NO-FAULT INSURANCE IN CANADA: 
A THEORETICAL BACKGROUND FOR NEW RECOMMENDATIONS 
TO PROMOTE SAFETY AND REDUCE HIGHWAY DEATHS

ALEXANDRIA S. PALAZZO

Automobile insurance systems based on no-fault principles have been in place for twenty-five years, and the time is ripe for examining their effects. Between the late 1960s and early 1990s, an insurance reform movement in North America pushed the Canadian system from a liability-based system toward a no-fault insurance system, which varies between provinces. Now in Canada, each insurance provider compensates individuals in motor vehicle accidents, regardless of who is at fault. This system developed in response to the compensation problems most motor vehicle accident victims experienced, with the arduous and drawn out litigation of the traditional tort system. No-fault insurance schemes allow motor vehicle accident victims to avoid the hassle of litigation and obtain compensation in a more timely fashion.

This Article focuses on the critically important side effects of the no-fault insurance system in Canada. Accident fatality rates have increased since the implementation of no-fault insurance according to a scholarly consensus. There is, however, a difference in the accident fatality rates in each province; some regions have much higher accident fatality rates than others. This Article argues that the difference in these rates depends in part on the variation of no-fault insurance each province has enacted. Three different types of no-fault insurance systems have been adopted across the nation: (1) a partial no-fault system that is publicly funded, (2) a partial no-fault system that is privately funded, and (3) a pure no-fault system that is publicly funded. To effectively lower all accident fatality rates in Canada, this Article recommends that all provinces and territories adopt a privately funded, partial no-fault automobile insurance scheme with the option to elect tort coverage by drivers.

I. Introduction

Compensation is defined as the “[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another.” Theoretically, it is the act of making someone “whole” again, or back to his or her pre-injury state. Compensation for

---

Copyright © 2015 Alexandria S. Palazzo, second year law student, University of Maine School of Law. I am especially grateful for the guidance of my adviser Professor Jennifer Wriggins, Sumner T. Bernstein Professor of Law during the process of writing this article. I am very appreciative for the support from the staff at Garbrecht Law Library, especially Reference Law Librarian Maureen Quinnan who assisted me in the early stages of my research. A sincere thank you must also be extended to Christopher Mariella, Luisa Deprez, and Jared Benjamin for their helpful comments on earlier drafts of this Article.

accidental personal injury has been an issue in North American tort systems since the mid-nineteenth century. Specifically, it has been the focal point of almost all automobile insurance systems across North America.

Initially, many governments in Canada and the United States employed an automobile insurance system that determined the amount of fault each party was liable for in every automobile accident. This system is known as “third-party” insurance. The amount of each party’s liability, and the amount of injuries each party sustains, decides the amount of compensation each involved party pays. The amount each party must pay is also known as “damages,” which highlights the losses each victim incurs in a motor vehicle accident. Between the late 1960s and early 1990s, a significant insurance reform movement consisted of a shift from a liability-based system, towards a no-fault insurance system. In these regimes, the determination of who is at fault is not essential. Rather, each insurance provider of the parties involved – regardless of who is at fault – compensate the individuals for their losses. This system is known as “first-party” insurance. Drivers who purchase automobile insurance in a no-fault regime are entitled to a set of pre-determined “accident benefits” if they are involved in a motor vehicle accident, such as: weekly medical benefits for impairments or disabilities, medical expenses, income-replacement benefits, lump-sum payments for permanent impairments, and

---

2 John F. Witt, Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement, 114 HARV. L. REV. 690, 701 (2001). The old common law writ of trespass provided victims of personal injury a means to recover for harm sustained, whether or not the injurer acted negligently. Id at 704. In tort law, negligence is understood as “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. . . .” supra note 1, at 508. Essentially, a person whose actions were merely accidental would be as responsible for paying a victim’s injury compensation, such as a person whose actions were completely reckless and did not exercise reasonable care. The industrialized period then changed the landscape of the negligence theory, evidenced by the foundational case Brown v. Kendall decided in 1850. Brown v Kendall, [1850] 60 Mass. 292. This decision is sometimes “explained as having been decided in order to subsidize the newly developed industries in the United States.” FRANK J. VANDALL, A HISTORY OF CIVIL LITIGATION: POLITICAL AND ECONOMIC PERSPECTIVES 4 (Oxford: Oxford University Press, 2011).


4 Id.
death benefits if death occurs. Today, every province and territory in Canada employs a variation of no-fault auto insurance. Provinces and territories require that drivers purchase a minimum amount of automobile insurance, with options to purchase additional coverage.

One of the most significant studies to contribute to this movement was the report, “Compensation for Automobile Accidents: A Symposium” published in 1932. Based on the recommendations of this Report, the Saskatchewan government became the first government in North America to implement a no-fault automobile insurance scheme. Thereafter, many governments in Canada and the United States adopted some variation of a no-fault scheme. This movement was premised on the concern that the traditional tort system, which relied on burdensome litigation to determine fault, made it excruciatingly difficult for automobile accident victims to be compensated for their losses – especially when either personal injury or death occurred. Studies conducted in the 1960s in Canada and the United States showed that fewer than fifty percent of victims of motor vehicles accidents received any compensation. This “new” no-fault insurance scheme had the potential to allow victims of motor vehicle accidents to avoid the hassle of litigation, and obtain compensation in a more timely and efficient manner.

---

6 Young B. Smith, The Problem and Its Solution, in Compensation for Automobile Accidents: A Symposium, 32 COL. L. REV. 785 (1932). Hereinafter, referred to as the “Compensation Report.” The Committee strictly focused on “the problem of compensation, rather than to the problem of accident prevention.” at 786. The Report sets forth the problems of the traditional common law system, and the reasons why it was inadequate: (1) the production of necessary evidence can be too difficult, (2) the jury may not believe the evidence shown, (3) when the trial has concluded, the amount of damages may be insufficient, and (4) the cost of litigation, such as lawyer’s fees, evidence production, etc. outweighs the actual value of the victim’s damage reward at 789. “The Committee’s conclusions . . . merely states that it favors a plan of compensation with limited liability and without regard to fault, analogous to that of workmen’s compensation laws.” at 797. The proposal was based on Massachusetts’s and New York’s workmen’s compensation acts, with benefits that mimicked New York’s workmen’s compensation laws. Id.
7 CARL BROWN, NO-FAULT AUTOMOBILE INSURANCE IN CANADA 1-2 (The Carswell Co. Ltd., 1988).
Now, in the second decade of the twenty-first century, it is time to assess whether the no-fault reforms have adequately addressed the problems of compensation the traditional automobile insurance system was claimed to have. Or, more importantly, has the shift to no-fault insurance actually increased the dangerousness of the roads and the number of victims to be compensated, creating the mirage of a successful system? Accident fatality rates have increased since the implementation of no-fault insurance schemes. In other words, analysis has shown that no-fault insurance schemes have affected the moral hazard of drivers in our society. “Moral hazard,” an economics term, is defined as the lack of incentive to reduce risk where an individual is protected from its consequences, such as insurance. It has been argued by several scholars that since the implementation of no-fault insurance, accident fatality rates have increased because moral hazard has simultaneously increased.

