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Insurance Regulation: Lessons from a Small Economy

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INSURANCE REGULATION: LESSONS FROM A SMALL ECONOMY*

Dr. Ronen Perry**

INTRODUCTION	189
I. THE REFORM.....	192
A. THE OFFICIAL STORY	192
B. THE UNTOLD STORY	195
II. INSURANCE COVERAGE.....	201
A. OVERVIEW	201
B. THE SCOPE OF COMPENSATION.....	202
1. <i>Economic Damages</i>	202
2. <i>Non-Economic Damages</i>	204
3. <i>The Exclusivity Provision</i>	207
4. <i>The Benefit to Insurance Companies</i>	209
C. COMPENSATION METHOD.....	209
1. <i>Interim Payments</i>	209
2. <i>Periodic Payments</i>	211
D. AMENDMENT NO. 8	215
III. THE PREMIUMS	219
IV. LESSONS FOR A FEDERAL SYSTEM	229
CONCLUSION	232

INTRODUCTION

IN March 2009, the faltering insurance behemoth AIG sparked national outrage when it announced a payment of \$165 million in executive bonuses after receiving more than \$170 billion in bailout money from the U.S. Treasury.¹ President Obama expressed his personal indignation in a public statement, concluding that this situation “underscores . . . the need for overall financial regulatory reform, so we don’t find ourselves in this position again, and for some form of resolution mechanism in dealing with troubled financial institutions, so we have greater

* Editor’s Note: The SMU Law Review staff typically checks cited material for both Bluebook form and substance. Parts of this Article rely on sources that are not available in English. Those sources could not be checked in the traditional law review sense but have been checked for Bluebook form. Wherever possible, English translations were obtained and checked. Any quotations from sources unavailable in English are the author’s translation.

** Professor of Law, University of Haifa. I am grateful to Mark Geistfeld and John Goldberg for inspiring me to write this paper and to Izhak Englard, Israel Gilead, Daniel More, and Ariel Porat for valuable comments on earlier drafts.

1. See, e.g., Edmund L. Andrews & Peter Baker, *A.I.G. Planning Huge Bonuses After \$170 Billion Bailout*, N.Y. TIMES, Mar. 15, 2009, at A1.

authority to protect the American taxpayer and our financial system in cases such as this.”² Is this merely an anecdote, a unique case that requires a tailored solution, or a symptom of a more fundamental deficiency?

The recent economic crisis showcased some of the main deficiencies of existing regulatory systems and rekindled the debate over the importance and scope of regulation in general and of financial services regulation in particular. Against this backdrop, insurance—one of the main pillars of the financial services sector—merits special attention because it remains the only financial industry in the United States that is not regulated on the federal level.³ In the landmark case of *United States v. South-Eastern Underwriters Ass’n*,⁴ the Supreme Court held that “[n]o commercial enterprise . . . which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause,”⁵ and that the insurance business was no exception.⁶ This opened the door to federal regulation of the insurance industry. Insurance companies were concerned by the prospect of rigorous federal regulation, and intensive lobbying began.⁷ The following year, Congress enacted the McCarran–Ferguson Act, whereby “the continued regulation . . . by the several States of the business of insurance is in the public interest, and . . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States.”⁸ Although many have encouraged Congress to repeal this Act, they have

2. *Obama’s Statement on A.I.G.*, N.Y. Times Blog: The Caucus, <http://thecaucus.blogs.nytimes.com/2009/03/16/obamas-statement-on-aig/> (Mar. 16, 2009, 13:45 EST).

3. *See, e.g.*, ROBERT E. LITAN, REGULATING INSURANCE AFTER THE CRISIS 9 (2009), available at http://www.brookings.edu/~mediafiles/rc/papers/2009/0304_insurance_litan/0304_insurance_litan.pdf (“The state system of insurance regulation contrasts with that of banks, which can choose their primary regulator (state or federal), mutual funds (federal), and securities and commodities brokers (primarily federal).”).

4. 322 U.S. 553 (1944).

5. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .”).

6. *South-Eastern Underwriters Ass’n*, 322 U.S. at 553. The Court overruled previous rulings to the contrary. *See, e.g.*, *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 510 (1913) (“[C]ontracts of insurance are not commerce at all, neither state nor interstate.”); *Hooper v. California*, 155 U.S. 648, 654-55 (1895) (“The business of insurance is not commerce.”); *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (sustaining a Virginia statute that regulated foreign insurance companies and holding that the statute did not violate the Commerce Clause because “issuing a policy of insurance is not a transaction of commerce”).

7. *See, e.g.*, Charles D. Weller, *The McCarran–Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 590-94 (discussing the insurance industry’s reaction to *South-Eastern Underwriters*); Note, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 DUKE L.J. 1340, 1341-42 (same). Unsurprisingly, state regulators also expressed vehement opposition to federal regulation. *See* Weller, *supra*, at 598 (noting that the National Association of Insurance Commissioners had an “indisputable imprint on the McCarran Act”).

8. 15 U.S.C. § 1011 (2006). The Act provides: (1) that the insurance industry shall be subject to state regulation and taxation; (2) that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede” state laws on these matters; and (3) that even the Sherman Act applies to the insurance market only insofar as there is no state antitrust regulation. *Id.* § 1012.

been unsuccessful so far.⁹

This Article unveils the inherent weakness of regulation on the state level and advocates cautious federal intervention. But unlike previous studies, this Article uses an interest-group theory with a strong comparative bent. An interest-group theory is premised on the idea that “regulation provides a mechanism through which organized interest groups can influence the distribution of economic rents in an industry.”¹⁰ Presumably, insurance regulation is no different. In addition, the state system of insurance regulation in the United States makes the use of foreign experience valuable because, in the absence of federal intervention, individual states operate much like small foreign economies. The vast foreign experience, despite its great value to American scholars and policymakers, is usually inaccessible due to language barriers. This Article aims to lift at least one barrier and to enrich scholarly and political discourse with timely and pertinent insights.

The purposes of regulation may vary, but all forms of regulation restrain the freedom or power of a certain group in order to secure an overriding societal benefit. The subversive yet commonsense view expressed herein is that the attempt to regulate markets, insurance markets in particular, may create an environment in which regulated groups are empowered rather than restrained. In trying to regulate insurance markets, the regulator reduces insurers’ incentive to compete and induces them to cooperate, vis-à-vis the regulator itself, to the detriment of consumers. This argument can be substantiated using evidence from a foreign economy, assuming that the lessons taught by others’ experience are applicable *mutatis mutandis* to American markets.

More than three decades ago, the Israeli legislature adopted a revolutionary road accident compensation scheme with an explicit social motivation. The new statutory regime combined drivers’ absolute liability for all personal injuries caused in road accidents with mandatory liability insurance.¹¹ The advocates of the reform hoped to attain an efficient and

9. See, e.g., Jay Angoff, *Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry*, 5 YALE J. ON REG. 397, 402-06 (1988) (discussing the effect of the McCarran-Ferguson Act on insurance premiums); Eddie Correia, *Antitrust Policy After the Reagan Administration*, 76 GEO. L.J. 329, 332 (1987) (“[O]ne current controversy in Congress is whether to repeal the McCarran-Ferguson antitrust exemption for the insurance industry.”); Charles R. McGuire, *Regulation of the Insurance Industry after Hartford Fire Insurance v. California: The McCarran-Ferguson Act and Antitrust Policies*, 25 LOY. U. CHI. L.J. 303, 305 (1994) (discussing efforts to repeal the McCarran-Ferguson Act). The Senate Judiciary Committee recently held a hearing on the subject. *The McCarran-Ferguson Act and Antitrust Immunity: Good for Consumers?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 25 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:35166.pdf. Yet the odds of reform are unclear at best.

10. J. David Cummins, *Property-Liability Insurance Price Deregulation: The Last Bastion?*, in AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, *DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY* 1, 7 (J. David Cummins ed., 2002).

11. See Izhak England, *Traffic Accident Victim Compensation in Israel: A Decade of Experience with No-Fault*, in *COMPENSATION FOR PERSONAL INJURIES IN SWEDEN AND*

comprehensive compensatory mechanism by resorting to the private insurance market, subject to rigorous legislative and administrative regulation. The legislature not only compelled drivers to purchase insurance compatible with their potential statutory liability, but also collaborated with the executive branch in determining the particulars of the scheme, including the extent of coverage and the premium rates. Despite its sincere intentions, however, the government barely controlled the substance of the new mechanism. Before and after the initial statutory reform, insurance companies established a unified front and aggressively negotiated the "terms" of the scheme with government and parliamentary officials. They have continued to do so quite successfully for decades.

Part I presents the official social justification for the statutory reform. It then shows that the insurance companies' greatest achievement is the government's relinquishment of its original plan, which was supported by economic and social considerations and recommended by an official commission to provide compensation for road accident victims through a national insurance system. This, however, was only their first political achievement. Part II shows that throughout the "regulation era," insurance companies impelled the legislature to restrict and gradually reduce their financial risk. For instance, damages for economic and non-economic losses under the statutory regime were capped, and the caps were subsequently lowered, while victims were deprived of their traditional rights of action in torts. Part III shows that during the same period, insurance companies exerted considerable pressure on the government through their representative union to steadily increase premium rates without a true economic justification. Part IV extracts valuable lessons for American scholars and policymakers from the Israeli experience.

I. THE REFORM

A. THE OFFICIAL STORY

On September 25, 1976, the Israeli Road Accident Victims Compensation Act (RAVCA or the Act) came into force.¹² The official motive for its enactment was social.¹³ According to the traditional view, the Act was meant to guarantee a prompt and efficacious remedy for all victims of

OTHER COUNTRIES 154, 157 (Carl Oldertz & Eva Tidefet eds., 1988) [hereinafter Englard, *A Decade of Experience*].

12. Road Accident Victims Compensation Act, 1975, S.H. [Sefer HaHukim] 234.

13. See, e.g., CLA 9121/00 Levi v. Menorah Ins. Co. [2003] IsrSC 57(5) 337, 348; CA 2856/00 Shkoy v. Hadar Ins. Co. [2002] IsrSC 56(2) 518, 520; CA 2199/99 Estate of Oded Lazar v. Port & Ry. Auth. [2001] IsrSC 56(1) 938, 958 (Strasberg-Cohen J., concurring); CLA 4231/97 Tzur Shamir Ins. Co. v. Naé [1999] IsrSC 53(2) 193, 200; CLA 2853/96 Karnit v. Perach [1999] IsrSC 53(1) 680, 690-91; CA 91/82 Goldman v. HaSne Ins. Co. [1984] IsrSC 38(3) 505, 517-18; ELIEZER RIVLIN, ROAD ACCIDENTS: PROCEDURE AND COMPUTATION OF DAMAGES 4 (3rd ed. 2000) ("The Act . . . reflects the victory of the social perception, aiming to translate society's moral duty to care for road accident victims . . . into a proper legal regime."); Daniel More, *The Deterrence Factor in the Battle Against Road Accidents*, in LOWENBERG FESTSCHRIFT 257, 287 (1988) ("[T]he common view is that this is a social Act, intended to provide compensation to any road accident victim.").

road accidents. During the discussion that preceded the second and third readings of the Bill, several Knesset members explained that before the Act, many road accident victims were left without compensation. The main goal of the Act was to change this reality, and guarantee proper compensation to *all* victims.¹⁴ In one of the first cases wherein the Supreme Court was required to interpret the provisions of the Act, Justice Barak opined that “the clear purpose of the Act is to impose liability—and a duty to insure against such liability—for any personal injury caused by the use of motor vehicles.”¹⁵ Since then, the idea of “compensation to any victim” has dominated the legal and extra-legal discourse about compensation for road accident victims.¹⁶ Another purpose, also derived from the supreme social goal, was to expedite the process whereby a victim received compensation. The Act was intended to provide a prompt remedy by curtailing the wearisome process characteristic of fault-based liability regimes.¹⁷ Put differently, the goal of RAVCA was to guarantee proper—and prompt—compensation to any victim.

The legislature sought to achieve this goal through a threefold reform. First, RAVCA imposes absolute liability on any person using a motor vehicle for personal injuries caused to others “in road accidents in which the vehicle is involved.”¹⁸ Absolute liability is more extensive than strict liability because it is not only independent of the defendant’s fault or lack thereof, but also unaffected by the victim’s contributory negligence.¹⁹ The abolition of fault theoretically guarantees compensation to any victim of a road accident and expedites compensation by reducing the number and complexity of legal disputes.

Second, RAVCA amended the Motor Vehicle Insurance Ordinance.²⁰ Prior to 1976, the Ordinance provided that a person would not use or

14. DK [Divrei HaKnesset] (1975) 3955, 3956 (statement of the chair of the Constitution, Law, and Justice Committee, Zerach Warhaftig); *id.* at 3959 (statement of the Minister of Justice, Chaim Zadok); DK (1973) 4007 (statement of MK Chaim Zadok); *id.* at 4015 (statement of MK Moshe Nissim); IZHAK ENGLAND, ROAD ACCIDENT VICTIM COMPENSATION 4 (2nd ed. 1990) [hereinafter ENGLAND, ROAD ACCIDENT VICTIM COMPENSATION]; Izhak England, *The Road Accident Victims Compensation Bill*, 5 HEB. U. L.J. 431, 433 (1974) [hereinafter England, *The Bill*].

