

Comparative Liability Studies: Challenges and Limitations

by Werner Pfennigstorf*

Editor's Introduction

This issue of "The Geneva Papers" is evidence, once more, of the Geneva Association's continued interest in all aspects of liability and compensation – an interest which it shares with economists, lawyers, insurers, consumers, and industries and professionals of all kinds all over the world.

However, while the interest is present everywhere to some degree, there are great differences in degree and focus. In the United States, where the interest has been strong for a considerable time, recent developments have raised concerns that there may be a *liability crisis*, with serious consequences on social and economic conditions. In other countries, concerns of a comparable magnitude have generally not been perceived.

Not surprisingly, therefore, the discussion about the legal, procedural, economic, social, and political issues regarding liability and compensation has been much more vigorous in the United States than in other countries, and much more effort and resources have been devoted to empirical studies of the actual economic results produced by the existing system – the amounts received by injured persons from various sources, the waiting times involved, various cost items, and the total cost of the system.

The first major study of this kind was conducted by Professor *Alfred F. Conard* of the University of Michigan Law School and was published in 1964; it concerned primarily automobile accident victims in Michigan and was based mostly on interviews with victims.¹ Another extensive study of automobile accident compensation was ordered by the U.S. Congress and undertaken by the U.S. Department of Transportation between 1969 and 1971.² Both of these projects included analyses of the compensation systems of other countries.

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¹ A. F. Conard et al., *Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation* (Michigan Legal Studies). Ann Arbor: University of Michigan Press, 1964.

² See J. A. Volpe, *Motor Vehicle crash losses and their Compensation in the United States: A Report to the Congress and the President* (Washington, D. C.: U. S. Government Printing Office, 1971). In addition to this summary report, about 15 detail studies of special aspects of automobile accident compensation and insurance were published as part of this project.

Similar studies on a broader scale and including material from insurers' claims files, were conducted later by the All-Industry Research Advisory Committee (now the All-Industry Research Advisory Council, hereafter AIRAC), an organization sponsored by the major insurance groups.³ The Rand Corporation and, since 1980, the *Institute for Civil Justice* (established within the Rand Corporation and supported by grants from various companies and industry groups) have conducted a series of studies concentrating on the judicial disposition of liability claims of various kinds.⁴

The first result of the studies and discussions was the enactment of "No-fault" automobile insurance laws in several states of the United States in the early 1970s.⁵ More recent reform efforts have aimed at eliminating or modifying those aspects of the tort liability system which have become widely recognized as the cause of undue cost and delay. Shortage of insurance coverage for certain liability risks has provided an additional incentive for research and reform proposals. Some changes, such as restrictions and limitations on recoverable damages for pain and suffering, punitive damages, and fees to be paid to attorneys under contingent fee arrangements, have already been made in several states. Each of these partial reforms had to be justified by reference to its potential effect on the total cost of liability and liability insurance, and continues to be contested on that basis.

In other countries, large-scale empirical examinations of the accident compensation systems have been the exception rather than the rule. One of the exceptions is the study of the *Woodhouse Commission*, which resulted in the comprehensive accident compensation scheme of New Zealand;⁶ another one is the study of the *Pearson Commission* in the United Kingdom.⁷ Finally, a noteworthy study was undertaken in the late 1970s by the *Centre for Socio-Legal Studies of Wolfson College*, Oxford.⁸

The rule is, however, that while the law and practice of compensation are continuously evolving everywhere and are the subject of a continuous academic discussion, and while reform proposals have been presented especially for automobile accidents, and some of them have been implemented, the subject has not in general received the degree of political attention that it has received in the United States. Most notably, there has not been a perception outside the United States of a "liability crisis", let alone one combined with a "liability insurance crisis".

³ *Automobile Injuries and Their Compensation in the United States*, 2 volumes, 1979; *Compensation for Automobile Injuries in the United States*, 1989.

⁴ Not all can be listed here. The following deserve special note: D. R., Hensler et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts* (1985); J. S. Kakalik and N. M. Pace, *Costs and Compensation Paid in Tort Litigation* (1986).

