigh universal or at least highly prevalent. "Public liability" policies, for example, are still comparatively rare among private home-owners as distinct from occupiers of commercial or industrial premises, so that, if the special loss-distributing capacity of the latter were to be considered worth exploiting, the relevant rule of law should be formulated or at any rate applied so as not to bear unjustly upon the former. Nor, for that matter, is it anything but a perversion of the argument, if what were considered crucial was that a particular defendant just happened to be insured rather than that he belonged to a class of persons who typically are, since recovery would not in

¹ See, for example the Nuclear Installations Act, 1965, of the United Kingdom, and the Vienna Convention on Civil Liability for Nuclear Damage, 1963.

² *Goldberg v. Kollsman Instruments* (1963), 191 N.E. 2d 81 where the manufacturer of the aircraft, but not the manufacturer of the defective altimeter, was held liable for a passenger's death resulting from a crash.

that event necessarily serve the function of broad and equitable loss distribution, besides having an unsettling effect on premium rating practices and injecting an undesirable element of capriciousness into the administration of the law. Some American courts have, on occasion, disregarded this precept, for example, in allowing recovery against a charitable hospital on proof that it was insured. (On a technical level, this disposition has been justified on the ground that the purpose of the immunity is to prevent the diversion of charitable assets, and that this would not occur if the burden of liability would be met from insurance.)

Secondly, sometimes it is the plaintiff who is the better loss distributor. Admittedly, no one would lightly advocate that a plaintiff should forfeit all claim to legal protection against one who has caused him injury merely because he could have protected himself against the risk by insurance; for it would adjudge failure to insure a more heinous dereliction than the negligence or other harm-creating conduct of the tortfeasor. This caution carries the more weight when insurance against the particular type of risk is nowhere near saturation level. Personal accident insurance against injury and death, for example, is still rather sporadic; and, as it happens, the insured is actually rewarded for his providence by being allowed to recover both the insurance proceeds and full undiminished damages from the tortfeasor. Yet there are some situations in which insurance against a specialized risk is very widely held by its potential casualties. The most prominent example, of course, is fire insurance by property owners, which offers a more economical and equitable method of absorbing fire losses than the less differentiated, and from the cost point of view easily calculable, general public liability insurance currently offered to potential defendants. This factor, even if not always openly acknowledged, may well have influenced the consistent refusal to attach responsibility to water companies for failing to maintain adequate pressure in their pipes sufficient to save a house on fire,³ and for the remarkable "New York fire rule" which exempts tortfeasors (such as railways) from liability for all but the first building set alight,⁴ not to speak of the recent Privy Council decision in *The Wagon Mound*⁵ which, in result, also set drastic limits to the extent of responsibility from a negligent fire damage. Statutes also which commonly set ceilings on the liability of railways for fire damage serve much the same purpose. The formula, however, which I would most commend in this connection is that of the small number of American statutes which, instead, confer the benefit of the plaintiff's fire insurance on the defendant, i.e. instead of the insurer being subrogated to the plaintiff's rights against the defendant, here the defendant is subrogated to the plaintiff's rights against the insurer.⁶ This has the advantage of making allowance in

³ *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441; *Moch Co. v. Rensselaer Water Co.* (1928), 159 N.E. (N.Y. Ct. of Appeals).

⁴ *Ryan v. New York Central R. Co.* (1866), 35 N.Y. 210.

⁵ [1961] A.C. 388.

⁶ See, e.g., *Ferren v. Maine Central R. Co.* (1914), 90 Atl. 497 (Me).

each individual case for whether or not the plaintiff actually is insured; in contrast to the proceeding "rough and ready" rules which apply right across the board regardless of the individual circumstance of the particular case.

II

Let me now turn to the impact of other compensation regimes on tort liability. For half a century and more we have become accustomed to look to workmen's compensation for taking care of work injuries. The inter-war period saw the frail beginnings of disability insurance, developing into the much more ambitious Social Security programs associated with the modern welfare state. These vary, of course, greatly from one country to another in coverage and in the value of their benefits. In most Western countries, however, they have long replaced tort liability as the largest source of compensation. Suffice it here to cite the findings of Professor Linden's remarkable study that, having regard only to automobile accidents which would not make much allowance for one of the largest non-tort sources (namely, workmen's compensation), these non-tort sources took care of 39% of the total compensation benefits, most significantly very nearly 100% of the hospital bills due to the embracing cover of the Ontario Hospital Services Commission. Time was when, aside from private charity, tort liability provided the only key to compensation from other than one's own resources. Today, quite patently, tort liability vies with many other regimes for shouldering that social task.