15. CA 133/79 Buchman v. Alnassara [1980] IsrSC 35(2) 64, 67.

16. See, e.g., CLA 3339/00 Eliahu Ins. Co. v. Dahan [2002] IsrSC 57(1) 503, 510-11; CA 483/84 Karnit v. Avraham [1987] IsrSC 41(4) 754, 761; REPORT OF THE COMMITTEE ON THE IMPLEMENTATION OF THE ROAD ACCIDENT VICTIMS COMPENSATION ACT 7, 7 (1991) [hereinafter IMPLEMENTATION COMMITTEE REPORT]; Anat Reitblatt, *Private Insurance of National Insurance: The Insurance Companies' Impact*, 35 INS. ISR. 26 (1977); Galia Shilo, *A Social Act Cannot Prevail Under Competition*, 83 INS. BROKER 6, 6 (1999).

17. See, e.g., Karnit, IsrSC 41(4) at 761; DK (1975) 3954, 3962 (statement of MK Zerach Warhaftig); DK (1973) 4007 (statement of MK Chaim Zadok); RIVLIN, *supra* note 13, at 3, 36; Reitblatt, *supra* note 16, at 26; Katya Schwartzman, *The Right of Reimbursement Under the Road Accident Victims Compensation Act*, 212 INS. ISR. 35, 36 (1994).

18. England, *A Decade of Experience*, *supra* note 11, at 157.

19. See *id.* at 158. The Act provides, however, that a person is not entitled to compensation if that person intentionally caused the accident. Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 7(1).

20. RAVCA §§ 18-19; Motor Vehicle Insurance Ordinance [New Version], 1970, N.H. [Nosah Hadash] 320.

allow another to use a motor vehicle without having an insurance policy that covered the user's liability for death or injury caused to third parties by the use of the vehicle.²¹ RAVCA made two significant changes to this provision. First, it added—probably for the sake of clarity—that an insurance policy under the Ordinance must cover any liability under RAVCA itself.²² More importantly, it added that a policy under the Ordinance must insure the vehicle's user against any personal injury he or she might incur while using the vehicle (first-party insurance).²³ Expanding mandatory insurance guarantees that a road accident victim will be able to recover for his or her losses and will not be left with only a forlorn hope of recovery due to the defendant's insolvency. This could also expedite recovery because insurance companies are not expected to delay payments like an average defendant.

Third, RAVCA established the Road Accident Victims Compensation Fund, commonly known as "Karnit."²⁴ Karnit is a government corporation²⁵ that primarily compensates road accident victims who are entitled to compensation under the Act but cannot recover from an insurance company because the user of the motor vehicle involved in the accident (1) is unknown (as in a hit-and-run accident), (2) does not have liability insurance, or (3) is covered by an insolvent insurer.²⁶ Put differently, Karnit serves a secondary or complementary role in the compensation scheme.

The abolition of fault, the expansion of mandatory insurance, and the establishment of Karnit were intended to guarantee proper and prompt compensation to all road accident victims. Moreover, the costs of the scheme were to be spread among all drivers. The wide burden distribution accords with the social goal of the reform.²⁷ RAVCA also introduced many procedural innovations intended to simplify and shorten the legal process.²⁸ Lastly, to aid the victim and avoid undue pressure to compromise, the legislature empowered the victim to demand interim payments to cover medical expenses and cost of living during the legal process.²⁹

21. *Id.* §§ 2-3.

22. *Id.* § 18(4)(a)(1).

23. *See also id.* § 18(4)(a)(2); ENGLAND, ROAD ACCIDENT VICTIM COMPENSATION, *supra* note 14, at 5.

24. RAVCA §§ 10-15.

25. *Id.* § 11.

26. *Id.* § 12(a)(1)-(3); *see also* IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 8. In other countries that have adopted strict liability with mandatory liability insurance regimes, cases in which victims were entitled to compensation but unable to recover from an insurance company were resolved in a similar manner. *See, e.g.*, B.S. MARKESINIS, THE GERMAN LAW OF OBLIGATIONS: THE LAW OF TORTS: A COMPARATIVE INTRODUCTION 712-13 (3d ed. 1997) (discussing the German road accident scheme).

27. DK (1975) 3955.

28. For instance, only one medical expert, who is appointed by the court, is allowed to testify at trial. RAVCA § 6A.

29. *See infra* notes 111-22 and accompanying text.

B. THE UNTOLD STORY

As explained above, RAVCA purported to serve a social goal. It was supposed to provide road accident victims with a prompt and efficacious remedy based on individual need rather than personal fault. Its underlying conception is of collective responsibility for the materialization of risks that every person is exposed to and that nearly every person creates in everyday life. But if the reform was motivated by a social goal, the choice of a legal regime based on personal liability and mandatory liability insurance is puzzling. Arguably, placing the treatment of road accident victims within the purview of the National Insurance Institute (NII) would more fully realize that goal. This is so mainly because of the inherent discord between the social goal of protecting victims and insurance companies' commercial motivation.³⁰ The NII's approach is naturally geared towards social protection, whereas insurance companies are commercial entities motivated primarily by profit. Maximizing profit is, of course, a legitimate aspiration, but it is likely to frustrate the social goal.

First, private insurance companies have a clear interest in delaying payment and reducing the amounts paid and, for these reasons, may wage exhausting legal battles against victims.³¹ Ideally, this phenomenon should not characterize the NII, which exists and operates to promote victims' interests. Unsurprisingly, the waiting period for decisions in claims filed with the NII by work accident victims is significantly shorter than that for road accident victims awaiting the resolution of actions filed pursuant to RAVCA. According to a 1991 governmental report, the handling time of workers' compensation claims by the NII averaged 1.6 months for hired workers and 2.1 months for the self-employed.³² In contrast, litigation under RAVCA may endure for years.³³

Second, a socially oriented statutory reform should fix victims' medical and vocational rehabilitation as one of its central goals. Efficient medical and vocational rehabilitation requires ongoing (not just one-time) attention to every victim, counseling and other rehabilitative services (not just financial aid), and initiatives on the part of the responsible body. Commercial entities will not take an interest in the fate of each individual victim beyond their narrow financial obligations and, therefore, cannot be made responsible for realizing this social goal.³⁴ The NII, on the other

30. See DK (1973) 4003 (statement of MK Reuven Arazi); IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 71; IZHAK ENGLAND, ROAD ACCIDENT VICTIMS COMPENSATION SCHEME: PRINCIPLES FOR A PROPOSED REFORM 36 (1972) [hereinafter ENGLAND, PRINCIPLES FOR REFORM]; England, *The Bill*, *supra* note 14, at 434-35; cf. J. David Cummins, *What's Driving Auto Insurance Up*, WALL ST. J., Jan. 5, 1989, at 1 ("[I]t is increasingly difficult to reconcile the social role of auto insurance with its provision through the private-insurance industry.").

31. See IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 72.

32. *Id.* at 73-74.

33. See Ronen Perry, *A Misrepresented Reform: The Story of the Road Accident Victims Compensation Act*, 28 TEL AVIV U. L. REV. 147, 168-71 (2004).

34. Monetary compensation alone does not guarantee optimal rehabilitation. The victim is frequently unaware of the available methods of rehabilitation and is unqualified, and

hand, has skilled and experienced personnel who can actively accompany and assist the victim through the rehabilitation process. This is a significant advantage.³⁵ Unsurprisingly, victims of road accidents that occurred in the course of work that were treated by the NII returned to work much faster than victims of other road accidents who had only a financial claim against an insurance company.³⁶

Furthermore, were the treatment of road accident victims transferred to the NII, the social cost of the scheme would be significantly lower than that of the existing regime. First, the operating costs of a national insurance compensation scheme are generally lower than those of a private insurance compensation scheme. Implementation costs of RAVCA include, *inter alia*, insurance companies' administration costs, brokerage and advertising expenditures, litigation and settlement costs (incurred by insurers and victims), and reinsurance costs. Transferring the processing of road accident victims to the NII would save brokerage, advertising, and reinsurance costs, as well as a significant portion of the total cost of litigation and settlement that characterizes the existing regime. A number of studies conducted at different times indicate that out of the NII's total financial outlay in handling work accident cases, operating costs constitute only 5%–7%, and the balance (93%–95%) goes straight into the victims' pockets. In contrast, of the total expenses incurred by insurance companies in handling road accident cases under RAVCA, operating costs (including victims' legal expenses) constitute 35%–46%.³⁷ Moreover, transferring the treatment of road accident victims to the NII would result in a considerable increase in the number of victims handled by the NII. This would arguably reduce operating costs as a percentage of total expenses due to economies of scale. Thus far, this Article has only compared the positive outlays associated with the two schemes. One should keep in mind, however, that the cost of implementing RAVCA also includes a certain profit for insurers, whereas the cost of implementing a national insurance scheme does not include this component.

Transferring road accident cases to the NII would also reduce the total cost of treating victims of road accidents that occurred in the course of work. At present, victims of dual accidents—namely those occurrences classified as work accidents *and* road accidents—can sue both the NII and

thus often unable, to choose the best course of action. Moreover, private service providers from which the victim may seek help are primarily concerned about their profit, and not victims' well-being.

35. See IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 79; Englard, *The Bill*, *supra* note 14, at 434-35; Yehuda Kahana, *The Costs of the Road Accident Victims' Compensation Act*, 23 ISR. ECON. Q. 370, 376 (1976-77) [hereinafter Kahana, *The Costs of RAVCA*]; Reitblatt, *supra* note 16, at 26. Note that the NII currently provides vocational rehabilitation services, but outsources medical rehabilitation.

36. See Yehuda Kahana, *Road Accident Victims' Insurance—Through the National Insurance Institute?*, 25 ISR. ECON. Q. 74, 79, 85 (1978-79) [hereinafter Kahana, *National Insurance Institute*].

37. See IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 73, 78; Kahana, *National Insurance Institute*, *supra* note 36, at 79-81; cf. Englard, *The Bill*, *supra* note 14, at 435 (discussing several jurisdictions in the United States).

the insurer of the car involved in the accident. Victims of dual accidents are dealt with twice by two separate entities. The marginal contribution of RAVCA to the well-being of such a victim is usually negligible because all payments from the NII are deducted from the victim's entitlement under RAVCA.³⁸ Undeniably, the abolition of this duality would considerably reduce the social cost of treating this type of victims. Moreover, "nationalizing" the treatment of road accident victims would save on the reciprocal accounting between the NII and private insurance companies in cases of dual accidents. The rate of dual-accident victims among road-accident victims has ranged between 15% and 25% over the years.³⁹ It follows, then, that transferring the treatment of road accident victims to the NII could significantly reduce the social cost of the compensation scheme.

The legislature was aware of the advantages of a national compensation and rehabilitation scheme when RAVCA was enacted.⁴⁰ Indeed, the first official proposal for the regulation of road accident victims' compensation, drafted by the Ben Ze'ev Committee in 1966, contemplated an extension of the existing workers' compensation scheme, operated by the NII, to road accident victims, thereby equalizing the rights of the latter to those of the former.⁴¹ However, insurance companies adamantly op-

38. Occasionally, it transpires that the scope of damages under RAVCA is lower than the expected payments from the NII, and the claim is denied. In a case like this, the wearisome process is ultimately futile.

39. See IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 74, 78; Kahana, *National Insurance Institute*, *supra* note 36, at 75-76; Kahana, *The Costs of RAVCA*, *supra* note 35, at 376.

40. Izhak Englard questioned the superiority of a national insurance scheme. See generally Englard, *A Decade of Experience*, *supra* note 11. But Englard's reasons seem unpersuasive. His main argument is that funds collected by the NII were used by the government in pursuit of general objectives unrelated to the specific goals of social insurance. *Id.* at 165. He added that "nationalization" of the auto insurance business would enable the government to obtain funding for other activities. *Id.* This argument is problematic. Even if Englard's assumption that the government uses NII funds to attain goals that are unrelated to social insurance is accepted, it does not follow that private insurance better serves the interests of road accident victims than national insurance. The flaw is not in the method itself, but in its implementation. This flaw could (and should) be overcome by setting strict criteria for the use of NII funds and by reinforcing supervision of those funds. Private insurance companies also use a significant part of the money they collect for purposes unrelated to compensation (for example, brokerage fees, general management costs, advertising, and profit). Englard's second argument is that transferring the treatment of road accident victims to the NII would reduce the amount of damages victims receive because their rights would be equalized with those of work accident victims. *Id.* This concern is addressed below. See *infra* note 50. The NII is obviously not without flaws. The basic argument is that, on the abstract level, social protection should be provided via a national mechanism, and not through private firms. The flaws inherent in social mechanisms arguably are not inevitable and can be repaired.