This Article argues that the difference in accident fatality rates across Canada depends in part on the type of no-fault insurance system that is employed in each province. That is, accident fatality rates in some regions are much higher than others. To effectively lower all accident fatality rates in Canada, this Article recommends that all provinces and territories adopt a privately funded, partial no-fault automobile insurance scheme with the option to elect third-party coverage, also known as “tort coverage,” by drivers.

Part II of this Article explores the emergence of no-fault insurance in Canada, the difference between “partial” and “pure” no-fault insurance systems, and the strengths and inadequacies of the current system. The differences between publicly and privately funded insurance, and how this also affects accident fatality rates will be analyzed. Since provinces and

---

9 See infra p. 27 and note 100.
territories each employ a variation of this system, inter-jurisdictional legal issues inevitably occur which Part II will address.

Part III will present the influential empirical findings of notable scholars in this field; special attention will be paid to two main case studies in Ontario and Quebec, which will help to evaluate no-fault insurance in Canada. An outside comparative analysis of New Zealand, a country that has completely abolished its tort system with a no-fault insurance regime in the entire nation, will be analyzed. Commonalities between New Zealand’s system and Quebec’s system will also be highlighted.

Part IV of this Article will present my recommended alterations to the current system. Statistics will be pooled from a variety of credible sources such as Transport Canada and Statistics Canada. Certain outside factors that evidently affect accident fatality rates will be discussed in this section, including distance driven, the use of seatbelts, impaired driving, and distracted driving. Finally, Part V will be a summation of my analysis. Based on the statistics presented in Table 1 below, elements from each no-fault system in provinces with the lowest accident fatality rates will be taken into account. Based on my analysis, Canada should uniformly adopt a privately funded, partial no-fault system in every province and territory. These reforms will likely lower accident fatality rates and increase the overall social welfare in the country.

II. Legal Background

A. The Emergence and Adaptation of “First Party” Insurance in Canada

In 1946, Saskatchewan became the first province or territory in North America to introduce a no-fault automobile insurance system.11 The Saskatchewan legislature was highly influenced by the 1932 Compensation Report, and proposed a form of strict liability that was made for motor vehicle owners who caused personal injury or death to others. This system would

---

10 See discussion infra Part IV, Part A.
11 BROWN, supra note 11 at 9.
work, however, only if it was backed by compulsory insurance.12 Thus, before any driver in Saskatchewan was able to drive their vehicle, they were required to purchase this publicly funded13 insurance coverage.

Over the years, the Saskatchewan insurance plan has upheld the fundamental objectives of no-fault insurance despite undergoing considerable changes.14 It was not until the 1970s that provinces such as British Columbia, Alberta, and Quebec began proposing and amending their insurance schemes. A few provinces adopted Saskatchewan’s model of the plan; however, the majority took different approaches and adopted a variety of different no-fault insurance systems.

B. Partial vs. Pure: Important Distinctions within No-Fault Schemes

During this insurance reform movement of the 1970s, provinces and territories adopted one of two no-fault insurance schemes – partial or pure – although the majority of provinces and territories implemented partial no-fault insurance systems. In a partial no-fault scheme, victims of motor vehicle accidents are entitled to set of pre-mandated accident benefits; however they are given the right to sue for additional damages.15 This partial no-fault system is also known as “add-on no fault.” In order to be able to sue for additional damages beyond the predetermined benefits, the victim’s losses must exceed a certain threshold value; a standard usually prescribed by each province's legislature operating under this system.16

Pure no-fault automobile insurance is the more radical type of no-fault scheme. In this scheme, victims of motor vehicle accidents are also entitled to a pre-mandated set of benefits. However, victims have no right to sue for additional damages.17 Essentially, despite how severe

12 Id.
13 See discussion infra Part II.B on terms “publicly funded” and “privately funded.”
14 See, e.g., Automobile Accident Insurance Act, R.S.S. 1978, c. A.35 (Can.).
15 Devlin, supra note 7, at 303.
16 Id.
17 Id.
or debilitating someone’s personal injury may be, victims are compensated strictly from their
government’s plan, not from people who are at fault. Victims are precluded from suing any party
to the suit.18 Quebec and Manitoba are the only provinces in Canada – and the only governments
across North America19 – that operate in a pure no-fault system.

C. Publicly or Privately Funded: Important Distinctions within No-Fault Schemes

Another distinction between the types of no-fault insurance scheme provinces were able
to adopt was how the coverage would be funded: either publicly or privately.20 Automobile
insurance that is supplied publicly to citizens means that government agencies, ministries or
departments are created in that province, and hold a monopoly for auto insurance in their
respective region.21 Typically, citizens do not have a choice but to pay for the services these entities provide, and the insurance is funded through a variety of sources such as premiums, tax levies, and user fees.22 For example, the “Manitoba Public Insurance” is a government-run insurance administration that funds automobile insurance to drivers in Manitoba.23 Today, four provinces support their citizens’ automobile insurance coverage through a publicly funded automobile insurance scheme: Quebec, Manitoba, British Columbia, and Saskatchewan.

18 Id.
19 Considering how large the United States of America is, it is interesting that none of the fifty states have adopted a pure no-fault system. This makes the Canadian research particularly important. Quebec implemented their pure no-fault system in April of 1977, but Manitoba’s cabinet minister Glen Cummings (at the time) did not announce Manitoba’s pure no-fault system until May of 1992 – more than fifteen years later. One year before the announcement, Cummings publicly said that Manitoba was steering away from no-fault insurance, and explained that he “did not see the benefits with no-fault when you compare the costs to society . . . .” Why the sudden change of heart? Why adopt a pure no-fault system, in the first place? There have not been many answers. EDWARD L. LASCHER, THE POLITICS OF AUTOMOBILE INSURANCE REFORM: IDEAS, INSTITUTIONS, AND PUBLIC POLICY IN NORTH AMERICA, 112-13 (Georgetown University Press, 1999).
20 See supra note 9.
21 DENIS BOIVIN, INSURANCE LAW 6 (Irwin Law Inc., 2004).
22 Id.
Conversely, a privately funded insurance has no association with the government, but rather operates in a free market. The remaining provinces and territories in Canada have no-fault insurance schemes that are privately funded. The insurance companies compete for clientele based on the quality of their insurance plans: the “amount of premiums they charge, versus the services and coverage they offer drivers.” There are, for example, over 140 private insurance companies in Ontario, which is the largest market in Canada. These systems differ from publicly funded schemes in that they have more flexibility with whom they choose to accept, the rates they charge certain drivers, and so forth.