⁵ See D. Couffin, *L'Assurance Automobile "No-fault": Les leçons de l'Expérience aux Etats-Unis* (Paris: L'Argus, 1977); W. Pfennigstorf, *Comparison and Evaluation of Major No-fault Programs in the United States*, AIDA Newsletter No. 17 (Jan. - March 1985) pp. 279-285.

⁶ *Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand* (Auckland, December 1967).

⁷ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, 3 Volumes (London: H. M. S. O., 1978).

⁸ See D. Harris et al., *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984).

The nature and causes of such differences between countries which have many economic, demographic, social and political characteristics in common have become the focus of renewed research interest. Considering the strong emphasis on cost and performance in the current American tort reform discussion, it is not surprising that Americans are interested not only in the legal rules and procedures of other countries but also in their practical administration, in the coordination of tort liability with social security, and in the cost of the system as a whole.

Lawyers and insurers in other countries, even though they have not so far perceived liability as a problem of alarming proportions, are nevertheless acutely aware that the American developments transcend national borders in many respects: (1) American liability rules directly affect all those who market goods or provide services in the United States, and their insurers, and (2) American liability theories and American-size damage awards tend to have a suggestive influence on lawyers and courts in other countries.

Consequently, while the legal and insurance community outside the United States has neither the will nor the power to influence the American tort reform movement in one or the other direction, it is more than a completely disinterested bystander. It does have an interest in helping to keep the reform discussion rational and fully informed. This includes contributing as much information on other countries as can be obtained and compiled in such a form that it may be used with maximum effect by American policymakers.

The papers collected in this issue of *The Geneva Papers* represent this type of cooperative comparative research. The four papers following this introduction were commissioned by the Geneva Association as part of the first, experimental, stage of a *Study of Comparative Liability Procedures*. This project evolved from a proposal submitted in 1986 by Martin Albaum, Director of Research of the Prudential Property and Casualty Insurance Company and significantly an active member of both the Geneva Association and AIRAC. The project was meant "to produce a rational basis for reforming the United States' accident compensation system (and possibly those of other countries as well) by identifying what works well in technologically advanced societies, rather than identifying abstract models".

Specifically, the proposal called for a *cross-national study* of two issues:

1. How the victims of some key types of accidents fare in the United States compared to countries like Britain, France, West Germany, and Sweden;
2. How the persons or organizations "responsible" for (or causing) the accidents are dealt with in these countries.

The *purposes* of the study, according to the proposal, were to be:

1. To illustrate some alternatives to the United States' arrangements for dealing with accidents;
2. To evaluate the advantages and disadvantages of the different systems in terms of the welfare of the accident victims, the minimizing of recurring accidents, and the overall economic costs to each country;
3. To begin to understand the conditions – political, social, and economic – that produced the different systems; and
4. To identify the cost beneficial elements in other countries' systems that might effectively be imported into the United States, and how this might be done.

The proposed study would start by constructing a set of typical accident situations, including injury and victim characteristics. They would provide a uniform basis for country reports detailing the most probable outcomes, based on interviews with experts. The country reports would in turn form the basis for a comprehensive comparative analysis.

It became soon apparent that agreement was difficult to reach on the basic accident situations and on the information sources to be used. The four pilot studies in this volume are evidence of the different approaches. Only one of them – the study on the United Kingdom, by *Baggs & Cannar* – provides figures on the disposition of actual cases (taken from court decisions at the upper end of the scale). The others focus on rules, practices, and trends, generally seeking to show the coordination between tort liability and alternative sources of compensation.

The four pilot studies were presented and discussed at a Seminar held in Zurich in December 1988. As they are being published, the project is moving into its second stage, which will be based on an agreed-upon set of standard accident situations and victims characterizations, as originally proposed.

It is understood by all involved that comparability of the results will be qualified by a large number of residual differentiating factors (such as wage levels, standard of living, consumption habits, etc.), and that therefore comparison should in any event be undertaken with the utmost caution.

The paper by *Szöllösy*, which was prepared independently, exemplifies ideally the type of empirical comparative research to which the larger project aspires.

The final paper in this issue is a summary of a book-length study, about to be published in the summer of 1990, which was commissioned by AIRAC, also with the general aim of providing a broader basis of comparative information for the current American tort reform discussion. This study seeks to summarize the essential facts about the structure, operation, cost, and performance of the liability and compensation systems of 10 major industrial countries.