This raises at least two important questions. The first is which of several funds available to a particular victim—the defendant's automobile insurance or workmen's compensation, let us say—should in the last resort bear the particular loss. Inevitably it involves a weighing of the competing claims in the light of relevant economic, social, and (as experience has shown) even downright political considerations. The second question, which stands on the threshold of the first, is what part, if any, tort liability may eventually claim to play in this over-all scheme of social security; in short, what are its credentials for survival, except as an unimportant adjunct to the criminal law in cases of physical aggression, defamation, and perhaps invasion of privacy?

First of all, then, the coexistence of compensation regimes compels an answer to whether benefits shall be cumulative, alternative or stand in some other relation. This from the point of view of the accident victim. In the larger perspective of loss distribution, it raises the question to what extent, if at all, "risk communities" other than that represented by the tortfeasor are to participate in bearing the loss. If, for example, the tortfeasor's liability were to be reduced by the amount of Social Security benefits accruing to the victim—the solution, by the way, substantially prevailing under the English law—its effect is that the general community shoulders part of the loss, relieving *pro tanto* the specific risk-creating activity (motoring, manufac-

turing, etc.) represented by the defendant. If, on the other hand, as happens to be the predominant approach in most other countries, it is felt that the public purse ought to be relieved if at all feasible, attention will have to be focused on ways to reallocate to the tortfeasor expenses already borne by the public fund, not to speak of the tortfeasor's assuming all obligations for the future. Only an entirely neutral, *laissez-faire* or policy-unoriented legal system could abide the accident victim grasping and retaining the full benefits of both.

Only American law has been lured into that posture. There is no time now to explore in any detail the "collateral source rule" — no reduction of tort liability on account of benefits received from a "collateral source". Suffice it to say that its basis is less to give a plaintiff double recovery than to prevent a tortfeasor from getting away with less than the full measure of his liability. It looks to the damage done to the defendant rather than the loss suffered by the plaintiff. For the sake of vindicating the penal principle, it is prepared to subordinate the compensatory function of tort damages.

Not that the collateral source rule necessarily entails the corollary that the accident victim will reap a windfall, for a number of devices are at hand in order to reallocate the loss without prejudicing either one of the two premises: (1) not letting-off the tortfeasor, and (2) not giving the plaintiff more than a single satisfaction of his loss. Broadly, these techniques take one of three possible forms: first, by conferring on the collateral source a right to indemnity, whether by subrogation (the standard incident of indemnity insurance), assignment or an independent claim against either the tortfeasor or the recipient of the benefit; secondly, by the latter returning the benefit to his benefactor, as in the not infrequent case of conditional gifts or conditional loans; and thirdly, in the case of otherwise continuing benefits, like periodical payments, by terminating these as soon as tort damages assure full compensation for the future. The last provides a suitable model for most kinds of social security, is the standard solution in New Zealand⁷ and has also been applied elsewhere, *e.g.* military pensions in the United Kingdom.⁸

Most common, of course, is the first of these methods, indemnity from the tortfeasor for the benefits conferred on the accident victim by the claimant. Long familiar as a feature of workmen's compensation, it has been taken over into most of the world's social security systems, including among others the Ontario Hospital Services Commission.⁹ As we know, promotion of the same idea was behind the attempt to deploy the old action for loss of services for the purpose of enabling an employer to recover fringe benefits, such as free medical treatment or disability pay.¹⁰ By discouraging this and losing them-

⁷ Social Security Act, 1964, s. 71.

⁸ See *Carrol v. Hooper*, [1964] 1 W.L.R. 345, [1964] 1 All E.R. 845.

⁹ The Hospital Services Commission Act, R.S.O. 1960, c. 176.

¹⁰ *E.g. R. v. Richardson*, [1948] S.C.R. 57, [1948] 2 D.L.R. 305.

selves in the irrelevancies of the action's hoary origins,¹¹ it seems to me, British courts probably did less than justice to the economic and social needs that were being pressed. Suffice it to say, at any rate, that German and French courts, confronted with the same problem, found no similar doctrinal or other obstacle to the support of such claims by employers, although their legal background in terms of prevailing theories of tort liability and damage assessment is no wit different from ours.

More provocative questions by far arise as soon as we emancipate ourselves from the premise that the tortfeasor's liability must not be reduced on any account. Least controversial are limits put on the right of subrogation so as not to prejudice members of the beneficiary's immediate family and thus, in the long run, the beneficiary himself. Such restrictions are found in most European systems, and have in recent years extended themselves also into the administration of Social Security systems.