D. Inevitable Inadequacies of the Current System: Inter-Jurisdictional Issues

The automobile tort reform movement of the 1970s led to three different types of no-fault systems that were adopted across the nation: (1) partial no-fault, publicly funded (2) partial no-fault, privately funded or (3) pure no-fault, publicly funded. In addition to these diverse models, each province stipulates its own thresholds or “caps” for the recovery on losses per person in a motor vehicle accident. These thresholds can be either quantitative or qualitative. This has

24 BOIVIN, supra note 17, at 9.
25 Id. at 10.
27 In my hometown of Hamilton, Ontario, I have seen first-hand experience of young drivers with two or more accidents on their record having a very difficult time obtaining automobile insurance. When automobile insurance is obtained, it is usually charged at an extremely high annual rate since these drivers are deemed “high risk drivers.” This is known as being “experience-rated” which is a method used to determine insurance rates in Ontario. Among other factors such as the model of your vehicle, your gender, age, driving record, and your place of residency, each specific insurance company creates a client’s premium rate using an algorithm. After speaking with two representatives at two insurance companies in Ontario, (“Allstate Insurance” and “Economical Insurance”) there is no way for the public to obtain a “report” or “model” which outlines the way drivers’ insurance rates are calculated. See Devlin supra note 3. See generally Insurance Bureau of Canada, How Car Insurance Premiums Are Calculated, online: Insurance Bureau of Canada <http://www.ibc.ca/on/auto/buying-auto-insurance/how-auto-insurance-premiums>
28 In theory, a pure no-fault system that is privately funded would not work. There would be no incentive for different private insurance companies to provide desirable coverage rates to different drivers, because there would be a cap on the amount they could recover, and no chance to recover additional damages. This makes sense as to why Quebec and Manitoba both employ a pure no-fault system that is publicly funded.
29 Eg., Ontario uses a qualitative threshold for pain and suffering damages, that gives individuals the option to sue for any additional damages if they their pain and sufferings exceed it, which is “. . .death, permanent or serious
inevitably caused inter-jurisdictional issues, which have been addressed generally through statute provisions and interpretations of case law.

Under privately funded no-fault insurance systems, coverage extends to insured persons who are involved in automobile accidents in Canada, the United States, and “vessels between the ports of those countries.” Issues arise when the effect of statutory provisions essentially say that laws may be applied to insurance contracts that were created in jurisdictions other than where the contract was made. Choice-of-law provisions have been enacted in various provincial statutes that stipulate the contractual consequences when drivers get into motor vehicle accidents outside of home provinces. For an example of a choice-of-law provision, the Ontario Insurance Act states:

Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured or the insured’s assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada.

This provision sets out certain elements that must be met in order for the Ontario law to apply: (1) the person must be a resident of Ontario, (2) the insurance plan must be issued in Ontario, and (3) all money must be payable to that office in Ontario. If these elements are not met, then common law choice-of-law rules will apply, and Ontario law may still apply. In *Kutziner v. Allstate Insurance Co.*, the deceased plaintiff resided in Moncton, New Brunswick before and at the time of the motor vehicle accident. The defendant company, however, issued the deceased’s

---

31 **BROWN**, supra note 11, at 142.
33 **BROWN**, supra note 11, at 143.
insurance coverage, which was located in Ontario. The Executrix of the plaintiff’s estate wished to claim death benefits under Ontario law that would not otherwise apply. The court concluded that Ontario law did not apply, since the elements of Section 123 were not met, and thus the death benefits were not reachable.

Recently in *Bray v. ING Insurance Co.*, the Plaintiff was injured on an all-terrain vehicle (“ATV”) in British Columbia, and claimed accident benefits from the defendant, an Ontario company. 35 ING Insurance (“ING”) asserted that the Ontario laws apply based on Section 123 of the Ontario Insurance Act, but because an ATV does not fall within the meaning of “automobile” in that Act, the Plaintiff shall not recover any accident benefits under Ontario laws. The Financial Services Commission of Ontario (“Commission”) concluded that the Ontario law did apply in this case, despite the accident occurring in British Columbia and the ATV was insured under British Columbia’s laws. ING’s argument succeeded, and the Plaintiff was not entitled to any accident benefits.

Under publicly funded no-fault insurance systems – such as Quebec’s no-fault insurance scheme – agreements have been made between governments to ensure non-citizens injured in their province are adequately compensated. For example, non-Quebec citizens would not be bound by the eradication of rights to sue for further damages under Quebec law. 36 For example, the Quebec legislature has stipulated:

> Where the victim of an accident that occurs in Québec is not resident in Québec, he is entitled to compensation under this title but only to the extent that he is not responsible for the accident, unless otherwise agreed between the Société and the competent authorities of the place of residence of the victim. 37

35 Bray v. ING Ins. Co., 2010 FSCO 10109 (Arbitration) (Fin. Serv. Comm’n On.).
36 BROWN, supra note 11 at 145.
Thus, according to the Quebec legislature, fault matters if you are not a Quebec resident. From the victim’s perspective, these statutory provisions and agreements seem quite arbitrary. Legislative powers are given to all provinces and territories, and these governments are able to use discretion and set laws that conflate a number of inter-jurisdictional issues. Many drivers are not aware that their rights to recovery can vary depending on where the accident takes place.

III. Methodology and Results
A. The No-Fault Decision: Was It The Answer?

Merely one decade after the automobile insurance reform, insurance scholars began to delve into the effects of no-fault insurance in many states and provinces across North America. Lawyers and economists began to analyze and comment on the moral hazard in states that adopted no-fault insurance schemes. Although research has been mainly based on information taken from U.S. states, it is applicable to the schemes adopted in Canada, since the no-fault systems – with the exception of Quebec and Manitoba – are all partial as opposed to pure. Scholars who have studied both the Canadian no-fault systems and the American no-fault systems have identified causal relationships between the automobile accident fatality rates and no-fault systems.38

In 1982, Elisabeth Landes published an important article regarding no-fault insurance and the social effects on society, which has been subject to considerable scrutiny by authors who have since studied.39 Essentially, Landes studied the consequences between voluntary and compulsory automobile no-fault insurance schemes, and the effects of different thresholds in compulsory no-fault systems, and famously argued that no-fault insurance increased accident death rates. She examined sixteen states that implemented no-fault insurance regimes between

38 See e.g., Devlin, notes 7 and 44.
1971 and 1975: New Jersey, Utah, Kansas, Colorado, Georgia, North Dakota, Nevada, New York, Connecticut, Minnesota, Massachusetts, Pennsylvania, Kentucky, Hawaii, Florida, and Michigan. Landes presents two theses: first, when compulsory insurance, covering even pain and suffering damages, serves as a substitute for liability in a no-fault insurance system, an increase in automobile accident fatality rates should not occur. Her second thesis states that if the mandatory no-fault insurance the higher the restriction threshold on liability in a no-fault insurance does not cover pain and suffering damages, an increase in accident fatality rates will occur. She hypothesizes that the higher the threshold on liability in a no-fault insurance system the more fatal accident rates will increase – up to fifteen percent. Since these fatality rates increase the amount of damages victims will potentially be able to recover, it increases the number of accidents because drivers reduce their level of driving care. In other words, drivers will “balance the costs” of how much they will be liable for paying in damages, and if this threshold is higher, then the driver would be personally responsible for less, should an accident occur. For example, New Jersey has a threshold of $200 per accident for which you are able to claim damages, where Minnesota’s threshold is $2,000. One would expect a higher level of driving care in New Jersey, and evidently lower accident fatality rates, as opposed to in Minnesota, according to Landes’s research.