41. See *Inter-Ministerial Committee Report on Questions of Traffic and Work Accidents*, 1 ISR. L. REV. 636, 654-55 (1966). Accordingly, the Committee recommended the abolition of the Motor Vehicle Insurance Ordinance [New Version]. *Id.* at 649. The Committee was appointed by the Minister of Justice and the Minister of Labor in 1964. The report follows an informal proposal set out in Uri Yadin, *Outline of an Automobile Compensation Plan for Israel*, 13 AM. J. COMP. L. 276 (1964).

posed that proposal, which was consequently shelved for several years.⁴² The idea of social insurance for road accident victims resurfaced in 1971 in a Ministry of Justice memorandum introducing a bill to provide benefits to road accident victims.⁴³ Izhak England, the author of a renowned commentary on RAVCA, wrote that deliberations over the proposal were conducted behind closed doors and that the public "only heard rumors about fierce hostility of various circles, most notably commercial insurance companies, which yet again opposed what they referred to as the 'nationalization' of the auto insurance business."⁴⁴ In the spring of 1973, the Ministry of Justice circulated a new memorandum, which was substantively different from its predecessor. According to the new document, commercial insurance companies were at the center of the road-accident victims compensation scheme. Persistent rumors suggested that the change was a result of covert negotiations with insurance companies, but these rumors were accorded no official confirmation.⁴⁵ The Ministry of Justice did not conduct any public debate before deciding to deviate from the original plan and never actually explained the surprising change in its policy.⁴⁶

During the Knesset deliberations on the draft proposal, a few members of Knesset were somewhat surprised that the ultimate proposal was not based on the original concept of social insurance.⁴⁷ But there was no serious response to these queries. Prior to the second and third readings, the chair of the Knesset's Constitution, Law, and Justice Committee succinctly stated: "[I]n the course of the committee's deliberations we also examined the feasibility and utility of transferring the treatment of and

42. See England, *A Decade of Experience*, *supra* note 11, at 157; England, *The Bill*, *supra* note 14, at 431 n.4.

43. See ENGLAND, ROAD ACCIDENT VICTIM COMPENSATION *supra* note 14, at 1; ENGLAND, PRINCIPLES FOR REFORM, *supra* note 30, at 35, App. 5; England, *The Bill*, *supra* note 14, at 431.

44. England, *The Bill*, *supra* note 14, at 431; see also England, *A Decade of Experience*, *supra* note 11, at 157.

45. At this stage, the insurance companies were supported by the Israel Bar Association, which was concerned about the impact of abolishing fault-based liability on Israeli lawyers' earnings. See Eli Salzberger, *The Israeli Jurists' Conspiracy: On the Israeli Bar and Its Allies*, 32 HEB. U. L.J. 45, 68 n.115 (2001). Salzberger probably overestimates the Bar's role in the dramatic shift from the original plan. Insurance companies played the key role here. When conflicts of interests arose between the insurance companies and the Bar, the insurance lobby always prevailed, and the Bar's attempt to promote its members' interests attracted fierce criticism. See, e.g., DK (1973) 4010 (statement of MK Ari Ankorian); *id.* at 4014 (statement of MK Uri Avneri).

46. See Meir D. Cohen, *The Road Accident Victims Compensation Bill*, 5 HEB. U. L.J. 3, 3 (1973); England, *The Bill*, *supra* note 14, at 431-32; Reitblatt, *supra* note 16, at 28-29. The change cannot be attributed to the NII's reluctance to treat road accident victims. On the contrary, the NII has consistently expressed its willingness to do so. See IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 23, 79.

47. See, e.g., DK (1973) 4003 (statement of MK Reuven Araz) ("Mr. Minister, I have listened to the reasons for your change of opinion about transferring this matter to the NII. I think that the reasons in favor of the original proposal outweigh the reasons against it. Why did we accept this method for compensating victims of work accidents, and we cannot accept it for compensating road accident victims? What is the difference?"); DK (1975) 3959-50 (statement of MK Nissim Eliad).

responsibility for insurance against road accidents to the National Insurance Institute,” but “the committee felt that this branch of insurance should be left with the insurance companies in the hope that they would invest the necessary effort to warrant the trust and credit given to them by the public.”⁴⁸ The Bill was approved on July 29, 1975, and this practically spelled an end to the debate. Feeble expressions of support for the Ben Ze’ev Committee’s original proposal are occasionally heard,⁴⁹ but the frequency and resonance of these voices have progressively diminished.

After the conclusion of the legislative process, several functionaries with questionable objectivity endeavored to justify the substantive change in the government’s position between 1971 and 1973, but the reasons given were contrived and patently unconvincing.⁵⁰ Arguably, the

48. DK (1975) 3955.

49. See, e.g., IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 71 (explaining that a serious social problem should be handled by a national institute, rather than private entities, and stating, “if this has not been done so far, it is only because of the steadfast opposition of strong interested parties that prevented the transfer of road accidents to the NII”).

50. See, e.g., *Interview of the Month with Dr. Jacob Picker: We Were Not Proved Wrong*, 16 INS. ISR. 16, 17 (1976). Both the interviewee (the Israeli insurance commissioner) and the forum (the journal of the Israeli insurance industry) are obviously not objective. The interviewer, or the editor, explained at the outset: “[The commissioner] had to withstand the public pressures, again—about the nationalization of auto insurance, and answer professional questions that only experts can examine thoroughly. He was the insurance companies’ ‘defender.’” *Id.* at 16. On the subject in question, Dr. Picker’s arguments seem unconvincing.

His first argument is that “the government should not engage in activities that can be performed by non-national entities.” See also Peretz Gordon, *We Should Not Nationalize Mandatory Auto Insurance*, 131 INS. ISR. 18, 19 (1986). But even if this were an accurate presentation of governmental policy in the 1970s, it is clear that privatization policy applies only where efficiency is the primary concern, and privatization actually enhances efficiency. In this case, social security, and not efficiency is the primary goal, and as explained above, the national scheme might be more efficient. Dr. Picker’s second argument is that “we should avoid public dependence on and friction with another national mechanism.” However, dependence on, and friction with, a national mechanism were replaced by dependence on, and friction with, private entities. There is no reason to assume that the dependence and the friction are less significant in the case of private insurance. In fact, insurance companies’ aspirations to increase profitability might create more friction. Dr. Picker’s third argument is that “it is doubtful that a national regime is more cost-effective and socially beneficial.” These arguments are addressed above. See *supra* notes 30-39 and accompanying text. Dr. Picker’s fourth argument is that, while RAVCA contains a few social security features, it basically creates a private insurance scheme. Put differently, the Act is not “social” in any way, so there is no reason to let a social institute take it over. See Gordon, *supra*, at 19. But the reform was indeed motivated by a social goal. If it does not truly achieve this goal, then it should be amended or replaced. Moreover, the adherents of national insurance contemplated an alternative scheme. They did not think that the NII should implement RAVCA instead of the private insurance companies. Dr. Picker’s last argument is that transferring the treatment of road accident victims to the NII would entail one of two things: increasing the amount payable under the National Insurance Act so that all accident victims would be compensated in accordance with the standards set by RAVCA or reducing the amount payable to road accident victims so that their rights would be equalized with those of work accident victims under the National Insurance Act. The answer is quite simple: If the distinction between work accident victims and road accident victims is justified, it can be preserved within the NII (after all, the NII already handles various types of claims and claimants). If, on the other hand, the distinction is not

fact that the principal beneficiaries of the sudden transition were insurance companies leaves no room for doubt. Insurance companies' interest in the non-nationalization of the auto insurance business was, and remains, undisputed.

First, premiums paid by the insured in the private sector include a component of insurer-profit, in addition to the other components, which reflect expected payments to the insured and administrative costs.⁵¹ If the treatment of road accident victims were transferred to the NII, private insurance companies would lose a significant source of profit. During the pre-enactment negotiations, insurance companies quite naturally demanded that a certain level of profit be assured following the enactment of RAVCA.⁵² Their persistence on this matter deserves special attention because in the pre-enactment debates, their representatives consistently claimed that mandatory road accident insurance was an unprofitable business and that they were interested in it only because they could not maintain other branches of insurance without it.⁵³ I speculate that the "unprofitable business" claim was intended to present insurance companies in a favorable light to legislators with social aspirations (as if to say, "We do not make profit on the backs of the insured") and to deter representatives of the State, in particular those of the NII, from taking over the "loss-making" business. Furthermore, the "unprofitable business" claim was arguably inconsistent with the pre-enactment reality.⁵⁴ At any rate, since the enactment of RAVCA, insurance companies have actually maintained profitability in auto insurance.

Second, insurance companies can profit immensely by investing the money they receive from the insured during the interval between collecting premiums and paying claims relating to those premiums.⁵⁵ For instance, in 2002, Israeli insurance companies collected mandatory insurance premiums totaling New Israeli Shekel (NIS) 3.6 billion, whereas only NIS 93 million was actually paid out for accidents that occurred during that year, with additional payments of NIS 3.2 billion ex-

justified, equalizing the rights of the two types of victims is not a real problem. It is warranted.

51. Insurance companies do not always profit from a specific policy, but the expected profit from a certain category of insurance is generally positive, either because premiums exceed payments and operating costs or because insurance companies obtain other advantages from selling this type of insurance.

52. See D. Hachami, *The Road Accident Victims Act: The Insurance Companies' Position*, 7 INS. ISR. 6, 7 (1975).

53. DK (1978) 744 (statement of MK Zerach Warhaftig); Hachami, *supra* note 52, at 7; Reitblatt, *supra* note 16, at 28.

54. See, e.g., DK (1978) 746 (statement of MK Shulait Aloni) ("Insurance companies argue that they are not enriched at the public's expense: Gentlemen, these arguments, and their fear of transferring the subject to the NII, are the best evidence that they are not losing money. If they truly lost, they would be willing to transfer this activity to the NII.").

55. See DK (1978) 743; Kahana, *National Insurance Institute*, *supra* note 36, at 83 n.34; Kahana, *The Costs of RAVCA*, *supra* note 35, at 375.

pected in subsequent years.⁵⁶ Third, the mandatory insurance branch serves as a lever for marketing other products (such as comprehensive auto insurance).⁵⁷ Fourth, the significant size of the mandatory auto insurance market⁵⁸ gives insurance companies additional advantages in their daily business activities. For example, it may reduce the average administrative cost per insured in all branches of insurance or enable insurance companies to obtain favorable financing terms.

In view of all this, insurance companies' steadfast opposition to the original plan of the Ministry of Justice is quite understandable. It is equally understandable why insurance companies waged their war against the "evil decree" far from the public eye. After all, the ultimate decision to relinquish the "nationalization" plan, made under pressure from the private insurance industry, was detrimental to the public. It is more difficult to understand why other parties involved in the legislative process played down these pressures. At any rate, the abandonment of the idea of national insurance for road accident victims is probably the most significant political achievement of Israeli insurance companies since the establishment of Israel in 1948, and the evident success in downplaying this "victory" for more than thirty years is an additional and highly valuable accomplishment.

II. INSURANCE COVERAGE

A. OVERVIEW

The principal political achievement of the insurance industry was the relinquishment of the original plan to transfer the treatment of road accident victims to the NII, despite the clear advantage of such an arrangement (at least from a social policy perspective). Nonetheless, the fingerprints of insurance companies are also discernible in the concrete provisions of RAVCA. It is clear that not all of the provisions that benefit the insurance companies were adopted exclusively as a result of their lobbying, but it is also clear that their intense involvement at all stages of the legislative process contributed considerably to the formulation of the Act. Some of the features presented below already appeared in the Bill of 1973, which was the product of covert negotiations between insurance companies' representatives and government officials.⁵⁹ Others were added by the Constitution, Law, and Justice Committee, after it repeatedly hosted and heard insurance companies' representatives.⁶⁰ Finally, insur-

56. See Memorandum from Yehuda Kahana on Evaluation of Pending Claims in 2002: Mandatory Insurance (2003), available at <http://ozar.mof.gov.il/hon/2001/insurance/memos/dochRehevChova2002.pdf>.

57. See Kahana, *National Insurance Institute*, *supra* note 36, at 83 n.34.

58. Revenues from this segment were NIS 3.8 billion in 2001, more than 25% of Israeli insurance companies' revenues. CENT. BUREAU OF STATISTICS, 53 STATISTICAL ABSTRACT OF ISRAEL tbl. 25.4 (2002), available at http://www.cbs.gov.il/archive/shnaton53/st25_04.pdf.

59. See Englard, *The Bill*, *supra* note 14, at 431-32.

60. DK (1975) 3953, 3958-59, 3964.

ance companies gradually attained other notable achievements through subsequent amendments of the Act.

