

# 3600

## NO-FAULT COMPENSATION SYSTEMS

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### Abstract

No-fault compensation systems are designed to overcome alleged deficiencies in the tort system as a means of compensation. Tort proponents argue that the tort system provides important safety incentives but this is generally discounted by no-fault advocates. This chapter surveys the no-fault compensation literature and concludes that the main focus has been the adequacy of the tort system as a system of compensation and deterrence. The law and economics literature has not shown much concern with efficient no-fault design.

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### 1. Introduction

No-fault insurance has been increasingly seen by many as a preferred alternative to the tort system. This view is driven, mainly, by perceived deficiencies in the tort system itself, rising liability insurance premiums and a belief that accident victims are not adequately compensated. During the 1960s and 1970s the main concern was automobile accidents. During that time many automobile no-fault schemes were introduced in the United States, Canada and Australia. In 1974, New Zealand introduced a no-fault scheme that covered all accidents. During the 1980s no-fault schemes were proposed covering product and medical malpractice accidents.

No-fault insurance commonly refers to changes in liability rules and compulsory insurance arrangements such that accident victims need not prove fault to receive compensation. Victims are made to buy self-insurance or tortfeasors are made strictly liable and forced to buy liability insurance, or some combination. For example, automobile no-fault schemes typically cover the driver-owner (self-insurance) as well as other drivers of the vehicle, passengers and any pedestrians injured by the vehicle (compulsory strict vehicle liability insurance). Product liability no-fault schemes involve imposing some form of strict liability on producers coupled with compulsory liability insurance (self-insurance may be permitted). But strict liability may be in name only - as Posner (1975, p. 471) puts it:

Although we speak of strict liability for product accidents, the term is a misnomer. Liability is restricted to defective products and the determination whether a product is defective resembles the usual negligence determination.

There are many variants of no-fault compensation schemes with varying degrees of residual tort liability and various types of insurance or non-insurance compensation. Germany and Austria introduced workplace no-fault schemes in the early 1880s, which involved compulsory industry insurance schemes. In England the Workmen's Compensation Act was enacted in 1897, purportedly based on the workers' compensation scheme introduced by Bismarck in Germany. However, the English legislation simply increased employers' common law liability and made no provision for compulsory employer liability insurance. Yet the Act was widely regarded in England as one of the most important pieces of legislation in the nineteenth century and later termed, despite the absence of insurance, 'the pioneer system of social security' (Beveridge, 1942, p. 41).

With the exception of automobile accidents there are striking similarities in the way industrialized countries treat accident victims. Chapman and Trebilcock (1992, pp. 799-780) point out that:

in most parts of the industrialized world, from the turn of the century onwards, the tort system has been largely displaced with respect to workplace injuries by no-fault workers compensation schemes .... On the other hand ... with respect to injuries or disabilities resulting from medical malpractice or product use, the tort system remains the primary compensatory vehicle for most victims ... with respect to auto-related accidents a very different picture emerges ... from about 1970 onwards massive diversity in policy choices has emerged.

Compensation became the focus of tort scholarship in the late 1960s after Keeton and O'Connell (1965) proposed an automobile no-fault scheme. Undoubtedly this reflected as Schwartz (1985, p. 548) put it:

the revolution in social policy perception and evaluation that characterized the 1960s and early 1970s ... the principle of broad social responsibility upon which the new evaluations rested made a tort style of reasoning seem excessively individualistic and moralistic.

Tort law critics argue that accident law does not effectively deter accidents nor adequately compensate victims. Accident law does not deter, it is argued, because any deterrent effect is swamped by imperfect insurance that does not properly penalize careless or unsafe behavior - see Fleming (1967, p. 823) and Atiyah (1980, Ch. 24). Instead, deterrence is better achieved by safety regulation. No-fault schemes re-allocate costs away from lawyers to accident

victims. Franklin (1967) described the tort system as a 'negligence lottery' due to the difficulties and considerable legal costs involved in proving fault - assessing causation and determining whether there was failure to take reasonable care is problematic after a number of years. Even if fault can be proved critics argue that victims face great uncertainties about the likely compensation amount and when it will be paid.