Landes’s empirical research demonstrated that no-fault insurance has “produced both an economically and statistically significant increase in fatal accidents: a medical expense threshold of $500 implies about a four percent increase in fatal accident rates; a medical expense threshold

---

41 Id. at 50.
42 Id.
43 Id. at 56.
44 Id. at 58-9, Table 2.
of $1,500 implies an increase in fatal accident rates of more than ten percent.”

Thus, the more populated an area is, the more likely accidents are going to occur, and the tendency for lawsuits to arise increases since the threshold is higher. Landes concluded by stating that those states which adopted no-fault insurance regimes between 1971 and 1975, suffered an additional 1,009 fatal accidents, compared to 379 in the pre-no-fault era.

One of the earliest responses to Landes’s research was in 1983 by scholars Saul Levmore and Jeffrey O’Connell. They attacked Landes’s conclusion that no liability for third parties will increase accident fatality rates if mandatory first-party insurance does not cover payment for pain and sufferings. They dismissed the claim by stating that “the lower the level of no-fault benefits, the more claims for pain and suffering are preserved.” In practice, pain and suffering is still compensated under no-fault insurance laws because these claims are usually related to no-fault benefits. Next, they attacked Landes’s second conclusion, which is that some drivers “will be less careful and more accident prone if they are not charged with all damage done.” They disagree with the way Landes tested this theory, which is by using the liability rules and connecting state medical expenses tort thresholds to fatal accident rates. They argued that fatal accident tort suits fall under all no-fault statutes because all stated thresholds are of course exceeded in these fatal accident cases. By focusing only on accident fatality rates, it does not take into account other identifiable factors such as population density.

---

45 Id. at 62.
46 Id.
47 Id. at 65.
49 Ibid at 649.
50 Ibid.
51 Ibid at 650.
52 Ibid at 651.
53 Ibid.
effects law has on human behavior, there needs to be a more “logically chosen connector” to the accident fatality rates and such a study must be “awesomely complicated” to come to any certain conclusions about no-fault insurance and safe driving.\textsuperscript{54}

Stephen Sugarman has also been a significant contributor to the no-fault insurance literature over the years. He is generally known to be an advocate for abolishing the tort system all together.\textsuperscript{55} In his response to Landes’s research findings, he revealed gaping holes in almost every aspect of her methodology. He stated that her study of fatality rates was unnecessary – albeit important – and should have examined accident data, instead. He asked an important question that Landes did not address: “[d]o people drive worse in no-fault states?”\textsuperscript{56} Ultimately, Sugarman decided that Landes’s research is incorrect because “by cutting auto costs, no fault leads to not worse, but simply to more driving, and for that reason more accidents.”\textsuperscript{57}

Shortly after Sugarman’s response, Paul Zador and Adrian Lund also responded to Landes’s work.\textsuperscript{58} They first attacked Landes’s use of the “level of driving care” theory, and the assumption that drivers are rational.\textsuperscript{59} Rational in this context means that drivers’ behavior can be inferred if they are taking optimal care while driving. For example, this theory says that the probability of causing an accident decreases when drivers minimize the cost of care and the excepted costs of motor vehicle accidents, combined.\textsuperscript{60} Zador and Lund hypothesized that even if accident losses did increase following the adoption of no-fault insurance, it does not mean these

\textsuperscript{54} \textit{Ibid} at 652-3.
\textsuperscript{56} \textit{Id.} at 589.
\textsuperscript{57} \textit{Id.} However, this conclusion is directly related to the question posed in the introduction of this Article. Because the system of no-fault insurance increases the amount of driving due to lowering the costs, as Sugarman admits, the system is eloquently set up to: create more accidents, compensate more victims, and prove that is an “adequate system.” This analysis will be fully developed in Part IV.
\textsuperscript{59} \textit{Id.} at 227.
\textsuperscript{60} \textit{Id.} at 228.
laws “necessarily reduce responsibility for care, and no liability rule can perfectly assign a socially optimal amount of responsibility to those involved in [motor vehicle] crashes.”

After obtaining data information from the Federal Highway Administration, Zador and Lund completed “multiple regressions . . . to determine the extent to which variation in the frequency of fatal crashes in the fifty states and the District of Columbia during 1967-1980 could be attributed to the enactment of no-fault.” After examining the same years as Landes in her study, it was concluded that there was no support for the claim that restricting liability for pain and suffering damages increased fatal accident rates, as Landes argued. Additionally, Lund and Zador actually found states that had less stringent no-fault thresholds actually “enjoyed a slight decrease in fatal accident rates.” These results, however, were not statistically significant enough to draw general a conclusion that no-fault insurance actually decreases fatal accident rates.

David Cummin, Richard Phillips, and Mary Weiss attempted to “resolve” the conflicting evidence between no-fault automobile insurance and accident fatality rates. Their first model analyzed the effects of tort restrictions on accident rates, by taking into account negligence probabilities and the “care level” of drivers. Their model assumed “accidents are bilateral,” which means two cars and two drivers are involved, both of which bear injuries. The formula they employed consists of two variables: (1) pain and suffering damages, and (2) economic damages such as loss of income and medical bills. Essentially, they concluded that the “effect

---

61 Id. at 229.
62 Id. at 230.
63 Id. at 234.
64 Id.
65 David Cummins et al., The Incentive Effects of No-Fault Automobile Insurance, 44 JOURNAL OF LAW AND ECONOMICS, 427 (2001).
66 Id. at 430.
67 Id.
of tort restrictions on incentives is ambiguous."\textsuperscript{68} However, they noted, "if negligence assignment and premium rates are relatively responsive to care levels then no-fault is likely to lead to an increase in accidents."\textsuperscript{69} Their findings are suggestive of insurance coverage with vigorous experience-rated plans; similar to the system is employed in Ontario – which is now home to the highest premium rates in the nation. Ontario will be studied in depth later on in this Article.\textsuperscript{70}

In the second part of their paper, Cumin, Philips, and Weiss directly examined fatality rates and no-fault insurance in fourteen states in four different years, per ten million vehicle miles. The independent variable in their model is no fault insurance, which is represented by variables of two different thresholds a partial no-fault regime may have: a monetary threshold, or a verbal threshold. The dependent variable, of course, is the number of accident fatality rates. They also examined important factors such as drunk driving and excessive speeding, which have a positive correlation with motor vehicle accident fatality rates. Overall, they concluded that their results are consistent with Landes’s research, and that there is a positive relationship between no-fault and fatal automobile accident rates, even though it is not extremely significant.\textsuperscript{71}

\textbf{B. Main Case Studies: How Has No-Fault Fared in Certain Provinces?  
\hspace{1em}i. Ontario}

Rose Devlin has researched Ontario’s no-fault insurance system at length.\textsuperscript{72} The province introduced its no-fault automobile system in June of 1990. Devlin references three important government reports that influenced Ontario’s automobile insurance system amendments,

\begin{flushleft}
\textsuperscript{68} Id. at 435.  
\textsuperscript{69} Id.  
\textsuperscript{70} See supra Part III.B.i.  
\textsuperscript{71} Id. at 453-4.  
\textsuperscript{72} supra notes 7 and 44.
\end{flushleft}
commencing in the mid-1980s. The common theme that arose out of these reports was that the price of the insurance for consumers had skyrocketed, and there was a chance that the no-fault insurance system would be able to lower costs for drivers and make accident compensation more accessible.