B. THE SCOPE OF COMPENSATION

1. *Economic Damages*

One clear advantage that RAVCA conferred on insurance companies pertains to the amount of compensation payable to a road accident victim. The Act subjected both economic and non-economic damages to rigid caps that did not previously exist.⁶¹ On the economic level, a relatively "reasonable" cap was initially set. In calculating the loss of earnings and earning capacity, monthly income in excess of three times the average wage ("the Maximum Income") must be disregarded.⁶² And if the ratio of the actual loss of earnings to the pre-accident earnings is lower than 100%, damages must be calculated by multiplying the Maximum Income by the same ratio.⁶³ It should be emphasized that a cause of action under RAVCA is exclusive.⁶⁴ It supplants, rather than supplements, any cause of action under traditional tort law.⁶⁵ So while a high-income individual injured in a work accident can bring an action in tort to supplement the limited sum awarded by the NII for loss of earning capacity, a similar person injured in a negligently caused road accident must be satisfied with the partial compensation awarded by an insurance company under RAVCA. Establishing an arbitrary cap on economic damages seems repugnant to an American sense of justice, especially in the paradigmatic case of a road accident in which a negligent driver injures innocent pedestrians or passengers. Under these circumstances, the legal system should arguably award the victim full compensation for the loss.

The drafters of the Act claimed that those who find the statutory compensation insufficient, such as a famous violinist or a surgeon who sustains serious economic loss following a hand injury, can easily purchase first-party insurance that supplements the statutory compensation schemes.⁶⁶ The Minister of Justice emphasized that "the premium in these cases is rather low."⁶⁷ In the same breath, the drafters argued that without a cap, the auto insurance premium would increase substantially.⁶⁸ But these arguments are contradictory. If the cost of insurance against economic loss not covered by RAVCA is "rather low" when borne by relatively few high-income individuals, how can it become burdensome when spread among all car owners?⁶⁹

61. See Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 4(a).

62. *Id.* § 4(a)(1).

63. *Id.*

64. *Id.* § 8.

65. See *id.*

66. See DK (1975) 3957; DK (1973) 4002, 4011, 4020; see also Road Accident Victims Compensation Bill, 1973, HH [Hazaot Hok], 406, 408.

67. DK (1973) 4002, 4020.

68. DK (1975) 3956; DK (1973) 4002; England, *The Bill*, *supra* note 14, at 434.

69. Cf. England, *The Bill*, *supra* note 14, at 434.

Furthermore, under Israeli law, the general rule for assessing damages for loss of earnings and loss of earning capacity is that the basis must be gross (pre-tax) income,⁷⁰ although lump sum compensation is exempt from tax.⁷¹ Yet the Bill of 1973 provided that "in assessing the compensation for loss of earning capacity, income tax must be deducted, but if compensation is capitalized, the deduction shall not exceed 15% of the capitalized value of the loss of earning capacity."⁷² The Knesset's Constitution, Law, and Justice Committee did not endorse this provision. It held that the cap on damages for loss of earning capacity was sufficient, that "deduction of income tax would constitute an additional, unjustified restriction," and that the proposed limit on deduction "might be unfair to low income victims, compared to high income victims."⁷³ Consequently, the first version of RAVCA did not include a provision regarding tax deduction. Damage assessment was therefore based on gross income, in accordance with the general rule of Israeli common law.

However, the insurance industry exerted considerable pressure on the government, claiming that without a substantial cutback in victims' compensation, a significant increase in premiums would be inevitable.⁷⁴ In consequence, only fifteen months after coming into force, RAVCA was amended.⁷⁵ The following provision was added: "[I]f the said compensation [for loss of earnings and earning capacity] is exempt from income tax, the victim's losses shall . . . be determined in accordance with the victim's after-tax income; provided that the deduction in respect of tax shall not exceed 25% of the lost income."⁷⁶ This Article does not discuss the theoretical advantages and disadvantages of this evaluation method.⁷⁷ It is, however, important to understand that in the wake of the amendment, a significant gap emerged between the economic damages payable to the victim of a traditional tort and the amount payable to a road accident victim under RAVCA. Member of Knesset (MK) Dov Shilansky briefly stated that members of the Constitution, Law, and Justice Committee were concerned that insurance companies would become even richer following this amendment and that "this unease was not allayed in the course of the deliberations."⁷⁸ Despite this concern, only two weeks passed between the first reading and the final approval of the amendment

70. CA 650/78 Khalif v. Israel [1981] IsrSC 35(2) 242, 247-51; CA 81/55 Kokhavi v. Becker [1957] IsrSC 11(1) 225, 235-37; CA 70/52 Grossman v. Rott [1952] IsrSC 6(3) 1242, 1251-53. The Israeli Supreme Court adhered to its ruling in *Grossman* despite the shift to the after-tax method in England. See British Transp. Comm'n v. Gourley [1956] A.C. 185 (N.L.) (appeal taken from Eng.) (U.K.).

71. Income Tax Ordinance [New Version], 1961, N.H. 120, § 9(7).

72. Road Accident Victims Compensation Bill, 1973, HH, 406, § 4(a)(2).

73. DK (1975) 3953.

74. Protocols of Knesset Proceedings, 38 Ins. Isr. 9-10, 27 (1978).

75. Road Accident Victims Compensation Act (Amendment), 1978, S.H. 49.

76. Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 4(a)(2).

77. See, e.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 143-44 (1987) (arguing that "the injurer's liability should be based on the victim's pretax losses in earnings rather than on his after-tax losses").

78. DK (1978) 743, 918.

on the second and third readings. The fact that the amendment was enacted with such haste, before the ink had even dried on the first version of RAVCA and before its economic implications were sufficiently understood,⁷⁹ seems to indicate the effectiveness of the pressure applied by the insurance industry.

Finally, it bears mentioning that, although the amendment significantly reduced the extent of economic damages payable to a road accident victim, it is not clear that the reductions will end there. The experience of other legal systems that have adopted similar compensation schemes shows that the insurance industry might pursue, overtly or covertly, further reductions in damages for loss of earning and earning capacity⁸⁰ as well as damages limitations for other economic losses (such as medical expenses, rehabilitation services, custodial care, etc.).⁸¹

2. Non-Economic Damages

An equally important restriction pertains to non-economic damages. The Bill provided that "compensation for non-pecuniary loss shall not exceed thirty thousand Israeli pounds [IL],"⁸² although damages for pain and suffering in ordinary tort cases reached IL 75,000 at that time.⁸³ The Constitution, Law, and Justice Committee understood that it was impossible to place such a low cap on non-economic damages and decided to submit two versions for vote in the second reading. The first version set an IL 75,000 cap, and the other set an IL 100,000 cap. Each version was supported by an equal number of committee members.⁸⁴ At first glance, this might seem like a fair proposal. Alas, more than two years passed between the first reading (July 17, 1973) and the approval of RAVCA on second and third readings (July 29, 1975). During that interval, the consumer price index rose by about 90%. So in real terms, the first version proposed by the Committee (IL 75,000) was higher than the original proposal (IL 30,000 * 1.9 = IL 57,000) by only 30%. More importantly, by that time, damages for pain and suffering in ordinary torts claims could run as high as IL 150,000,⁸⁵ 50% more than the second version and ap-

79. Insurance companies collected 815 million Israeli pounds before incurring any expense or obligation. DK (1978) 746.

80. See generally Bruce Feldthusen, *Have the Politics of Rate Regulation Produced a Better No-Fault Regime for Ontario?*, 39 LES CAHIERS DE DROIT 473, 478 (1998) ("The basic rule for quantifying income replacement is that the plan will pay 80% of the victim's pre-accident after tax earnings to a maximum of \$400. This is a decrease from 90% of net weekly income to a maximum of \$1,000 under Bill 164, and 80% of gross earnings under the *Ontario Motorist Protection Plan*."). Apparently, there was another attempt to reduce the cap on economic damages under RAVCA shortly after it came into force. Deputy Minister of Finance Yehezkel Flomin said that "we did not see fit to return to the proposal to set the cap on damages for loss of earnings at twice the average wage." DK (1978) 740.

81. See, e.g., Feldthusen, *supra* note 80, at 482 (explaining that medical, rehabilitation, and attendant care benefits under the Ontario no-fault auto insurance scheme are capped).

82. Road Accident Victims Compensation Bill, 1973, HH, 406, § 4(a)(3).

83. See CC (TA) 1762/71 Baron v. Ben-Marji, [1973] IsrDC 5734(1) 445.

84. DK (1975) 3953, 3955-56.

85. See CA 570/72 Baron v. Ben-Marji [1975] 9 Savir 243 (Isr. S. Ct.).

proximately double the first. Eventually, and possibly due to some lobbying by the Road Accident Victims Organization and the Israeli Bar Association, the Knesset adopted the second version by a bare majority (36:32),⁸⁶ although its supporters believed this too was deficient.⁸⁷

The Bill of 1973 did not state that the cap on non-economic damages would be linked to the consumer price index, but the Minister of Finance was authorized to change it with the approval of the Knesset Finance Committee.⁸⁸ During a period in which the annual consumer price index frequently reached double digits, failing to link the cap to the index would have caused a rapid decrease in the real value of non-economic damages and unremitting pressure on the Minister to raise the cap. Of course, any attempt to raise the cap would prompt power struggles between interested parties.⁸⁹ Insurance companies probably understood that adopting the original proposal could work to their detriment because if the cap were to be frequently adjusted, the growing gap between non-economic damages under traditional tort law and under RAVCA would repeatedly resurface. Ultimately, the cap was linked to the consumer price index,⁹⁰ and the authority to raise the cap, which had meanwhile been transferred from the Minister of Finance to the Minister of Justice, has never been exercised.

Two comments must be made here. First, although RAVCA was enacted on July 29, 1975, it provided that the cap would be linked to the consumer price index only from the date of its coming into force, namely September 25, 1976.⁹¹ In that short period, the index rose 40%, so the real value of the cap plummeted before its actual linkage to the index. Even if damages for pain and suffering in ordinary tort actions had only increased in accordance with the rate of the index, the gap between the amounts awarded under tort law and under RAVCA, which was already significant when the Act was adopted, had increased considerably by late September 1976. Second, and more importantly, over the years, damages for pain and suffering in tort actions increased at a rate that significantly exceeded the rate of inflation.⁹² The gap between the highest amounts that courts were willing to award in ordinary tort actions and the RAVCA cap thus continued to widen. While the RAVCA cap currently stands at NIS 150,000,⁹³ damages for pain and suffering in ordinary tort actions

86. DK (1975) 3963.

87. *Id.* at 3956.

88. Road Accident Victims Compensation Bill, 1973, HH, 406, § 4(a)(3).

89. DK (1975) 3954 (statement of the chair of the Constitution, Law, and Justice Committee, Zerah Warhaftig).

90. Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 4(b).

91. *See id.*

92. *See* DAVID KATZIR, DAMAGES FOR PERSONAL INJURIES 622 n.54 (4th ed. 1997).

93. NIS 1 = IL 10,000. The New Israeli Shekel replaced the old Shekel in 1986. Bank of Israel Banknotes and Coins Catalog, [http://www.bankisrael.gov.il/cartel/eng/cat_all\)eng.htm?series_num=8](http://www.bankisrael.gov.il/cartel/eng/cat_all)eng.htm?series_num=8) (last visited Jan. 16, 2010). The Shekel replaced the Israeli pound (Lira) in 1980. Bank of Israel Banknotes and Coins Catalog, http://www.bankisrael.gov.il/catalog/eng/cat_all-eng.htm?series_num=8 (last visited Jan. 16, 2010).

may reach NIS 500,000 – 1,000,000 in severe cases.⁹⁴

This, however, is not the end of the story. Where the victim's life expectancy is shortened due to an injury, an Israeli court in an ordinary tort action can award damages for the non-pecuniary component of loss of life expectancy (what an American lawyer may refer to as "hedonic damages for wrongful death")⁹⁵ in addition to damages for pain and suffering. Compensation under this type of damage may amount to hundreds of thousands of shekels in particularly grave cases.⁹⁶ Sections 2(a) and 3 of the Road Accident Victims Compensation Regulations (Assessment of Damages for Non-Pecuniary Losses)⁹⁷ establish the formula for calculating non-economic damages recoverable by victims of road accidents subject to the statutory cap. The calculation is based on three parameters (level of disability, age, and duration of hospitalization), which are a subset of the considerations that have always guided the courts in determining the extent of damages for pain and suffering. So, arguably, this calculation was intended to determine only the extent of damages for pain and suffering and did not preclude additional compensation for loss of life expectancy.⁹⁸ However, the explicit wording of RAVCA and the unequivocal legislative intent led the Supreme Court to rule that the term

94. The following table provides several examples of pain and suffering awards in cases of severe injuries.

Case	Date	Nominal award	In late-2008 NIS
CA 283/89 Haifa v. Moskowitz [1989] IsrSC 47(2) 718.	3/30/1989	150,000	540,000
CA 5049/91 Kupat Holim v. Rachman [1991] IsrSC 49(2) 369.	9/26/1991	200,000	465,000
CA 2517/93 Boym v. Guttehin [1993] IsrSC-Takdin 1994(2) 335.	5/2/1993	600,000	1,200,000
CA 702/87 State of Israel v. Cohen [1994] IsrSC 48(2) 705.	5/8/1994	180,000	330,000
CA 6978/96 Amar v. Kupat Holim [1996] IsrSC 55(1) 920.	8/2/1996	400,000	570,000
CA 390/99 Kupat Holim v. Dayan [1998] IsrSC 55 (1) 765.	12/9/1998	600,000	715,000
CA 2055/99 John Doe v. Ze'ev [2001] IsrSC 55(5) 241.	7/11/2001	500,000	580,000
CA 390/06 Grinstein v. Ackerstein Indus. Ltd. [2008] (unpublished).	7/22/2008	500,000	500,000

95. See, e.g., Cindy Domingue-Hendrickson, Note, *New Mexico Adopts Hedonic Damages in the Context of Wrongful Death Actions: Sears v. Nissan* (Romero v. Byers), 25 N.M. L. REV. 385, 385-87 (1995); Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687, 1687, 1692 (1990).