Compulsory self-insurance, it is argued, ensures all accident victims are compensated without the need to prove fault. Savings in legal costs and the other costs of administering a liability system mean that compensation can be provided to those not compensated through the tort system. Also, compensation can be paid promptly and according to changed circumstances unlike the tort system, which takes time because it involves a once-for-all assessment of loss. As O'Connell (1975a, p. 461) put it:

The solution for auto accidents is not seen to be a system whereby, after an accident between Smith and Jones, each will be paid regardless of anyone's fault, by his own insurance company, periodically, month by month as his losses accrue, for his own out-of pocket expense (relatively easy to tot up from, say the medical bills, in contrast to fighting over what pain is worth in dollars and cents). As a corollary each will be required to waive his tort claim based on fault against the other. With the savings from arguments over fault and from no longer paying for non-pecuniary losses, more people are eligible for payment from the insurance pool into which fewer - or surely no more - dollars need to be paid. This is, in essence, the 'miracle' being wrought by no-fault auto insurance.

Automobile no-fault schemes were introduced in many jurisdictions in Australia, Canada and the United States during the 1970s. These schemes mostly introduced compulsory self-insurance but still allowed for tort claims to varying degrees. 'Add-on' schemes allow full tort recovery while 'threshold' schemes allow for tort recovery if loss exceeds a minimum dollar amount or a 'verbal' threshold (such as death). Comprehensive or *pure* no-fault schemes abolish tort claims altogether. Quebec and the Northern Territory in Australia abolished tort claims for automobile accidents while New Zealand has abolished tort claims for all accidents, introducing a universal social insurance scheme for accidents in its place. While no-fault compensation schemes are common for workplace accidents and to a lesser extent for automobile accidents, there are few no-fault schemes for product accidents and for medical malpractice. Dewees, Duff and Trebilcock (1996) provide an impressive, comprehensive analysis of no-fault schemes (including for environmental damage, which is not covered here).

While most of the literature has pointed to deficiencies in the tort system, scant attention has been paid to the design of optimal no-fault schemes. As a

result, those proposing no-fault solutions have largely ignored practical lessons from insurance, which balance compensation and incentives to take care. Often, the different roles played by social security, social insurance and private insurance have not been properly recognized or understood.

Social security provides assistance through cash transfers or payments in kind on the basis of need, funded from general tax revenues. Social security provides a safety net for redistributing national income across the life cycle, between rich and poor and across generations. Social insurance is a compulsory insurance scheme, either publicly or privately run. Benefits are not usually related to contributions. Rather, social insurance schemes usually favor particular groups on the basis of need. Private insurance differs from social insurance in a number of ways. Individuals decide how much protection they want, which together with premiums and the terms of the insurance contract are determined in advance. Premiums are related to expected payout (the probability of an accident times the expected harm) to the extent justified by the costs of setting risk classes.

Further, in their haste to abolish the tort system those proposing no-fault solutions have generally not take into account the background of medical, hospital, and social security schemes that co-exist with the tort system. For example, 85 percent of American families had life insurance and private health insurance (see Dewees, Duff and Trebilcock, 1996, p. 26). No-fault schemes are grafted not only onto pre-existing tort laws but also onto existing social security and social insurance arrangements. Thus no-fault schemes favor particular kinds of accident victims over others who may be similarly injured by other kinds of accidents (or in the case of comprehensive no-fault schemes, over those similarly disabled by congenital defects) - see Ison (1980).