Much more radical are limitations on subrogation based on broader considerations of loss distribution such as the better loss-bearing capacity of one compared with another of several available sources of compensation. This line of thinking is especially associated with, and has made, greatest advance in Scandinavia. It starts with the premise that any claim to recoupment, depending as it does for vindication on the legal process, carries the burden of justifying itself. This is of course reminiscent of Holmes' point of departure, except that he was dealing with the problem of liability, *i.e.* shifting the loss from plaintiff to defendant, whereas we are here concerned with shifting it from a collateral source of compensation to the tortfeasor. This makes quite a difference as revealed by the fact that Holmes considered the defendant's fault to furnish a sufficient reason for supporting recovery by plaintiffs, but the prevailing Scandinavian view deems it generally inadequate to justify recoupment by an insurer.

The position that ordinary negligence does not warrant a shifting of the loss to the tortfeasor is defended on the ground that recoupment is for all practical purposes a real issue only as against insured defendants where the deterrent value of liability (on any account highly problematical) is almost completely evaporated. In any event, any outstanding balance of uncompensated loss would furnish a sufficient catalyst for accident prevention. Moreover, once the injured person has been made whole, there is no further justification for insisting on the pound of flesh from a tortfeasor guilty merely of ordinary negligence, all the more having regard to the progressively diluted standards of so-called legal negligence. In addition, attention is also directed to the high cost of collecting subrogation claims.

By contrast, subrogation is allowed where this would promote recognized policy objectives. As against tortfeasors guilty of inten-

¹¹ *I.R.C. v. Hambrook*, [1956] 2 Q.B. 641 (C.A.).

tional misconduct or gross negligence, it is justifiable in order to promote accident prevention or deter outright antisocial behaviour as an adjunct to the criminal law. Against operators of ultra-hazardous activities it is justifiable because they ought to bear the cost of their own peculiar risks as a matter of sound resource allocation; and in all other cases of strict liability — which in Scandinavian law means automobile accidents — as well as where the injury was inflicted “in the course of trade or business” on the additional ground of the defendant’s manifest loss-spreading capacity.

This scheme, in effect, hinges on a calculus of loss allocation that impinges heavily on basic policies of the law of torts. While not necessarily at cross purposes, it is calculated to infuse a new set of values that may ultimately refashion the whole structure of the tort law of tomorrow. As long, however, as it merely purports to play a peripheral role on the edges of conventional tort law, is there not something a trifle invidious about varying a tortfeasor’s liability according to whether his victim happens to be insured or not, whether the regime that will fix the allocation of the accident cost turns out to be tort law or insurance law — letting him off the hook in the one case, but not in the other? In seeking to find an answer to this question, it is at least worth recalling as one of the perennial facts of life that the extent of tort liability has never borne any relation to the magnitude of the defendant’s guilt, being entirely dependent on the fortuitous amount of the loss that happens to ensue. Adding to the multitude of existing variables the new factor of whether the victim turned out to be insured does not therefore add a new dimension.

This Scandinavian system of loss allocation is now approaching its first half centenary. But important as was its educational impact, its actual operational role was quite modest so long as its range remained limited to private insurance. It received a very notable boost, however, when it was recently taken over into Swedish workmen’s compensation and, for a time only, into compulsory health insurance. Thus, subrogation came to be limited to cases of intentional or grossly negligent conduct and traffic accidents, *i.e.* against automobile liability insurers. After less than seven more years, all subrogation was soundly exorcised from health insurance in 1962, and it is generally believed to be only a matter of time for workmen’s compensation and private insurance to fall into line.

The most categorical repudiation of the philosophy underlying the collateral source rule is found in the recommendations of the Monckton Committee in England in 1946¹² which were in large measure adopted by Parliament in solving the problem of Alternative Remedies that attained prominence as the result of the thoroughgoing overhaul of the whole Social Security system following the Beveridge Report.¹³ After canvassing all the conceivable alternatives,

¹² Report of Committee on Alternative Remedies (1946).

¹³ Report on Social Insurance and Allied Services (1942).

the Committee came down squarely in favor of the compensatory principle that an injured person should not have the same need met twice over, dismissing at once the analogy of private accident insurance (which was a reward for initiative and thrift) as well as the argument that he would have himself contributed to the cost of the scheme. This premise was eventually compromised in Parliament by the concession that a plaintiff need not bring into account one-half of the benefit he would receive during the first five years, in token of his own payments.¹⁴ Secondly, instead of adhering to the existing model of a set-off of damages against benefits, the Committee proposed a set-off of benefits against damages. This meant of course that the tortfeasor would in the end get the advantages of these benefits in the form of reduced liability; in sum, that to this extent he would be exonerated at the expense of Social Security.