The Ontario government implemented “regulation rates” in their privately funded no-fault insurance system. Rate regulation refers to the prices of insurance plans that may be charged to customers, which are fixed by governments and regulatory bodies. Rate regulation benefits classes of drivers differently: “the higher risk drivers will benefit more from the regulation than lower-risk drivers.” That is, firms would try and insure less high-risk drivers because the likelihood of these drivers getting into accidents was higher, and they would evidently cost the firm more money under this system. Consequentially, this resulted in firms attempting to reduce the number of high-risk drivers they insured.

In her empirical analysis, Devlin’s hypothesis is analogous to those studies preceding her: “the more pervasive the no-fault system the greater will be its effects.” She notes that “mixed evidence” has come out of the question of whether or not driving care is reduced in no-fault systems versus liability systems. She draws attention to one benefit of Ontario’s no-fault system, which is the decrease in administrative costs. For example, victims are able to receive accident benefit compensation relatively easily by submitting an accident benefit package to their

---

74 Devlin, supra note 7, at 300.
75 Id. at 301.
76 See supra note 22. This is a real-life example of the effects price regulation has on drivers, since people, like my significant other, are being “dropped” by insurance companies, essentially making it hard for them to obtain auto insurance in the market elsewhere.
77 Devlin, supra note 7, at 301.
78 Id. at 303.
insurance company – sometimes with the help of a lawyer – without having to incur major legal fees.

Importantly, Devlin has recognized the significance of Ontario’s verbal threshold with regards to pain and suffering damages. A verbal threshold describes the type of impairment, disfigurement, or injury the victim must prove to have, and it usually must be severe. This is different from an arbitrary monetary threshold that the rest of provinces and territories employ in Canada.

She has found that the savings of Ontario’s no-fault system was claimed to have may be reduced because there are potential costs with interpreting verbal thresholds. The verbal threshold can be more costly because it requires lawyers to obtain evidence such as medical records, witness testimony, and so forth in order to meet this threshold in court. This is one disadvantage to the verbal threshold that Ontario has enacted; however, it is considered a more restrictive standard to meet, which in turn can ensure that a victim is not exaggerating the severity of their injuries. In conclusion, the privatized partial no-fault insurance system that is employed in Ontario has had little effect on the motor vehicle accident fatality rates, and it employs a strict verbal threshold for pain and suffering damages.

ii. Quebec

As mentioned earlier in this Article, Quebec was the first province in Canada to adopt a pure no-fault system. Since the enactment of Quebec’s pure no-fault insurance regime in March of 1978, studies have reviewed its effects on social welfare, with Michael Gaudry’s being the

---

79 See supra note 31.
80 Id. at 305.
81 Cummins et al. supra note 60, at 436.
first. Gaudry compiled evidence from claims against insurance companies and police reports. He found that from 1977 to 1978, insurance claims under the new scheme increased twenty percent in only four months. An even stronger reaction occurred in the same year with respect to accident victims. Gaudry found that the total number of accidents increased by twenty seven percent, and the number of victims by approximately thirty percent. Most importantly, he found a seven percent increase in accident fatalities overall.

Gaudry noted that the fatality rates were most significant since these rates cannot be hidden or forged. He concluded that these rates increased because of “higher road use and qualitative changes associated with the Act, but all other measure of road safety had remained unchanged.” Thus, the results did not occur due to a mere increase in the number of drivers on the road; they occurred because of important changes in the law. The three main consequences that occurred with the change in the law were as follows: (1) it forced fourteen to eighteen percent of uninsured vehicles to acquire vehicle insurance, (2) it removed the notion of fault for bodily damages and (3) a flat-premium insurance charge was required for bodily damages independently from the driver’s safety record. Gaudry also attributed almost a ten percent increase in fatal accident rates in Quebec as a “direct result of the new regime.” He argued that these results affect the safety of citizens on the roads, and in turn increases moral hazard in the society. Thus, the costs of this pure no-fault system clearly outweigh the benefits.

---
83 Id. at 3.
84 Id. at 4.
85 Id. at 18.
86 Id. at 23.
87 Devlin, supra note 7 at 304.
Don Dewees and Michael Trebilcock took a very different approach to the effects of first-party system on society after it was introduced in Quebec. They made a very general claim that “fatality rates, measured by distance driving, have consistently declined over time in the U.S. and other industrialized nations.” Gaudry’s results were simply ignored by the Dewees and Trebilcock in their report. They did not examine in detail of how they reached this conclusion, or explain where they believe Gaudry went wrong in his analysis. They focused mainly on the “comparative advantage” no-fault schemes had over the tort system, with respect to administrative costs and compensation recovery time. In their findings, they reported the percentage of victims compensated in one month in Quebec: in less than one month, thirty two percent of victims are compensated in a no-fault system, versus only five percent of victims in the tort system. These numbers get increasingly higher, with ninety six percent of victims being compensated less than six months in a no-fault system, but only thirty five percent of victims are compensated in less than six months under the tort system. In this respect, the benefits of this system are clear. According to Dewees and Trebilcock, the administrative and compensation benefits of Quebec’s pure no-fault insurance system are unequivocal because accident fatality rates are steadily decreasing across industrialized nations.

C. Stop and Take Notice: New Zealand’s Tort Reform Experience

New Zealand has undergone considerable tort reform since the beginning of the twentieth century. Since it is a smaller and more remote island country, their tort laws have not garnered much attention from North American countries. Although New Zealand has a much smaller population and a different political structure than Canada and the United States, their no-fault

---

89 *Id.* at 74.
90 *Id.* at 73, see Table 3.
91 *Id.*
insurance scheme should be taken into account, as compensation is one of the goals in all three nations’ no-fault systems. Part.III.C is going to explore the insurance system New Zealand now employs, and provide evidence of the effect of this system on the society.

In the early twentieth century, New Zealand commenced a tort reform in the realm of worker’s compensation: for industrial accidents, tort law was replaced with a domestic no-fault system. The tort system in the rest of the country – including automobile accidents – remained the same. A commission was created in order to evaluate the effects of this national no-fault system, which released a report known as the Woodhouse Report. The findings of the Woodhouse Report were influential. It argued that only a small number of victims received any compensation at all through the tort system, and those who did, did not receive an adequate amount in light of their injuries. The Woodhouse Report also argued that the litigation process is too long and victims did not receive any significant financial assistance, which made the procedure extremely difficult with the pressure of pending case results. The Report said, due to the many burdens of this system, it is time for it to be replaced with a plan more receptive to “contemporary social needs.” This is exactly what the National Party government did in 1974.