No-fault scheme proposals have focussed on providing minimal levels of compensation to accident victims through 'accident funds' contributed to by those engaging in the risky activity. Contributions are not usually based on the amount of risky activity undertaken nor the likelihood of suffering or causing an injury. As a result, schemes have tended to ignore incentive effects and be designed along social insurance principles. Law and economics scholars generally criticize no-fault design because, as Trebilcock (1989, p. 53) puts it:

the notion that the consequences of accidents, and perhaps other classes of misfortunes, should be solely a community rather than an individual responsibility ignores the fact that accident (or misfortune) rates are often significantly influenced by the conduct of individuals, which targeted pricing and benefit policies and a residual role for the tort system are likely to influence significantly. In short, it is assumed, without justification, that economic incentives do not influence individual behavior. Neither theory nor empirical evidence supports this assumption.

Thus the law and economics literature has focussed on whether there are deficiencies in the tort system sufficient to justify no-fault insurance and whether no-fault schemes change incentives sufficiently to affect accident rates. The literature has not been concerned, generally, with the design of efficient no-fault systems until very recently.

## **2. Automobile No-Fault**

Many studies have demonstrated that the tort system is not only slower to provide compensation than no-fault but also tends to overcompensate small losses and undercompensate large losses. Carroll and Kakalik (1991, pp. 32-33) show that no-fault schemes banning non-economic loss reduce transaction costs by 80 percent and that threshold systems can reduce overall compensation costs by 10 percent. Seen simply as a system of victim insurance, automobile liability insurance is not efficient. Yet the tort system still provides considerable compensation. Rolph, Hammitt, and Houchens (1985) found that about two-thirds of those compensated by automobile no-fault would be compensated by the tort system.

Automobile no-fault schemes differ considerably. Most do not provide compensation for non-pecuniary loss and so recovery depends on the extent to which tort actions are permitted. Add-on states do not change the tort systems and so litigation is unlikely to be affected. Caldwell (1977, pp. 941-942) found a negligible reduction in litigation in add-on jurisdictions.

Threshold states have had mixed experience in limiting tort actions. Caldwell (1977) found that the strict verbal threshold in Michigan reduced claims by 87 percent between 1973-75. Low pecuniary thresholds reduce claims much less. But, as Dewees, Duff and Trebilcock (1996), p. 57) point out:

since their introduction in the 1970s both monetary and verbal thresholds have been greatly eroded by claims 'padding' to surmount thresholds, by expansive judicial interpretations of verbal thresholds, and by the impact of inflation on monetary thresholds - most of which are not indexed to increases in the nominal costs of injury compensation.

Evidence on premium costs is mixed. Premiums increase in add-on systems. Caldwell (1977, p. 965) found that premium increases between 1971 and 1977 in add-on states were twice that of states abolishing tort altogether. Premium increases in states with tort thresholds depend on the size of benefits (including the size of deductibles and the extent to which collateral benefits are offset) and the tort threshold.

But even if no-fault or first-party schemes can provide victim insurance more effectively, do they lead to more accidents because would-be negligent drivers are no longer responsible for the harm they cause? A number of empirical studies have attempted to assess whether reducing driver liability affects accident rates. In the United States Medoff and Magaddino (1982) found no-fault increased liability loss rates (claims weighted by average claim cost per premium dollar). Landes (1982a) found that states in the United States that imposed minor restrictions on tort claims experienced increases of 2-5 percent in fatal accidents while those imposing greater restrictions suffered 10-15 percent more. On the other hand, Kochanowski and Young (1985) and Zador and Lund (1986) found no relationship between no-fault and fatalities. In a study of New Zealand and Australia, McEwin (1989) found that add-on no-fault schemes did not increase automobile fatalities but in schemes where tort liability was abolished altogether fatalities increased by 16 percent. McEwin admitted that the size of the impact is questionable given the problems involved in isolating the various determinants of road fatalities. Both Gaudry (1988) and Devlin (1988) found increased accidents as a result of the introduction of a no-fault scheme in 1978. Gaudry attributed the increase not to the change in liability but rather to the fact that previously uninsured drivers now drove less carefully and a flat-rate premium that reduced the cost of insurance to high-risk drivers. Devlin, on the other hand, attributed the increase to the abolition of tort claims.