96. See, e.g., CA 4022/98 Technion-Isr. Inst. Tech. v. Twister [1999] IsrSC-Takdin 1999(2) 255 (awarding NIS 350,000 for a fourteen year reduction in life expectancy); see also *infra* note 98.

97. Road Accident Victims Compensation Regulations (Assessment of Damages for Non-Pecuniary Losses), 1976, KT 3590, 2706.

98. This argument was endorsed by the District Court in Haifa. CC (Hi) 160/92 Yifrach v. El-AI Isr. Airlines, [1996] IsrDC-Takdin 1996(1) 448 (awarding a road accident victim NIS 175,000 for loss of life expectancy in addition to non-economic damages under the Regulations); CC (Hi) 417/89 Ghanayim v. Hamed, [1998] IsrDC-Takdin 1998(1)

"non-pecuniary loss" in section 4 of the Act covers all non-pecuniary losses, including pain and suffering and loss of life expectancy. Put differently, compensation for non-economic losses under RAVCA and its regulations is exhaustive.⁹⁹ This ineluctable conclusion substantially broadens the already wide gap between non-economic damages in ordinary tort cases and non-economic damages under RAVCA.¹⁰⁰

The draft of the first amendment to the Act, introduced in late 1977, provided, *inter alia*, that the cap on non-economic damages would be reduced to IL 75,000 and that it would be linked to the consumer price index only from January 1978 onwards.¹⁰¹ By then, the amount of damages for pain and suffering in ordinary torts claims had reached IL 300,000,¹⁰² and courts had begun to award higher damages for loss of life expectancy.¹⁰³ The proposed amendment was passed in the first reading by a tiny majority of 25:23.¹⁰⁴ However, the proposed reduction was discarded by the Constitution, Law and Justice Committee during the preparation of the draft law for the second and third readings.¹⁰⁵ It is conceivable that the proposed reduction was used as a bargaining chip to secure the passage of the more important component of the same draft law, whereby damages for loss of earnings and earning capacity are calculated on the basis of net income.

3. *The Exclusivity Provision*

To sum up, under considerable pressure of the insurance industry, the legislature established rigid limitations on the scope of economic and non-economic damages payable to road accident victims. Still, this achievement would have been incomplete without an exclusivity provision. According to section 8, "one who acquired a cause of action under this Act following a road accident . . . shall not have a cause of action for

11865 (awarding NIS 700,000 for loss of life expectancy in addition to non-economic damages under the Regulations).

99. See CA 2801/96 El-Al Isr. Airlines v. Yifrach [1998] IsrSC 55(1) 817, 833-39; see also DK (1973) 4010 (statement of MK Ari Ankorian) ("[T]o my colleague, MK Chaim Zadok, who spoke about other heads of damages, such as loss of life expectancy, and loss of the amenities of life, I must say that the Bill speaks about non-economic damages, and not about pain and suffering. This evidently encompasses all types of non-economic loss.").

100. Moreover, under the general principles of Israeli tort law, the victim's estate, in the case of a fatal injury, is entitled to full compensation for the loss of life expectancy and for pain and suffering—if the death was not immediate. On the other hand, the estate of a road accident victim is entitled to 25% of the maximum award for non-economic damages under RAVCA. See Road Accident Victims Compensation Regulations (Assessment of Damages for Non-Pecuniary Losses), 1976, KT 3590, 2706, § 4. An attempt to challenge the validity of this section failed. CA 184/80 Eigler v. HaMagen Ins. Co. [1981] IsrSC 35(3) 518.

101. DK (1978) 740.

102. See CA 42/78 Israel v. Rachamim [1979] IsrSC 33(1) 208.

103. See, e.g., CA 402/75 Estate of Israel Mashlach v. Rosneblum [1976] IsrSC 30(3) 97; CA 384/74 Estate of David Azulay v. Vulcan Casting Indus. [1975] IsrSC 30(1) 374.

104. DK (1978) 750.

105. *Id.* at 919.

bodily injury under [general tort law].”¹⁰⁶ In the absence of this provision, victims of negligently caused road accidents would have been able to exercise their limited rights under RAVCA and bring an action in tort for the difference between the actual loss and the limited statutory compensation. Insofar as the additional compensation would have also fallen on the shoulders of insurance companies (under liability insurance policies), those companies would not have benefited from the statutory caps. The exclusivity provision ensures that the overall liability of insurance companies will, in any event, be strictly limited.¹⁰⁷

Arguably, a social reform intended to provide a limited and immediate remedy for accident victims should not contain an exclusivity provision. If a particular act fails to fully compensate the victim for negligently caused injuries, an exclusivity provision denies that victim the fundamental right to full compensation for harm caused by wrongful conduct.¹⁰⁸ A social reform should generally *extend* legal protection by providing a remedy for those who are not entitled to compensation under the law of obligations; it should not override existing rights. Accordingly, most social compensation schemes, including the Israeli work accident compensation and veterans’ disability compensation systems, do not include exclusivity provisions.¹⁰⁹ In this respect, RAVCA is exceptional. But at this stage, the reader can hardly be surprised. The exclusivity provision, alongside the caps on economic and non-economic damages, primarily served the economic interests of insurance companies.¹¹⁰

106. Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 8.

107. Arguably, the exclusivity provision denies not only the victim’s right of action in torts, but also the insurer’s right of subrogation against a third party whose negligence caused the accident. *See* CA 3765/95 Hussein v. Turm [1996] IsrSC 50(5) 573. However, from the insurer’s perspective, this is an insignificant price to pay for the advantageous statutory caps. In the vast majority of cases, a road accident is caused by negligent driving, and so the driver’s insurer would not have had a right of subrogation even if the exclusivity provision had not existed. Moreover, the exclusivity provision precludes recovery under general tort law. RAVCA § 8. It does not preclude recovery under the Defective Products Liability Act (DPLA). Defective Products Liability Act (DPLA), 1980, S.H. 86; RAVCA § 8. A road accident victim who also has a cause of action under the DPLA will generally prefer to bring an action under RAVCA because, while both acts set similar caps, RAVCA is deemed more efficient. But the availability of a cause of action under the DPLA provides the basis for a right of subrogation in the appropriate cases.

108. DK (1973) 4004-05 (statement of MK Nissim Eliad).

109. For instance, the Ontario no-fault auto insurance scheme does not include an exclusivity provision. Feldthusen, *supra* note 80, at 480-81, 485. The German no-fault road accident scheme also preserves fault-based actions. *Strassenverkehrsgesetz* [Road Traffic Act], Mar. 5, 2003 BGBI.I at 310, S. 16 (F.R.G.). Statutory schemes in other jurisdictions usually include exclusivity provisions only if they do not set caps on damages. *See* MARKESINIS, *supra* note 26, at 697 (discussing the Swiss Road Traffic Act). There are a few exceptions. The most notable is New Zealand’s statutory scheme. *See* Injury Prevention, Rehabilitation, and Compensation Act 2001, 2001 S.N.Z. No. 49, §§ 317-318 (N.Z.).

110. *See* DK (1973) 4003 (statement of MK Shmuel Tamir: “Who are the Ministry of Justice and the Ministry of Finance protecting? The affluent insurance companies? Is this simply the Ministry of Finance’s continued flirtation with big business?”); *see also id.* at 4014 (statement of MK Uri Avneri) (“It seems that the Minister of Finance continues to appease the wealthiest at the expense of the less wealthy. The insurance companies are among the richest and most pampered companies in Israel.”).

4. *The Benefit to Insurance Companies*

One possible counterargument is that statutory caps on insurance companies' liability serve the interests of the insured because they guarantee relatively low and stable premiums. This argument is disingenuous. While setting rigid caps on economic and non-economic damages *may help* maintain low and stable premiums, it *guarantees* only low and stable payments to victims. As long as premiums may increase at rates that are unjustified in light of the relevant risks, restricting liability is principally the interest of the insurer. It is no wonder, then, that the insurance companies waged a battle on two fronts. On one front, they worked to reduce their expenses through compensation caps and deductions, together with the exclusivity provision. On the other front, they repeatedly, and without a real justification, urged the regulator to increase the premiums, and thus, their revenues, as will be shown in Part III. The simultaneous liability restriction and premiums increase produced an enormous positive cash-flow for insurance companies.

Even if limiting liability truly resulted in low premiums, insurance companies would still benefit from such a limitation. First, doing away with caps and deductions would result in one of two possibilities. One is that insurance premiums would be prohibitively high, prompting public protest and renewed examination of RAVCA's merits. The traffic victims' insurance sector would once again face the threat of "nationalization." The second possibility is that insurers would partially or fully absorb the additional risk, with a subsequent decline in profitability. Understandably, neither option would be welcomed by the insurance industry. Restricting liability reduces the likelihood of these eventualities. When the expected payment to any victim is lower, insurance companies can make greater profits without imposing an intolerable burden on the insured. Furthermore, caps and deductions strengthen the bargaining power of insurance companies in negotiating settlements with victims. Litigation is time consuming, wearisome, and costly, so the lower the expected recovery is, the easier it is to persuade the victim to settle for inadequate compensation.

C. COMPENSATION METHOD

1. *Interim Payments*

One of the reform's main objectives was to accelerate victims' healing process through interim compensation. Interim compensation covers the victim's medical expenses and cost of living during the legal process. It satisfies the victim's immediate, and often urgent, needs in the course of litigation, thereby facilitating recovery and rehabilitation while preventing insurance companies from using victims' misfortune to impel them to settle for less than they deserve.¹¹¹ The Bill of 1973 provided that "the person liable under the Act . . . must immediately pay the victim or de-

111. DK (1973) 4003; IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 8.

posit with the court for the victim's benefit any portion of the damages that cannot be reasonably disputed."¹¹² Participants in the pre-enactment deliberations explained that "immediately" denoted less than a month after the accident.¹¹³

Unfortunately, prior to the second and third readings, the chair of the Constitution, Law, and Justice Committee stated that the Committee had not endorsed the above proposal; instead, it accepted the claim of the insurance companies' organization that "immediate payment of a significant portion of the amount claimed would complicate the legal process by dividing it into two burdensome trials in which the parties would put forward the same arguments and submit the same evidence, and therefore the cost of litigation would increase."¹¹⁴ Consequently, the Committee proposed that a person liable under RAVCA (and his or her insurer) would reimburse the victim for medical expenses actually incurred and make monthly payments to cover the victim's medical and nursing needs and basic costs of living until the case was tried or settled. This proposal was ultimately approved on the second and third readings.¹¹⁵ According to the accepted version, the victim must formally apply for interim payments.¹¹⁶ The person liable and his or her insurer then have sixty days to comply.¹¹⁷ In the case of non-compliance, the victim has to submit a special request to a competent court.¹¹⁸

The difference between a "portion of the damages that cannot be reasonably disputed" and monthly payments that cover particular needs can be enormous. For instance, assume that a twenty-year-old woman who earned NIS 5,000 a month and spent 60% of her income on basic necessities is injured in a road accident. Assume further that the victim contends that she has lost all of her earning capacity, whereas the insurance company claims that she lost only 80% of that capacity. The portion of the claimed sum that cannot be reasonably disputed is the capitalized value of an annual loss of $\text{NIS } 80\% * 5,000 * 12$ over 45 years (until retirement). Assuming a constant interest rate of 3% a year, the present worth factor is 24.5187, and so the undisputed amount should be $80\% * 5,000 * 12 * 24.5187 = \text{NIS } 1,176,898$. This is the amount that the victim would receive under the original proposal. The sum that she will actually receive under RAVCA is, at most, NIS 3,000 a month, and if her standard of living has not deteriorated following the accident because she has other sources of income, then she will not receive interim payments at all.¹¹⁹

Reported cases show that the ratio between interim payments and ulti-

112. Road Accident Victims Compensation Bill, 1973, HH, 406, § 4(c).

113. DK (1973) 4013.

114. DK (1975) 3954.

115. Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 5.

116. *Id.* § 5(h).

117. *See id.*

118. *Id.* § 5A.

119. Road Accident Victims Compensation Regulations (Interim Payments), 1989, KT 5200, 1090, § 3(b).

mate awards is indeed very low.¹²⁰ Moreover, interim compensation is paid periodically, and not in a lump sum. Finally, it is not always immediate. As previously mentioned, while the original proposal obliged an insurance company to pay the undisputed amount “immediately”—namely within one month of the accident—and without notice, the Act as it was ultimately worded requires the victim to initiate a request and then gives the insurer sixty days to comply with that request.¹²¹ Insurance companies often do not comply, thereby necessitating a separate legal process and delayed payment. Thus, in many cases, the victim obtains the first interim award long after the accident.¹²² Under those circumstances, and given the duration and cost of litigation, many victims are presumably induced to settle for partial and inadequate compensation. More importantly, as explained above, insurance companies can benefit from delaying payments. The deviation from the original proposal, in practice, allows insurance companies to delay payment of a significant amount of money. These two facts may explain insurance companies’ insistence on the revision.