New Zealand currently employs a publicly funded government agency, called the Accident Compensation Corporation (“ACC”), which operates the no-fault system for all automobile accidents and personal injuries. The benefits are extremely generous: wage replacement at eighty percent of weekly earnings starting one week after the injury, hospital and

---

94 Id. at 194.
95 While there is some merit to this argument, it is common practice today for lawyers to pay for legal costs and expenses – if their client is indigent – as permitted by the Model Rules of Professional Conduct 1.8(e)(2). Further, many personal injury attorneys work on a contingency basis, and do not ask for payment (besides a retainer, usually) until the client receives their damage award.
96 Matheson *supra* note 87 at 196.
medical costs, transportation and rehabilitation costs, lump-sum payments for permanent disabilities, and benefits for surviving spouses if death occurs.\textsuperscript{97} Until 1990, the ACC would also cover “emotional losses,” such as pain and suffering. However, these claims have since been barred under the system. If victims are seeking recovery on emotional damages, they may bring a common law claim, which the ACC has historically rejected.\textsuperscript{98}

This system has been popular amongst the New Zealand population for almost three decades now, according to Peter Schuck. In his study, however, he noted that eighty percent of deaths and serious injuries are still caused by motor vehicle accidents.\textsuperscript{99} To reduce the number of these events, he explained that New Zealand has enacted the New Zealand Injury Prevention Strategy (“NZIPS”) in 2005. This plan was created to address these fatality and injury rates. However, it was also noted that the upkeep for this system costs the government 190 million dollars more per year than the previous tort system.\textsuperscript{100}

Other authors, such as Ian McEwin, have also found a positive association between the no-fault auto insurance scheme and fatality accident rates in New Zealand.\textsuperscript{101} As a response to Landes’s findings, McEwin attempts to prove the incentive effects of no-fault insurance in New Zealand and Australia – which has a scheme analogous to the one in New Zealand. McEwin’s statistical model took into account two variables, one which demonstrated the introduction of no-fault and the other variable was used to plug in different factors that could potentially affect fatality rates, such as driving conditions. His conclusions suggest that governments barring the right to sue for pain and suffering losses is a significant factor in promoting road safety. “The ability to obtain noneconomic loss compensation by meeting court care standards appears to be

\textsuperscript{97} Schuck \textit{supra} note 86 at 190.
\textsuperscript{98} \textit{Id.} at 197.
\textsuperscript{99} \textit{Id.} at 201.
\textsuperscript{100} \textit{Id.} at 200.
an important factor in encouraging driver care.” Minor restrictions on damages, however, do not affect the number of fatality accidents as McEwin reported.

IV. Recommendation: A Contemporary Theoretical Approach to No-Fault Insurance in Canada
A. Analysis

The research surrounding no-fault automobile insurance regimes and the impact on fatality rates is conflicting. When authors use different theoretical models based on many assumptions, it is probable that they will come to different results. This analysis is going to take into account fatality rates in Canada in 2011 – the most recent study – along with other legislative changes that occurred in the nation since the enactment of no-fault regimes in the early 1990s. Table 1 illustrates fatalities per 100,000 populations, per billion kilometres, and per 100,000 licensed drivers, with data taken from Transport Canada. This table will be referenced continuously throughout my analysis, as it is pertinent to my conclusion as to what type of

<table>
<thead>
<tr>
<th>Table 1</th>
<th>2011 Casualty Accident Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Fatalsities per 100,000 Population</td>
</tr>
<tr>
<td>Canada</td>
<td>5.8</td>
</tr>
<tr>
<td>Newfoundland</td>
<td>5.5</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>12.4</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>6.7</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>8.3</td>
</tr>
<tr>
<td>Quebec</td>
<td>6.1</td>
</tr>
<tr>
<td>Ontario</td>
<td>3.5</td>
</tr>
<tr>
<td>Manitoba</td>
<td>8.8</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>14.2</td>
</tr>
<tr>
<td>Alberta</td>
<td>8.3</td>
</tr>
<tr>
<td>British Columbia</td>
<td>6.4</td>
</tr>
<tr>
<td>Yukon</td>
<td>25.4</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>0.0</td>
</tr>
</tbody>
</table>

---

102 Id. at 23-4.
104 STATISTICS CANADA, ANNUAL DEMOGRAPHIC ESTIMATES: CANADA, PROVINCES AND TERRITORIES (2012), Catalogue No. 91-215-X
105 STATISTICS CANADA, CANADIAN VEHICLE SURVEY, Catalogue No. 53-223-XIE
automobile insurance compensation scheme should be implemented nation-wide.

Transport Canada’s study produced significant results. In 2011, the number of automobile fatality accidents decreased approximately ten percent from 2010, or 2,237 to 2,006. These results are overall positive for the country. No-fault insurance is not the only factor that will be considered for the effects on automobile fatality rates: impaired driving, the use of seatbelts while in motor vehicles, and distracted driving. The average of fatalities in Canada will be considered as a “baseline” when comparing the rates in certain provinces, since every province has a different variation of the no-fault insurance system.

Landes’s second theory is potentially relevant to the statistics in Table 1. As explained, she strived to prove that when governments put greater restrictions on damage recovery, the frequency of accidents increased since drivers reduced their level of care. To understand this theory, medical damages and pain and suffering damages will be analyzed. This is important because provinces and territories are able to stipulate the threshold of these damages per person, per accident. Particularly, Landes’s theory can be applied to the statistics of three certain provinces: Prince Edward Island, Saskatchewan, and New Brunswick.106

Prince Edward Island, New Brunswick, and Saskatchewan have relatively high fatality rates compared to the national average, and they all have high restrictions per person when involved in an automobile accident. Prince Edward Island grants each accident victim $25,000

106 Although Yukon and Nunavut have the highest accident fatality rates in the nation, these territories will not be considered in my analysis. There are very few roads in these territories, because they are mainly covered in ice and snow through the year. Citizens customarily travel by dog sled or skidoo. It would not be proper for me to take into account their fatality rates when analyzing these legal theories in connection with the no-fault regimes in Canada. Interestingly to note, however, these territories do not have a cap on the amount of pain and sufferings damages that may be awarded. See generally TRAVEL IN THE NORTHWEST TERRITORIES AND NUNAVUT, http://www.aadnc-aandc.gc.ca/eng/1303141328180/1303141490064 (last visited Nov. 12, 2008).
for medical expenses over four years, and $2,500 for pain and suffering. New Brunswick awards accident victims $50,000 over four years, and $7,500 for pain and suffering. Saskatchewan awards every person per accident up to approximately $6 million dollars in medical expenses if the no-fault insurance plan is chosen, or $25,000 for the tort insurance option. They also do not have a threshold for pain and suffering damages. These rates are considerably high when taking into account Ontario’s compensation thresholds; the province with the lowest fatality rates in the country. Ontario’s no-fault insurance plan grants $50,000 to one person over the course of ten years, and they have a very strict verbal threshold for pain and suffering damages that is hard to meet in order to obtain damages.