Modeling and testing the impact of automobile no-fault schemes has not yielded unambiguous results. Some studies have been flawed methodologically - for a summary see Dewees, Duff and Trebilcock (1996, pp. 22-26). Some empirical tests fail because they take no account of changes in incentives due to changes in the way insurance premiums are set, the extent to which merit rating and deductibles are used, or whether no-fault benefits offset benefits from other sources.

### **3. Other Accidents - Product and Medical Malpractice**

Unlike automobile accidents, product, medical and workplace accidents involve some negotiation and bargaining. In a perfect world without transaction costs, perfect information and actuarially fair insurance (the insurance premium equals the expected loss) self-interested participants will result in efficient levels of risk and compensation (Coase, 1960). Any attempt to impose a no-fault scheme, by definition, imposes welfare costs - workers receive more compensation and have fewer accidents than they are willing to pay for.

Proponents of product and medical malpractice no-fault schemes point to the fact that the tort system is costly, bargaining and other transaction and

information costs are high. Like many no-fault advocates O'Connell (1975a) stresses defects in the tort system as follows:

What about other accident victims - those injured by, say, manufactured products such as a power tool, or falls in stores, or in the course of medical treatment? ... the plight of those who suffer losses from such accidents is much worse than that of auto accident victims ... In the first place, the issues in, say, a products liability case are far more technical and demanding than in a typical auto case .... The scenario for medical malpractice cases follows that for products liability ... surgical procedures ... are so very complicated that trying to determine whether they were properly executed makes even many difficult products liability cases look easy.

Much of the impetus in the literature for expanding the scope of no-fault schemes resulted from the liability insurance crisis in the 1980s - although as Schwartz (1991, pp. 46-51) notes, the product liability crisis was mainly confined to the United States. Croley and Hanson (1991) argue that increases in product liability insurance premiums in the United States represented an efficient internalization of producer costs. It is worth noting that product liability insurance was usually combined with general liability policies and was not merit-rated - see The Inter-Agency Task Force on Products Liability Contractors Study (1978). Increasing liability premiums have led to a trend towards self-insurance and so the likelihood that incentives to take care have improved (Priest, 1989). But strict liability may not improve safety. Dewees, Duff and Trebilcock (1996, p. 204) argue that strict liability 'impounds the costs of non-negligently caused accidents ... to the extent that non-negligently caused accidents are in part a function of intensity of consumer use, a negligence regime enjoys advantages over a strict liability regime'. They go on to argue 'that it would be desirable to reinstate the negligence regime, preferably accompanied by a fairly robust regulatory compliance defense'.

Hensler et al. (1991) found in a survey of 26,000 households that almost one-third of injuries in the sample were product related. Half of these occurred at work and so were covered by workers' compensation - the tort system contributed only about 5 percent of compensation. Hensler et al. found that for accidents outside the workplace only 2 percent of those injured took action and only 1 percent retained a lawyer. Nevertheless, tort law serves as the only basis for direct compensation for nearly all products-related accidents outside the workplace.

Little has been written about product no-fault schemes. Instead, product no-fault is generally considered together with universal no-fault schemes covering all accidents (see below). Schwartz and Mahshigian (1987) consider the prospects for a no-fault scheme to cover all product accidents but conclude that there is no causation 'trigger' available to cover many different types of

product defect. Thus a general product no-fault scheme is unlikely. Dewees, Duff and Trebilcock (1996, pp. 240-245) describe limited compensation schemes for vaccine- and drug-related injuries in a limited number of jurisdictions such as California, Germany, France, Japan and the United Kingdom. There are some notable differences between vaccines and other products. Vaccine injuries 'tend to be imposed on the consumer', 'the vaccinee may face a greater risk of suffering a vaccine-induced adverse reaction than of contracting the disease through wild virus in the community' and 'the so-called liability insurance crisis has been particularly acute with vaccines' (pp. 240-241). They also point out, in relation to the National Childhood Vaccine Injury Act of 1986 in the United States which introduced a mandatory no-fault scheme but retained tort after a no-fault claim was made, that 'it appears that the rationale behind preserving the tort system at all was to maintain incentives for the manufacture of "safe" vaccines'.