2. Periodic Payments

An additional achievement of the insurance companies, albeit of secondary importance, relates to the manner in which damages are awarded at the end of the legal process. From the outset, it was clear that periodic payments (being standard practice for work accident victims) better accomplish the stated social goal than does lump sum compensation (customary in tort cases).¹²³ From a social perspective, lump sum payments have two flaws.¹²⁴ First, a victim receiving a large payment might spend it all at once, invest it foolishly, or divide it up between his family members and, in a short time, become a welfare case.¹²⁵ Periodic payments ensure that the victim benefits from the compensation for a long period of time.

120. *E.g.*, CC (Hi) 417/89 Ghanayim v. Suaed, [1998] IsrDC-Takdin 1998(1) 420 (total award: NIS 8,177,365; interim payments: NIS 1,058,300 (12.9%)).

121. RAVCA § 5.

122. *See, e.g.*, CC (TA) 65/91 Faraj v. The Auto Insurance Pool, [1995] IsrDC-Takdin 1995(1) 720 (accident occurring on October 25, 1989 and interim payment awarded more than two years later, on January 9, 1992); CC (TA) 40/97 Sheinland v. Migdal Ins. Co., [1998] IsrDC-Takdin, 1998(2) 2443 (accident occurring on June 21, 1996 and interim payment awarded on May 10, 1998).

123. *See* DK (1973) 4003-04 (statement of MK Reuven Arazi); IMPLEMENTATION COMMITTEE REPORT, *supra* note 16, at 78-79.

124. Admittedly, lump-sum awards may have an advantage from an economic efficiency perspective because periodic payments are more costly to administer. *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 46-47 (1987). Arguably, periodic payments that are adjusted in accordance with the victim’s condition reduce the victim’s incentive to take measures to recover (because recovery reduces the periodic payment). But a court can solve this problem by reducing the periodic payment if the victim does not take the necessary steps or by holding that the payments are not contingent on future events. *See* Samuel A. Rea, *Lump-Sum Versus Periodic Damage Awards*, 10 J. LEGAL STUD. 131, 143, 148 (1981).

125. *See* Rea, *supra* note 124, at 132, 141-42; *see also* DK (1975) 3957 (statement of MK Ari Ankorian).

Second, a lump-sum payment ignores future changes in basic needs and medical and rehabilitation costs that cannot be foreseen at the time of judgment.¹²⁶ In that sense, flexible periodic payments are arguably a better fit with the principle of *restitutio in integrum*, which is a fundamental principle in the law of remedies.

The idea of compensating road accident victims in the form of periodic payments was brought up more than once in the discussions that preceded the reform¹²⁷ and was included in the recommendations of the Berenson Committee in 1972.¹²⁸ However, it was not reflected in the Bill of 1973. The Minister of Justice opined that it was “preferable to carry out the reform in two stages; first approve the Bill as is, and then, when the time is ripe, introduce periodic payments.”¹²⁹ The official reason was that:

[O]pinions are divided with respect to potential victims’ responses. Some say that periodic payments are desirable because they eliminate the risk of a person receiving a large sum of money and subsequently wasting it, thus becoming a burden on the public; and others argue that this method practically imposes guardianship on a large group, and that this is problematic.¹³⁰

However, the opposing reason seems unconvincing because this kind of paternalistic “guardianship” has already been imposed on an even larger group, namely victims of work accidents.¹³¹

What then is the reason for the deviation from the Berenson Committee recommendations? Arguably, two elements combined to cause the deviation. First, from the insurance companies’ perspective, a lump sum payment is *generally*—but not always—preferable to periodic payments.¹³² The traditional method has the advantage of finality and certainty,¹³³ and its administrative cost is relatively low.¹³⁴ Second, under the Bill of 1973, an insurance company was supposed to immediately pay the victim that part of the damages “that cannot be reasonably disputed.” So the choice of a payment method at the end of the legal process became marginal.

126. See CA 283/89 Haifa v. Moskowitz [1989] IsrSC 47(2) 718, 725; CA 357/80 Naim v. Barda [1982] IsrSC 36(3) 762, 781-82.

127. See DK (1973) 4003-04 (statement of MK Reuven Arazi).

128. BERENSON COMM., REPORT OF THE COMMITTEE ON THE SIMPLIFICATION AND IMPROVEMENT OF CIVIL PROCEDURE (1972) (discussed in DK (1973) 4002).

129. DK (1973) 4002.

130. *Id.*

131. National Insurance Act [Consolidated Version], 1995, S.H. 210, §§ 103-17. The NII pays an annuity to severely injured work accident victims. *Id.*

132. Margaret Devaney, *A Comparative Assessment of Personal Injuries Compensation Schemes: Lessons for Tort Reform?*, ELEC. J. COMP. LAW, Sept. 2009, at 2, <http://www.ejcl.org/133/art133-2.pdf>. In fact, many victims also prefer a lump-sum payment, even when this entails a compromise. See *id.* Presumably, the reason is more psychological than economic. Perhaps the average victim does not wish to depend on an insurance company for a long period of time. Moreover, lawyers clearly prefer lump-sum payments (especially if they handle cases on a contingency fee basis).

133. See England, *A Decade of Experience*, *supra* note 11, at 159.

134. See *id.*; see also LANDES & POSNER, *supra* note 124, at 46.

The idea of periodic payments was once again raised after the first reading, during the debates of the Constitution, Law and Justice Committee, and apparently in the wake of the Committee's revision of the rules pertaining to immediate payment. Since the use of this system was intended to protect the victim, the Committee decided that periodic payments would be awarded by the court at the victim's request.¹³⁵

Given the advantages of periodic payments, insurance companies presumably realized that outright opposition to this method could push the legislature back to the idea of "nationalization," especially since the NII was accustomed to paying monthly allowances to (work) accident victims.¹³⁶ Accordingly, the insurance companies' opposition was not categorical. Nonetheless, they insisted that "the Act should only establish the principle . . . and leave the details for regulations," and that "both parties, the plaintiff and the defendant alike, would be able to request that the court order payment of damages in a periodic manner."¹³⁷

The first demand was apparently intended to enable the companies to conduct the battle over the particulars of the scheme in what they regarded as a more convenient forum (*vis-à-vis* the Ministry of Justice and not the parliamentary battleground).¹³⁸ In my view, the second demand had two rationales. First, it was intended to give the insurance companies another bargaining chip in their negotiations with road accident victims. A victim desiring a lump sum payment knows that if he or she rejects the insurance company's settlement proposal, not only is the process likely to drag on for years, but the company might ultimately request that damages be paid in a periodic manner.¹³⁹ Second, an insurance company might occasionally prefer not to pay damages in a lump sum. If the interest rate on which the present worth factor is based is lower than real return that the company can expect from investing the entire sum, it will presumably prefer to make small periodic payments, as long as the benefits exceed the risk of an increase in the amount of the periodic payment. The consistent reduction of the interest rate on which the present worth factor is based from the 1950s through the 1970s¹⁴⁰ made it clear to insurance companies that a lump sum payment might not be worthwhile and

135. DK (1975) 3954 (statement of the chair of the Constitution, Law, and Justice Committee, Zerach Warhaftig); *id.* at 3958 (statement of the Minister of Justice, Chaim Zadok).

136. National Insurance Act [Consolidated Version], 1995, S.H. 210, §§ 103-17.

137. See Hachami, *supra* note 52, at 7.

138. Negotiating with the Ministry of Justice is more convenient for the insurance companies for several reasons: (1) it is far from the spotlight and attracts less public attention; (2) it is conducted with a few functionaries rather than dozens of Knesset members; (3) an average functionary is generally less accountable than a Knesset member; and (4) many functionaries expect to benefit from their relations with big business after their retirement from public service.

139. DK (1975) 3961 (statement of MK Yoram Aridor).

140. The interest rate on which the present worth factor is based was 6% in the early 1950s. See, e.g., CA 188/54 Schwarzbard v. Holzman [1954] IsrSC 8(2) 1443, 1445. It was 5% between the late 1950s and the mid-1970s. See, e.g., CA 313/56 Isr. Elec. Corp. v. Bloomberg [1957] IsrSC 11(2) 1087, 1094; CA 553/73 Eliahu v. Hanhan [1975] IsrSC 29(2) 341, 343. It was 3% from the mid-1970s. See, e.g., CA 469/74 Zada v. Bachar [1975] IsrSC 30(1) 169, 171.

underscored the importance of being able to request periodic payments. Furthermore, an insurance company, like any other defendant, may prefer the periodic method when it is convinced that the victim's life expectancy is shorter than what he or she claims it to be, because in that way the insurance company does not bear the risk of having to pay for losses that the victim will not truly sustain.

The first demand did not trigger any significant dispute. In accordance with the proposal of the Constitution, Law, and Justice Committee, and without any reservations, the Minister of Justice was authorized to enact regulations whereby compensation for loss of earning capacity and ongoing expenses would be paid in a periodic manner. The Minister only enacted the Road Accident Victims Compensation Regulations (Periodic Payments) in 1978.¹⁴¹ The imprint of the insurance companies on these regulations is evident, yet unsurprising. The Berenson Committee recommended that courts be *authorized* to award periodic payments where the degree of the plaintiff's functional disability exceeded 20%, and would be *obligated* to do so where the disability exceeded 50%.¹⁴² The regulations, on the other hand, authorized the court to award periodic payments if "the victim lost 40% or more of his future earning capacity following the accident" or if "the damages constitute the victim's principal source of livelihood."¹⁴³ Under no circumstances is the court *obligated* to award periodic payments, and it is *allowed* to do so only when the injury is quite severe.

The second demand triggered a dispute among the members of the Constitution, Law, and Justice Committee. Most of the Committee members supported the proposal that authorized a court to award periodic payments only at the victim's request. The minority argued that the words "at the victim's request" should be deleted for two reasons. First, a court should retain full discretion on this matter because victims do not always know what their best interests are.¹⁴⁴ This argument is problematic not only because it assumes that people do not know what is best for them and how to make the best use of their money, but also because if the victim's best interest is the main consideration, then it is inconceivable that insurance companies would be empowered to initiate the request for periodic payments.¹⁴⁵ It would be more plausible to authorize a court to award periodic payments on its own initiative *or* at the victim's request. This would give courts broad discretion without providing insurance companies with another means of promoting their own economic interests. The second reason, reiterating insurance companies' openly-declared position, was that the majority's proposal would generate procedural ine-

141. Road Accident Victims Compensation Regulations (Periodic Payments), 1978, KT 3815, 706.

142. See ENGLARD, ROAD ACCIDENT VICTIM COMPENSATION, *supra* note 14, at 195-96.

143. Road Accident Victims Compensation Regulations (Periodic Payments) § 1.

144. See DK (1975) 3958 (statement of the Minister of Justice, Chaim Zadok).

145. See DK (1975) 3961 (statement of MK Yoram Aridor).

quality between the parties.¹⁴⁶ However, the Constitution, Law, and Justice Committee provided a convincing explanation for the distinction between the parties: periodic payments are intended to protect the victim's interests, so the power to apply for such payments should be exclusively the victim's. Ultimately, the minority's reservation was adopted on the second reading by a 42:34 majority,¹⁴⁷ and the power to apply for periodic payment was also granted to the insurance companies. Naturally, it has rarely been used.

D. AMENDMENT NO. 8

During its first fifteen years, RAVCA did not provide a definition for the phrase "use of a motor vehicle," despite its central role in the statutory definition of a "road accident." The task of interpreting this phrase was thus imposed wholly on the Supreme Court of Israel. The Court endeavored to broaden the circle of victims entitled to compensation under the Act by interpreting the phrase "use of a motor vehicle" in a generous and inclusive manner, believing that this was consistent with the Act's social purpose. The seminal case was *Shulman v. Zion Insurance Co.*,¹⁴⁸ which established three important rules. First, a "principal use" of a motor vehicle is any use that fulfills its purpose. Accordingly, in the case of a multipurpose vehicle, each of its purposes (even those that are not transport-related) will be deemed use thereof.¹⁴⁹ Second, "use of a motor vehicle" includes "ancillary use," namely auxiliary measures and related acts necessary for the realization of the vehicle's purpose (or purposes).¹⁵⁰ Under this criterion, not only roadside repairs of the vehicle are part of its use, but also repairs carried out at home or in a garage because repairs are necessary for the fulfillment of the vehicle's primary purpose.¹⁵¹ Third, the causal link between "use of a motor vehicle" and a personal injury may exist even if the injury results from the intentional act of a third party, provided that the injury falls within the risks created by the vehicle's principal or ancillary use.¹⁵² For example, a causal link was found to exist when the injury stemmed from: tampering with the car's brakes, causing an accident in the course of driving;¹⁵³ detonating explosives hidden in the car at the moment of ignition or during the ride;¹⁵⁴ throwing stones at the car (even if the injury was caused by slivers

146. *Id.* at 3957 (statement of MK Ari Ankorian).