These results not only reinforce Landes’s second theory, but Cumin, Philips, and Weiss’s findings as well. The provinces that have higher and less restrictive thresholds on damages are reporting higher automobile accident fatality rates, compared to the province of Ontario, which has very strict and lower thresholds and is reporting the lowest fatality rates in the nation. This is even more striking when you take into consideration the population sizes of each province. Ontario has roughly 13 million people, while Prince Edward Island, New Brunswick, and Saskatchewan have 146,000, 753,000, and 1.25 million persons, respectively.⁠¹⁰⁷ There are six times the number of people and passengers on the roads in Ontario than those three provinces collectively, with a higher chance of accidents per day. This data also support McEwin’s and Lund and Zador’s findings, which articulated that smaller restrictions on damage awards do not affect fatality rates. Ontario is a province that employs a lower restriction on medical damages, and a very difficult threshold to meet for pain and suffering damages, and has the lowest fatality rates in the nation.

⁠¹⁰⁷ Population by year, by province and territory (number), Statistics Canada, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm
It is also important to note that the previously mentioned provinces of Ontario, Prince Edward Island, and New Brunswick employ partial no-fault systems, which are all privately funded. Based on this factor, I am interested in taking Landes’s second theory one-step further, in connection with drivers and their level of care. Fundamentally, I would like to propose that the pure no-fault regimes are experiencing higher accident fatality rates compared to the national average because these insurance plans are *publicly funded*. This is a behavioral economic theory, as opposed to the rational economic theory used in Zador and Lund’s research. A behavioral economic theory argues that after an economic scheme is in place, individuals make decisions based on the risks and the cost-benefits of each decision.\(^{108}\) Quebec and Manitoba are the two pure no-fault systems in the country. Quebec has no restrictions per person involved in an accident. Manitoba also has no restrictions on the amount of economic damages per person per accident. Can this potentially affect the level of care drivers will take when on the roads? It is possible that these publicly funded, pure no-fault systems give drivers a “false sense of security.”

Up front, drivers are paying for their coverage plans through the government. When victims are in a motor vehicle collision and they are reimbursed for their losses, they may not be able to fully comprehend that the money is coming out of the victims’ pocket. Damage awards are funneled through other public means, such as tax dollars. Since the money is “indirectly” coming from the drivers, they do not seem as affected by money they are actually losing. They may have comfort knowing that their system is publicly funded, and that they are compensated quite quickly. In the worst-case scenario, they will be reimbursed in a short amount of time, and can essentially “forget about” the accident that has just happened, especially since fault is not calculated in the amount of awards. Hypothetically speaking, a driver in Manitoba is driving along city streets

\(^{108}\) *Advances in Behavioral Economics*, 3 (Colin F. Camerer et al. eds., 2011).
when she is distracted by a text message she has just received, and hits a stop sign. She suffers whiplash, post-traumatic stress disorder, and back pain, and there is damage to the front end of her vehicle. Her doctor has recommended for her to stay off work for two to four weeks. This driver would be reimbursed quickly and efficiently through her coverage plan, despite the fact that the accident was unilateral and her fault. Further, her insurance premiums on her vehicle would not increase; she would simply get a driver’s license record fee.

Citizens who reside in privately funded, partial no-fault provinces experience the cost of their accidents on a more direct basis. When citizens are involved in an accident, the charges to his or hers driving record is recorded immediately, which affects their insurance premium immediately the next year. This is paid out-of-pocket to their private insurance company on a monthly basis, every year.

There are many factors that affect motor vehicle fatality rates in a country. One of the most important factors is the wearing of seatbelts while riding in a motor vehicle. In Canada, seatbelt laws are left up to the discretion of provincial legislation. Many provinces and territories introduced seatbelt laws in the late 1970s, but they were not vigorously enforced until about the 1980s. For example, all drivers in Ontario are mandated to wear their seatbelts, along with ensuring all children less than sixteen years of age are secured in a seat wearing a seatbelt, and all adults over the age of sixteen must also wear seatbelts. Almost all of the provinces and territories require every passenger in a motor vehicle to wear a seatbelt today.
These laws were enacted in Canada at roughly the same time no-fault insurance was introduced in some of the provinces. According to Transport Canada, for every one percent of passengers that wear their seatbelts properly, one in five lives are saved in motor vehicle accidents. This is significant rate and an excellent strategy for lowering fatality rates from accidents. However, it can be argued that wearing your seatbelt does not affect a driver’s level of care while driving. Perhaps drivers and passengers alike strictly adhere to seatbelts laws for deterrence reasons. For example, they do not want to get demerit points taken off their license, or get hit with a substantial fine if they are found not wearing seatbelts by law enforcement. All of these Highway Traffic Act infractions also affect one’s insurance.

Impaired driving is another important factor that impacts motor vehicle accident fatality rates. The Traffic Injury Research Foundation found that an estimated 7.5 million people in Canada know a family member or close friend that has been a victim of a drinking and driving incident they did not cause. In 2006, 907 Canadians were killed in automobile accidents that involved a drunk driver.\(^{114}\) Alcohol-impaired driving offences are all listed in the Criminal Code of Canada, which prohibits alcohol or drug impaired driving. If you are convicted with impaired driving, the consequences are severe, with the potential of serving life imprisonment.

With all of the new advancements in technology that has transpired in North America throughout the last two decades, distracted driving has become a serious problem in Canada and the United States. Almost every person today has a cell phone, with many people having “smart phones.”\(^{115}\) In response to this, certain provinces such as Ontario have implemented stringent texting and driving laws with severe penalties if a driver is seen driving and holding their cell phone.

---


\(^{115}\) \(\text{A “smartphone” is defined as “a cell phone that includes additional software functions” such as “e-mail or an internet browser.” Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/smartphone.}\)
cellphone.\textsuperscript{116} This is a relevant factor that affects accident fatality rates today, and it is especially important since previous literature on the effects of no-fault insurance does not discuss texting and driving laws. There are many states in the US that do not enforce texting and driving rules, such as Maine for example.

\textbf{B. Alternative}

Although automobile accident fatality rates have steadily decreased in Canada throughout the years, it is clear that these rates vary widely among the various provinces, with rates being higher in certain provinces over others. I am making a recommendation that is a conglomerate of the different aspects of no-fault insurance that I believe are beneficial to the social welfare of all Canadian citizens.

My recommendation for a no-fault insurance regime reform plan in Canada is three-fold. First, all provinces and territories have the no-fault aspect of the respective insurance systems to be optional, like the scheme enacted in Saskatchewan. In this province, all drivers have no-fault insurance coverage by default, unless they elect to take tort coverage and file a declaration form with the Saskatchewan Government Insurance agency.\textsuperscript{117} All provincial and territorial governments in Canada should re-integrate and re-emphasize the importance of the tort common law system. Second, the no-fault insurance scheme should be a partial no-fault scheme, with a right to sue pain and sufferings that has a verbal threshold – analogous to the threshold in Ontario. The medical expense threshold – per person, per accident – however, can be a monetary threshold and the same amount does not have to be stipulated in every province and territory; that may be left to each legislature. However, as my analysis has pointed out, these monetary thresholds should be stricter and more uniform across the country. Third, all no-fault insurance

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{116} Display Screens and Hand-Held Devices, O. Reg. 366/09 (Can.).
\end{enumerate}
\end{footnotesize}
regimes should be privately funded. Each of these reasons will be discussed in the next paragraph.