More interest has been shown in designing medical malpractice no-fault schemes - see, for example, O'Connell (1985). Pure medical no-fault schemes were introduced in New Zealand in 1974 (as part of its universal scheme), in Sweden in 1975 and in Finland in 1987. After noting that there are few empirical analyses, Dewees, Duff and Trebilcock (1996, p. 146) conclude that:

comprehensive no-fault patient compensation ensures that substantially more injured patients will be eligible for benefits than under the current tort system. Furthermore, the no-fault plans in Sweden and New Zealand have had reasonable success in defining the concept of a medical injury and in compensating most injured patients promptly and at relatively low administrative cost.

#### **4. Universal No-Fault**

In 1974 New Zealand abolished tort law remedies for all personal injuries by accident and replaced it with a no-fault compensation scheme administered by a state monopoly. The scheme was based on five principles from the Woodhouse Royal Commission (1967) Report. They are: community responsibility (the community collectively bore a basic responsibility for the social costs of accidents; comprehensive entitlement (equity required giving assistance to all those disabled by accident, irrespective of cause, time or location); complete rehabilitation (accident victims should recover in the shortest possible time); real compensation (compensation should reflect real loss) and administrative efficiency (collecting funds and paying benefits should be conducted as efficiently as possible).

Cover was provided without proof of 'fault' no matter how or where the accident occurred, whether at work, at home, on the road, or while participating

in a sporting or recreational activity. In return, the common law right to sue for damages for personal injury (except for punitive or exemplary damages) was abolished. The scheme was administered by a monopoly, the Accident Compensation Commission.

The major justification for the scheme was deficiencies in the common law yet as Palmer (1979) noted:

The argument against the common law in the 1967 Royal Commission was largely based on principle. There were almost no empirical data in New Zealand on who got what, when, and how from the common law system. Only modest amounts of information were collected by the Royal Commission itself. (p. 26)

Currently, the scheme has six accounts: Employers; Earners; Non-Earners; Motor Vehicle; Subsequent Work Injury; Medical Misadventure. The Employers Account pays for all work-related injuries except for work-related motor injuries. Employers pay a premium based on payroll (like workers' compensation). Only since 1996 has the premium depended on the risk involved in the work carried out by the employer's workers. Prior to that, bonuses were given for good safety records.

The Earners Account was established in 1992. Earners pay a premium on their total earnings, collected through normal 'Pay As You Earn' taxation arrangements. Most of these premiums are paid into the Earners Account to cover non-work-related injuries in the home, playing sport or other recreational activities. Prior to that non-work accidents suffered by workers were paid from the Earners Fund. No empirical studies have been carried out to determine to what extent risk-compensating wages have compensated for premiums formerly paid by employers.

The Non-Earners Account pays for injuries suffered by those not in the workforce, except injuries caused by motor vehicle accidents which are funded by the Motor Vehicle Account. The Government pays the ACC for these costs from general taxation revenues and so forms a (more generous) part of social security.

The Motor Vehicle Account pays for all motor vehicle injuries. It is funded from part of the annual licensing fee for motor vehicles and a tax of two cents per litre on petrol sales. The Subsequent Work Injury Account pays the cost of work-related claims that involve a recurrence of an injury received in previous employment. It is funded from the four principal accounts, the Employers, the Earners, the Non-Earners and the Motor Vehicle accounts. The Medical Misadventure Account pays the cost of injuries that result from error by medical practitioners or from rare and severe outcomes of medical or surgical procedures. It is funded from the Earners and Non-Earners accounts.