The reasons given in support of this, duly adopted, proposal were essentially negative, aimed at minimizing administrative difficulties rather than positively seeking to promote loss allocation in a particular direction. At the forefront was the conviction that it would be undesirable, especially for a governmental agency, to instigate litigation, perhaps without or even contrary to the wishes of the injured person. Besides, it would involve heavy expenses in maintaining a staff for investigation and in the legal cost of collecting promising claims. Not least was the pervasive English concern with reducing the volume of litigation—underlying as it did the recommendation against any form of recoupment as well as the initial insistence that the injured person not be allowed more than a single recovery in the hope, indeed, that in all but the very serious accidents he would be satisfied with National Insurance benefits and not pursue his chances in common law proceedings.

The difference between the British and the original Scandinavian solution remains profound. True, they share the common link of breaking away from the conventional shibboleth of subrogation as a desirable adjunct for the vindication of tort law. Beyond that, however, they differ both in orientation and effect. The Scandinavian discriminates between different classes of tortfeasors in active promotion of social policies relative to accident prevention and capacity for loss distribution. The British is content with a more abstract choice that Social Security might as well relieve all tortfeasors, whatever the nature of their "wrong" or ability to absorb the loss. So much for their differences in philosophy.

In actual operation, the two schemes are no less disparate. For all practical purposes, subrogation is of course of no real moment except against insured or institutional defendants. Yet it is precisely against these that subrogation continues to enjoy official sanction in Sweden. In contrast, the principal thrust of the British formula is for Social Security to shoulder a substantial portion of the auto-

¹⁴ Law Reform (Personal Injuries) Act, 1948, s. 2.

mobile accident bill. Those who attach great importance to the economic calculus of resource allocation may be tempted to deplore that a particular activity or industry may thus escape paying a portion of its own proper operating costs, thereby distorting the true cost of the economic product.¹⁵ That the British legislator has not been overconcerned with this, indeed has not shrunk from deliberately subordinating it to competing considerations of national benefit, is shown by the decision, at the time of abolishing workmen's compensation, henceforth to make a flat charge for the cost of industrial injury benefits, precisely so that the extra-dangerous industries (which also broadly happened to be those of greatest national importance) thus receive an indirect subsidy. In any event, this insensitivity for finer discriminations between different "risk communities" is least open to rebuke in case of automobile accidents for the simple, if robust, reason that motor transport represents an activity from which all members of the community benefit in substantial measure. Whether a portion of the accident bill is therefore borne by a social security fund to which virtually all citizens make contribution or by the premium-paying motoring community does not make a great deal of difference, especially when automobile insurance is compulsory and the cost, except in the case of "private" motoring, can be readily passed on as a cost item in the pricing of goods and services.

Finally, let me say only one brief word about the last question broached, namely, the eventual fate of tort liability as a source of compensation for accident victims. As I see it—and I confess it to be a long, very long guess—the function eventually reserved for tort law in the larger scheme of social security will be at best to supply additional aid and redistribute the accident cost with more discrimination. One of the more perplexing problems arising from the coexistence of tort liability and other systems of compensation, so startlingly disparate in point of their respective benefits, is the revaluation of the claim by those tortiously injured to so large and seemingly disproportionate a share of bounty. Ontario, in company with many other countries, enforced just such an adjustment by abolishing all tort recovery against an employer as the price for offering the much lower but assured benefits of workmen's compensation; and it is probably not too bold a guess that, under the stress of social necessity, other types of accidents may eventually qualify for similar re-appraisal. A straw in the wind, at least, is that most proposals advocating the introduction of a compensation scheme for traffic victims contemplate some limitations on recovery, such at least as the abolition of damages for non-economic loss.

Tort law's second peculiar task stems from its capacity for distributing the cost of accidents with greater discrimination and finesse than is either desired or possible under a general social security program. Being essentially a form of "enterprise or sponsorship"

¹⁵ See Calabresi, *Some Reflections on Risk Distribution* (1961), 70 *Yale L.J.* 499.

liability, it is designed to pass off the cost among those who benefit from or participate in the risk-creating activity. In what I said earlier in comparing the Scandinavian and British schemes, you may find some answers to the challenging questions whether and, if so, to what extent the cost of particular accidents should properly be borne by the one or the other.