First, liability and negligence rules are the essence of the tort system. Today, with the amount of distractions drivers may have, and the number of vehicles on the road, a pure no-fault automobile insurance system seems unfathomable because of the moral hazard outlined in this Article. No-fault insurance systems in Canada should give citizens the ability to elect tort coverage and earn compensation through the common law system, based on the negligence theory. Although it may take longer for citizens to become reimbursed under the third-party liability system, it has the ability to promote fair, just, and equitable results for those victims of motor vehicle accidents. More important, it has the ability to emphasizes deterrence, rather than focusing on compensation. As a result, it encourages drivers to drive with the utmost care. By going through the court system, the amount of personal liability – essentially money – is greater than going through the no-fault system. Through a court judgment, the individuals at fault will essentially pay damages out of their own pocket rather than it being paid strictly by their insurance company. Therefore, all drivers will reevaluate the consequences from motor vehicle accidents, and deter them from driving carelessly.

Under this proposed system, an interesting dynamic may arise when a car accident occurs, and one of the drivers has elected tort coverage. In Saskatchewan, drivers with tort coverage have limited access to medical and personal injury compensation as compared to those with no-

118 Some may counter this recommendation and say that each province is different, both geographically and demographically, and that having the same scheme in all of the provinces would not be beneficial to all citizens, and to leave this up to the legislative grace of each provincial government. However, many of these recommendations are modeled after the scheme in Ontario, which has the lowest automobile accident rates in the country. This is even more influential knowing at Ontario has approximately 13 million people and inevitably the most cars on the road on any given day. An interesting fact is that the Greater Toronto Area (“GTA”) has the longest commute in North America, an astounding one hour and forty-five minutes each way. Therefore, it would be conceivable that smaller provinces such as Nova Scotia and Prince Edward Island would only benefit from this type of scheme, while also boosting their economy by opening up and creating more private insurance firms.

119 See supra text accompanying notes 2-6.
fault insurance. In this scenario, fault matters. If you are found to be not at-fault, you have the ability to sue for pain and suffering damages, but these drivers are required to pay for their own lawyer. It is not included in their insurance coverage. If the driver with tort coverage is found to be at fault, however, they are not entitled to obtain a lawyer and sue for pain and suffering damages. Further, it is not necessary for these specific drivers to obtain lawyers. They may agree to settlements with their insurance companies regarding medical expenses, income loss, other treatment expenses, and so forth.  

No-fault insurance does – of course – have benefits, which is why this element of the insurance scheme is included in my recommendation. Many proponents of no-fault insurance boast about the extremely fast turnaround rates of compensation and inexpensive administrative costs, as demonstrated through the case studies of Quebec and New Zealand. The higher amount of coverage that there is, there is a greater chance of saving costs on legal fees, court trial fees, medical expenses, and so on. This was a problem that no-fault insurance was aimed to fix. Of course, it does not take into account the incentive effects of driver care, which has the ability to create more accidents, and thus more costs.

Second, as analyzed above, pure no-fault has detrimental effects on our society. Both pure no-fault systems in Canada have higher fatality rates as compared to the national average. There is also something to be said for the fact that no states in the US have implemented a pure no-fault system. It is a very radical system that forces drivers to surrender their right to sue for pain and sufferings.

As iterated above, a negligent and distracted driver should be liable for the loss of enjoyment of life – or the loss of life – a victim will experience because of inconsiderate actions.

\[120\] This information was obtained during a conference call with Jocelyn Clement, the Claims and Salvage Manager at the Saskatchewan Government Insurance, Crown Corporation. Her e-mail is: jclement@sgi.sk.ca.

\[121\] See supra note 39.
To this point, it is important to note that the exaggeration of emotional pain and suffering is a problem in the common law tort system. To effectively combat this issue, an adoption of a verbal threshold is appropriate and has fared well in Ontario – which is the only province that employs this type of threshold. With the verbal threshold, it makes it difficult for victims to exaggerate their claim, as they will need to meet a strict standard. Claims would qualify only if they meet the severity of the threshold by providing convincing evidence. Verbal thresholds are also known to be stricter than monetary thresholds. This recommendation is also consistent with McEwin’s findings that the ability to sue for emotional sufferings encourages driver care. This is why the complete ban on pain and suffering damages in pure no-fault system does not seem equitable or fair in the no-fault insurance scheme in Canada.

At the most basic level, having the same partial no-fault system in all provinces and territories provides for uniformity within the country, eliminating inter-jurisdictional problems as outlined earlier. This aspect of my recommendation is modeled on New Zealand’s system, because its population appreciates a clear and uniform system in a country. Information is more easily accessible since it is the same no matter what region you live in, and drivers understand the consequences and procedures if they are unfortunately in an accident in different parts of the country.

Third, private insurance provides benefits to the society as a whole. First, from an economic perspective, it provides jobs and generates economic activity to a vast amount of people and communities. Although government agencies also employ a number of people, private insurance scheme encourages new company development and allows small businesses to prosper. With the effect of this market competition, it incentivizes firms to provide the best

---

122 See supra note 28.
123 Cummins et al., supra note 60 at 435-6.
possible insurance coverage for drivers, which ultimately benefits the consumers when they are shopping for new insurance plans. Further, citizens are more intimate with their plans and how much automobile insurance is costing them. Theoretically, the incentives for taking a high level of care are present when the drivers are behind the wheel. The disadvantage of private insurance is that of course, it becomes very expensive and almost difficult to find an insurance company when you have a history of accidents or vehicle infractions on your driving record.124

V. Conclusion

Ultimately, a proper analysis into the consideration of whether no-fault insurance contributes to an increase of fatality accident rates must consider multiple factors. Causation cannot be proven by a simple look at the increase or decrease of accident fatality rates since the implementation of no-fault insurance across Canada. Previous literature on no-fault insurance schemes has conflicting results: some believe there is definite correlation between the enactment of no-fault insurance and accident fatality rates, while others are skeptical. The fact is that accident fatality rates still vary considerably in different province across Canada. These rates can analyzed in connection with the type of no-fault insurance regime that is employed in that province or territory, since ultimately, all of the provinces and territories have enacted important legislation on matter that affects accident fatality rates: impaired driving law, seatbelt laws, and distracted driving laws. In order to mend the disparities of the current no-fault system in Canada, this Article proposes a policy recommendation that consists of a partial no-fault system in Canada, which is privately funded, with a reinforcement of the tort system (in the legal sphere) by granting consumers the option to elect tort coverage.

124 See supra notes 22 and 63.