147. DK (1975) 3963; *see also* DK (1975) 3961, 3957-58 (presenting the minority's reservation).

148. CA 358/83 *Shulman v. Zion Ins. Co.* [1988] IsrSC 42(2) 844.

149. *Id.* at 858. For example, trenching is a principal use of a backhoe loader.

150. *Id.* at 858-59. The following are considered ancillary uses: entrance to and exit from a motor vehicle, changing a flat tire, washing the vehicle, parking the vehicle, and loading and unloading the vehicle.

151. *Id.* at 860-61.

152. *Id.* at 868-69.

153. *Id.* at 866.

154. *Id.* at 871-74.

of glass and not by interference with the driving);¹⁵⁵ and intentionally slamming a truck's door on the plaintiff's leg.¹⁵⁶

The Supreme Court's generous interpretation of the statutory concepts led to a relatively aggressive legislative reaction in the form of Amendment No. 8.¹⁵⁷ Technically, Amendment No. 8 modified the definitions of the terms "road accident" and "victim" and added a new definition for the phrase "use of a motor vehicle." Essentially, the Amendment was intended to narrow the definition of the term "road accident," which had crystallized in the rulings of the Supreme Court.¹⁵⁸ First and foremost, the Amendment removed from the Act's ambit accidents that did not stem from the use of motor vehicles for transportation, even if they occurred while using a vehicle for another of its intended purposes.¹⁵⁹ Second, the legislature narrowed the range of activities considered to be "ancillary" uses of a vehicle. For example, it was clarified that maintenance or repair of a motor vehicle would be considered "use" only in the case of roadside repairs by the driver or another person who does not provide this service in the course of his or her work. The Act no longer covers roadside assistance provided by professionals or repairs carried out at home or in a garage.¹⁶⁰ Third, Amendment No. 8 explicitly excluded intentionally caused injuries from the Act's coverage. It added the following provision to the definition of a "road accident":

an event shall not be regarded as a road accident if it occurred as a result of an act intended to cause injury to the person or property of the victim, and the injury was caused by the act itself and not by its impact on the use of the motor vehicle.¹⁶¹

Why was this Amendment passed? One explanation was that the Amendment would facilitate victims' recovery by substantially shortening litigation.¹⁶² However, this prediction is puzzling. The new definitions are not simpler than the previous definitions interpreted by the Supreme Court, and so the volume of legal questions could not really be expected to drop. Unsurprisingly, the new definitions have given rise to interpreta-

155. *Id.* at 870-71.

156. *Id.* at 869.

157. Road Accident Victims Compensation Act (Amendment No. 8), 1990, S.H. 2.

158. See DK (1990) 5224; see also IZHAK ENGLARD, ROAD ACCIDENT VICTIM COMPENSATION 3 (3d ed. 2005) [hereinafter ENGLARD, ROAD ACCIDENT VICTIM COMPENSATION 3D].

159. The Amendment redefined the term "road accident" as an occurrence in which a person sustains bodily injury as a result of the use of a motor vehicle for transportation and provided a transport-oriented definition of the phrase "use of a motor vehicle." Limiting RAVCA's applicability to transport-related risks was the main purpose of the Amendment. See Road Accident Victims Compensation Bill (Amendment No. 8), 1989, HH 31, 32-33; DK (1990) 2269; RIVLIN, *supra* note 13, at 3, 105-06.

160. See Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 1 (defining "use" of a motor vehicle).

161. Road Accident Victims Compensation Act (Amendment No. 8), 1990, S.H. 2.

162. See DK (1990) 5224 (statement of the chair of the Constitution, Law, and Justice Committee, Uriel Lin).

tive difficulties in recent decades.¹⁶³ Moreover, Amendment No. 8 did not change the scope and complexity of factual disputes, nor did it contain any procedural breakthroughs. It seems, therefore, that the only conceivable time saving might result from the reduction in number of potential claimants (and potential claims). Yet a reduction in the number of potential claims under RAVCA could only marginally contribute to shortening litigation. This marginal benefit comes at a significant cost: it denies redress to victims who were entitled to recovery under the original version of the Act. The Amendment cannot be said to “facilitate recovery” by those victims.

Still, the main explanation for the Amendment was set forth by then Minister of Justice, Dan Meridor. He explained that the Supreme Court’s liberal interpretation of RAVCA was detrimental to a large portion of the population: “It imposes a heavy burden on drivers who are forced to pay additional premiums for insurance against risks unrelated to transportation” and “we do not think it is justified.”¹⁶⁴ But this position is problematic. RAVCA spreads losses that stem from the use of motor vehicles among the *owners* of such vehicles and not among drivers.¹⁶⁵ Apparently, the justification for imposing the burden on this group is that its members are the ones who actually chose to possess and use—directly or indirectly—these dangerous objects and are the main beneficiaries of their existence. According to this logic, one cannot argue that spreading an injury among all motor vehicle owners is justified only when the injury stems from realizing transportation risks in the narrow sense. The use of motor vehicles creates a plethora of dangers that would not arise if motor vehicles did not exist. If we believe that spreading the cost of injuries resulting from the materialization of risks inherent in the use of motor vehicles among their owners is warranted, then we cannot claim that it is unjustified to spread the cost of injuries stemming from some of the risks associated with the natural and ordinary use of such vehicles. Arguably, any distinction between the various risks inherent in the use of motor vehicles is contrived.

Note that Amendment No. 8 also excluded from RAVCA’s coverage certain types of cases in which a person was injured due to the materialization of transport-related risks, such as road accidents caused by terrorist activities¹⁶⁶ or accidents that occurred in the course of professional maintenance of a car,¹⁶⁷ although the official rationale for the Amend-

163. See ENGLAND, ROAD ACCIDENT VICTIMS COMPENSATION 3D, *supra* note 158, at 73.

164. DK (1990) 2269-70; see also Road Accident Victims Compensation Bill (Amendment No. 8), 1989, HH, 31, 32; DK (1990) 5057; CA 2199/99 Estate of Oded Lazar v. Port & Ry. Auth. [2001] IsrSC 56(1) 938, 951-52.

165. See generally RAVCA.

166. The Amendment modified the definition of “victim” in RAVCA section 1, excluding victims of terrorist activities (even where the injury was caused by the terrorist activity’s impact on the use of the motor vehicle).

167. This issue is discussed above. See *supra* notes 158-60 and accompanying text.

ment does not support such an exclusion.¹⁶⁸

But even if we agree that it is unjust to impose the burden of insurance against risks unrelated to transport on motor vehicle owners and ignore the revisions that are inconsistent with this rationale, it is still necessary to examine whether the Amendment truly realized its proclaimed goal and reduced mandatory auto insurance premiums, or at least prevented their increase. One year after *Shulman*, mandatory auto insurance premiums shot up 9%–10% in real terms (a nominal rise of more than 30%).¹⁶⁹ The question is therefore, whether premium rates reverted to the pre-*Shulman* level following the Amendment, as promised by its drafters. The Amendment was adopted on September 30, 1990. Three months later, mandatory insurance premiums were adjusted.¹⁷⁰ The new premiums were higher than the premiums that preceded the Amendment by 36.3% nominally, and by 8.2% in real terms. One may argue that the new Amendment could not be expected to have an impact on premiums only three months after its enactment. However, in the next adjustment of premium rates in the summer of 1993,¹⁷¹ about three years after the Amendment was adopted, the premiums were raised by more than 18% in real terms (62% nominally). The aggregate increase in premium rates from the enactment of Amendment No. 8 until the summer of 1993 was 28% in real terms (120% in nominal terms). This rise could not be justified by the actual changes in variables relevant to the assessment of expected payments by insurance companies (annual number of victims, average scope of compensation for each victim, and number of the insured), even if the number of potential plaintiffs under RAVCA was not reduced by Amendment No. 8.¹⁷²

This being the case, is it possible to argue that the Amendment actually benefited the insured? In terms of the end result, there is reason for skepticism. The Amendment was enacted in order to ease the burden on motor vehicle owners, but immediately after its enactment, the regulator significantly increased premium rates. Presumably, the view that an amendment was required to ease the burden on the insured rested, *inter alia*, on representations made by representatives of the insurance industry. As Part III will show, the demand to increase the premiums in the years that followed the Amendment was also initiated by the insurance companies. It is thus possible to conclude that, in a relatively short pe-

168. The legislature probably intended to preclude recovery under RAVCA whenever an alternative compensation scheme was available for the victim. But it is unclear why the existence of an alternative compensation scheme should deprive road accident victims of their rights under RAVCA.

169. See Road Accident Victims Compensation Order (Premium Rates), 1988, KT 5135, 18 (pre-*Shulman* rates); Road Accident Victims Compensation Order (Premium Rates), 1989, KT 5212, 1274 (post-*Shulman* rates).

170. Road Accident Victims Compensation Order (Premium Rates), 1990, KT 5318, 365.

171. Road Accident Victims Compensation Order (Premium Rates), 1993, KT 5540, 1068.

172. My calculations are based on the data used in Part III below.

riod of time, the insurance companies devised a combination of measures that substantially improved their economic position.

III. THE PREMIUMS

Section 18 of the Bill of 1973 was supposed to add a qualification to section 4A(a)(4) of the Supervision of Insurance Business Act that authorizes the Minister of Finance to determine, either generally or for a particular branch of insurance, the minimum and maximum premium rates.¹⁷³ According to this qualification:

With respect to insurance policies under section 2 of the Motor Vehicle Insurance Ordinance [New Version], premium rates and the method for distributing the risks between different classes of vehicles will be adjusted annually by a committee appointed by the Minister of Finance in consultation with the Minister of Justice and the Minister of Transport, in accordance with criteria determined by the Minister of Finance in regulations.

The main problem from the insurance companies' perspective was that they were not accorded any official role in the committees that were supposed to determine premium rates. In a memorandum submitted by the chairman of the Insurance Companies Association to the Knesset's Constitution, Law, and Justice Committee, the companies insisted that their representatives be appointed to these committees "in a commensurate proportion."¹⁷⁴ In addition, they demanded that the criteria for determining premium rates include a fixed percentage of profit, in excess of all costs. They further demanded an annual adjustment of premium rates and that in the case of losses, the following year's premiums would compensate them for these losses, up to the agreed level of profits.

The version ultimately adopted on the second and third readings (section 17 of RAVCA) provided that premium rates would be determined by the Minister of Finance, in consultation with the Minister of Justice and the Minister of Transport, after hearing the representative organization of the insurance companies and with the approval of the Knesset Finance Committee.¹⁷⁵ The insurance companies were thus granted official standing in the premium setting process. This is quite reasonable. The price that a person can charge for a product he or she manufactures or a service he or she provides cannot be determined without at least

173. Supervision of Insurance Business Act, 1951, S.H. 221.

174. See Hachami, *supra* note 52, at 7.

175. Road Accident Victims Compensation Act (RAVCA), 1975, S.H. 234, § 17; see also DK (1975) 3954-55. This section was abolished by the Motor Vehicle Insurance Act. Motor Vehicle Insurance Act (Insurance Under Conditions of Supervised Competition and Arrangements for the Transition Period), 1997, S.H. 205, § 10. Section 10 was supposed to go into effect on January 1, 2000. *Id.* § 16. Its date of effectiveness was postponed (twice) until March 31, 2001. See Motor Vehicle Insurance Act (Insurance Under Conditions of Supervised Competition and Arrangements for the Transition Period) (Amendment), 2000, S.H. 58, § 4; Motor Vehicle Insurance Act (Insurance Under Conditions of Supervised Competition and Arrangements for the Transition Period) (Amendment No. 2), 2000, S.H. 108, § 9.

giving that person the right to present his or her arguments as to what the price should be. On the other hand, the insurance companies' hopes for commensurate representation in the premium setting body were dashed. The Constitution, Law, and Justice Committee preferred to entrust the task of determining the premiums to a "disinterested body" (namely the Minister of Finance), and to subject it to parliamentary supervision (by the Knesset Finance Committee). Nonetheless, it appears that the Committee overestimated the capacity of governmental and parliamentary bodies to stand up to pressures exerted by the insurance companies.

Global experience indicates that when insurance premiums in a particular branch are determined by a regulator and not by free market forces, the premiums are very high in relation to insured risks.¹⁷⁶ Instead of competing with each other, insurance companies establish a powerful lobby that negotiates with functionaries whose limited terms in office prevent them from waging a battle against economically and politically powerful entities. During the deliberations on the first amendment of RAVCA in 1977, MK Zerach Warhaftig, one of the Act's staunchest supporters, admitted that immediately after the enactment of RAVCA, insurance companies began to argue that premiums should be raised. There was "intensive pressure to raise them more and more, despite the absence of any need or real justification to do so."¹⁷⁷ Warhaftig concluded: "I am deeply concerned that the Ministry of Finance is under severe pressure, and cannot withstand this pressure exerted by the insurance companies. Insurance companies are in the position of a cartel, something akin to a monopoly. They operate together and dictate the conditions."¹⁷⁸ The insurance companies began to apply unrelenting pressure even before they obtained and provided initial data about expected outlays¹⁷⁹ and continued to do so even when it became clear that their revenues exceeded expected expenses.¹⁸⁰ This pressure paid off.