The universal scheme was built on pre-existing funding sources - workers' compensation and compulsory automobile liability insurance. When initially set up the primary focus was on providing compensation and promoting rehabilitation. Increasing scheme liabilities have led to concerns that the behavioral assumptions underlying the scheme are inadequate. As a result the scheme has been continually reviewed.

In 1979, it was decided to review the scheme and assess its overall cost. The review also took into consideration employers' concerns that they were subsidizing the cost of non-work claims. A Cabinet Committee recommended that claimants should meet part of the cost of the first two visits to the doctor, lump-sum awards for minor injuries and for pain and suffering and loss of enjoyment of life be abolished except for serious cosmetic disfigurement. As a result several amendments were made to the Act in 1982. These included: changing from a fully-funded to a 'pay-as-you-go' system: first week compensation payable by employers for work accidents was reduced from 100 percent of pre-injury earnings (exclusive of overtime) to 80 percent of pre-injury earnings (including overtime); the ACC was given the power to refuse to pay compensation to people injured while committing a crime; compensation for work-related motor vehicle accidents were no longer funded from the Earners Account but from the Motor Vehicle Account. The maximum amount of compensation for the loss or impairment of bodily function was increased from \$7,000 to \$17,000. However, the amount of compensation payable for pain and suffering and loss of enjoyment of life remained at the 1974 level of \$10,000.

Employer pressure in 1992 led the Government set up another committee to review the scheme. The Accident Rehabilitation and Compensation Insurance Act 1992 was aimed at controlling premium costs its objective being: 'to establish an insurance-based scheme to rehabilitate and compensate in an equitable and financially affordable manner those persons who suffer personal injury'. Lump-sum compensation was abolished and compensation for work-related motor vehicle accidents was transferred from the Earners Fund.

Despite considerable discussion of the scheme, there have been virtually no empirical studies of its impact by independent researchers. Most studies have been internal. Soon after the scheme began employers started to complain that injury rates had soared. In particular, complaints by the meat-freezing industry led to the ACC setting up an independent inquiry. The inquiry found that worker lost time in the meat-freezing industry increased by 92 percent in the first two years (initially, workers were fully paid for the first week after a work-related accident) (Palmer, 1979, p. 373).

The New Zealand Business Roundtable (1987) expressed concern that no-fault insurance was provided by a public monopoly. They argued that the scheme constrained the ability of people to determine their own insurance arrangements. They proposed that the universal no-fault scheme be replaced

with a requirement that New Zealanders buy a minimum level of first-party accident coverage and that private insurers supply this. On 14 May 1988 the New Zealand Government announced that employers and self-employed people would be able to buy 24-hour accident insurance from either private insurers or the Accident Compensation Corporation.

## **5. Conclusions**

Fault and no-fault compensation systems should not be considered in isolation. Fault systems can be combined with safety regulation and compulsory first- or third-party insurance systems. So can no-fault systems. From a policy perspective different combination of insurance/safety regulation should be considered in terms of their ability to provide optimal compensation and safety as well as satisfying societal demands for 'retribution' and 'justice'. But while a considerable amount has been written, we still don't know whether no-fault insurance, taken together with other compensation sources and other incentives to take care, increases overall welfare.

One thing seems clear. If we are concerned solely with accident compensation, the tort system is unsatisfactory. However, the tort system seems to provide important safety incentives, although how important is difficult to determine empirically. Experience with no-fault schemes suggests that proponents were so concerned to fight battles to abolish tort that little time was given to designing efficient no-fault systems that took into account elementary insurance principles such as merit rating and incomplete insurance to overcome adverse selection and moral hazard problems. However, those administering no-fault schemes have learnt from experience and have made some adjustments. The law and economics literature, concerned primarily with the adequacy of the tort system and deterrence, has not concerned itself much with no-fault design. At the end of the day public policy towards accidents should be concerned with empirical evidence about the efficacy of alternate compensation systems incorporating elements of tort, disability insurance and social security. To date this has not been accomplished.

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