176. See, e.g., MARKESINIS, *supra* note 26, at 714 (explaining that the German regulator controls auto insurance rates, which "prevents effective competition between insurance companies and thus helps keep insurance premiums unrealistically high"); Randall Bovbjerg, *Massachusetts No-Fault: A Note on Some Changes in the Law and in Rate Levels*, in NO-FAULT AUTOMOBILE INSURANCE IN ACTION 247, 249 (Alan I. Widiss et al. eds., 1977) ("In Massachusetts, auto insurance rates are set by the Insurance Commissioner on an industry-wide basis after hearing the insurers' requests This lack of rate competition is sometimes cited as another reason for Massachusetts' high premiums."); see also LITAN, *supra* note 3, at 10 ("Contrary to a perception . . . that the regulation of insurance rates benefits consumers, the most recent academic research amply documents otherwise. For example, states that have tightly regulated auto insurance rates have not lowered average premiums below what they otherwise would be, while distorting insurance rates for individual classes of consumers, forcing safer drivers to subsidize higher risk drivers.").

177. DK (1978) 744.

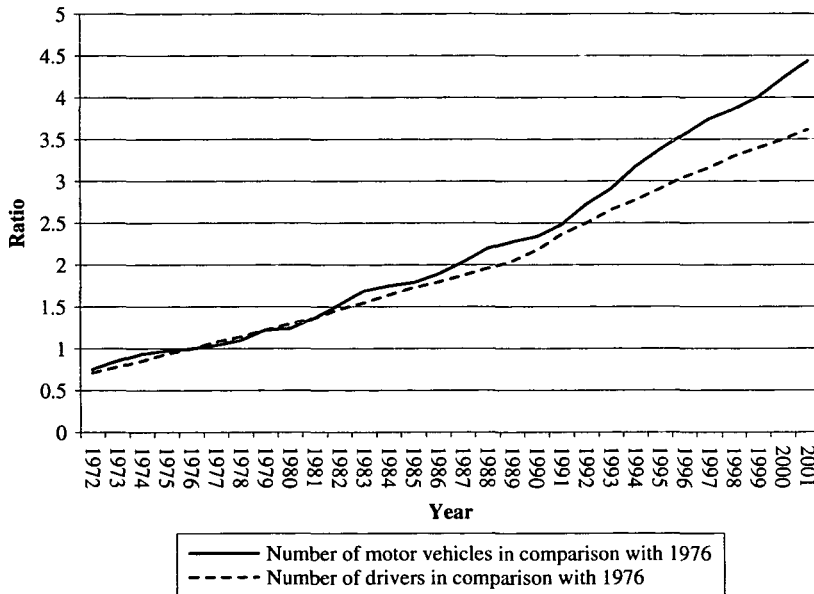
178. *Id.*

179. *Id.* at 746 (statement of MK Mordechai Wirshovsky).

180. In 1979, insurance companies' income from the mandatory auto insurance business was 2.7 billion Israeli pounds (1.5 billion pounds were premiums collected from the insured, and 1.2 billion were the annual return on investment of accumulated reserves). In the same year they paid out 1.1 billion pounds (0.9 billion in compensation to road accident victims, 0.2 billion in administrative costs). Uzi Abel, *Three Years Under the Road Accident Victims Compensation Act*, 21 Soc. Sec. 158, 159 (1981).

To realize just how effective this pressure was, it is necessary to understand which factors affect insurance companies' profitability. The total sum of expenses depends first and foremost on the number of eligible victims (n), and the average rate of compensation paid to each of them (c).¹⁸¹ Total revenues depend on the number of the insured (i) and the average premium paid by each of them (p). The profit rate corresponds with d , defined as $d = i * p - n * c$. From the enactment of RAVCA until the end of 2000, the number of motor vehicles in Israel (i) increased 4.23 times. In the same period, the number of drivers "using" motor vehicles increased 3.5 times. Figure 1 depicts the ratio of total motor vehicles (and drivers) in a given year to total motor vehicles (and drivers) on the date of RAVCA's enactment. During those years, the annual number of road accident victims (n) increased 1.93 times, as shown in Figure 2.¹⁸² The maximum value on the vertical axis (the ratio axis) is identical in the two figures to emphasize the tremendous gap between the increase in the number of the insured—hence premiums paid—and the increase in the number of victims—hence payments made.

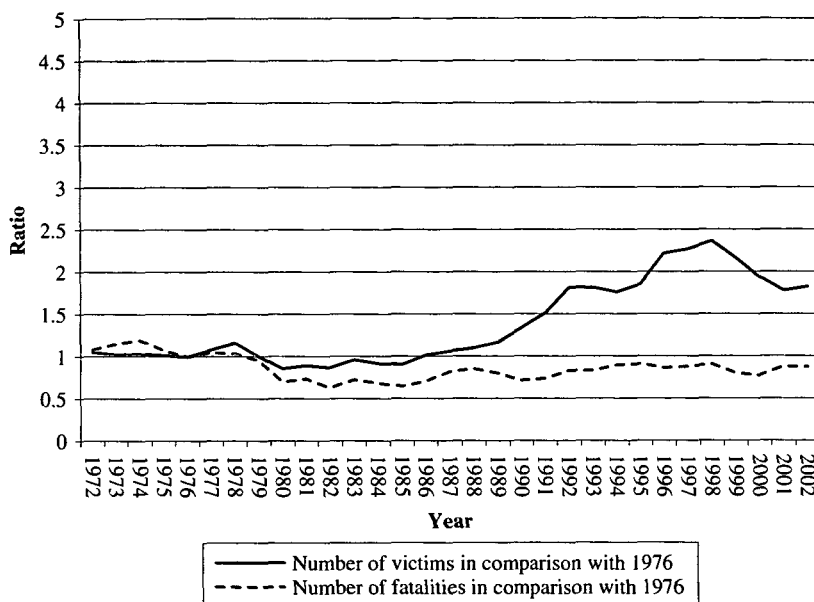
FIGURE 1. RATIO OF THE NUMBER OF MOTOR VEHICLES AND DRIVERS IN A GIVEN YEAR TO THEIR NUMBERS IN 1976.



181. In this part, operating costs are not considered. Presumably, the ratio between operating costs and total expenditure has decreased as insurance companies have gradually become more efficient. More importantly, insurance companies were allowed to charge an additional fee for operating costs, in excess of fixed premium rates.

182. This Figure and all related calculations are based on data collected by the Israeli Central Bureau of Statistics. CENT. BUREAU OF STATISTICS, 53 STATISTICAL ABSTRACT OF ISRAEL tbl. 24.1 (2002), available at http://www.cbs.gov.il/archive/shnaton53/st24_01.pdf.

FIGURE 2. RATIO OF THE NUMBER OF VICTIMS AND FATALITIES IN A GIVEN YEAR TO THEIR NUMBERS IN 1976.



The average compensation paid to every victim (*c*) depends, first, on the distribution of victims according to the severity of the injury. The more severe the average injury, the higher the average compensation. According to the data that forms the basis for Figure 2, the ratio of the fatalities in 2000 to fatalities in 1976 was 0.77, whereas the ratio of the total victims in 2000 to total victims in 1976 was 1.93. Put differently, the proportion of fatalities relative to the total number of road accident victims in 2000 was 2.5 times lower than in 1976. The proportion of severely-injured victims decreased at a similar rate.¹⁸³ This means that the average severity of injuries decreased, although this change cannot be expressed numerically.

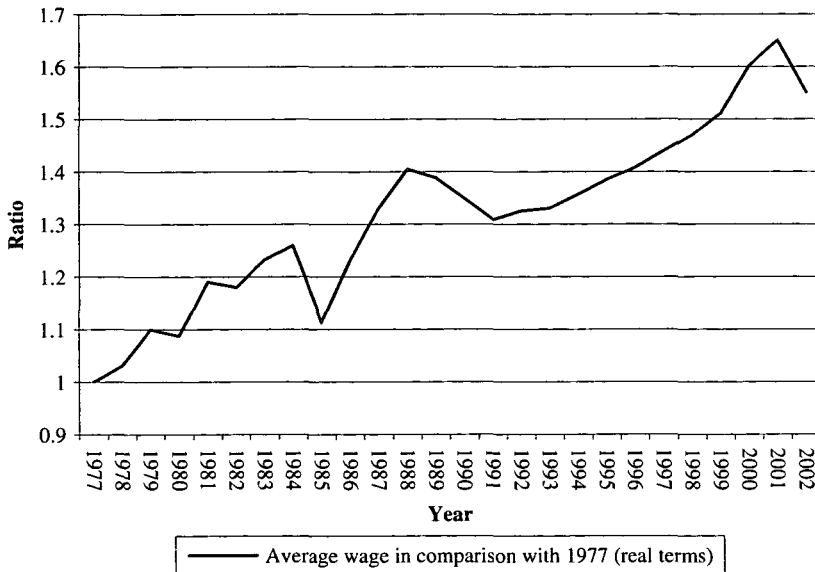
Another important factor affecting average compensation is the change in the average wage level in the economy. This factor is important because compensation for loss of earnings and earning capacity (including loss of pension) is usually the main component of any claim under RAVCA, especially in cases of severe injuries, which have a significant effect on *c*.¹⁸⁴ Figure 3 presents the relationship of the current value of

183. This can be deduced from a simple statistical analysis. Compare DK (1975) 3955, with CENT. BUREAU OF STATISTICS, 54(7) MONTHLY BULLETIN OF STATISTICS tbl. Q.5 (2002), available at http://www.cbs.gov.il/archive/200307/yarhon/q5_e.htm. In 1974, 3,366 people were severely injured in road accidents (15.5% of the total number of road accident victims). CENT. BUREAU OF STATISTICS, *supra*. In 2000, 2,896 people were severely injured in road accidents (7.2% of the total). *Id.*

184. A sample of cases reveals that this component accounts for 60%–70% of total compensation. To this should be added compensation for attendant care (personal assistance, nursing and domestic services, and home maintenance), which is also related to the average wage in the economy.

the average wage in the economy in a given year to the current value of the average wage in 1977. It shows that the average wage increased 1.6 times—in real terms—between 1977 and 2000.¹⁸⁵ According to this datum, and given that the average severity of injuries decreased, one may reasonably deduce that the average compensation (*c*) did not increase more than 1.5 times (in real terms).

FIGURE 3. RATIO OF THE AVERAGE WAGE IN A GIVEN YEAR TO THE AVERAGE WAGE IN 1977 (IN REAL TERMS).



It is possible to argue that this analysis is unfair to the insurance companies because the costs of medical services provided to road accident victims, which also affect average compensation (to a lesser extent), increased at a higher rate than the average wage in the economy. The premise is correct, but this does not entail a significant deviation from the preceding analysis (which does not purport to be absolutely accurate). The reason is quite simple. The real increase in the various components of compensation not directly linked to the average wage does not exceed (at least not significantly) the real increase in the average wage. The cost of medical services (except dental treatment) increased 3.2 times in real terms between 1977 and 2000.¹⁸⁶ However, there are other components of compensation whose aggregate weight is not less than that of compensation for medical services, and the real cost of these components rose

185. This Figure and all related calculations are based on data collected by the Israeli Central Bureau of Statistics. CENT. BUREAU OF STATISTICS, 53 STATISTICAL ABSTRACT OF ISR. tbl. 12.31 (2002), available at http://www.cbs.gov.il/archive/shnaton53/st12_31.pdf; CENT. BUREAU OF STATISTICS, 47 STATISTICAL ABSTRACT OF ISR. tbl. 12.24 (1996), available at <http://www.cbs.gov.il/archive/shnaton47/st12-24.gif>.

186. The calculation is based on data taken from the Statistical Abstracts, *infra* note 187.

negligibly (dental treatment), did not change at all (non-economic loss), or even decreased (medications, medical equipment, travel and mobility costs). Even under assumptions favorable to the insurance companies, weighting the real changes in various components of compensation not directly related to the average wage, each according to the component's relative weight in the overall compensation, does not produce a result significantly higher than 1.6.¹⁸⁷ And even if the result of this weighting is slightly higher than the real change in average wage, the difference has a negligible impact on the average compensation per victim (c) because of the dominance of the wage-dependent components in overall compensation.

The last variable in the equation, and the only one actually regulated under RAVCA, is premium rates (p). As explained above, premium rates were the product of intensive and effective pressure applied by the insurance companies. Thus far, it is clear that during the relevant period, the number of motor vehicles in Israel (i) increased by a factor of 4.23, the number of victims (n) increased by a factor of 1.93, and the average compensation per victim (c), at the very most, increased by a factor of 1.5. In terms of proper policy, the regulator should have fixed premium rates according to the formula $d_y|_{y>1977} \leq d_{1977}$.¹⁸⁸ Put differently, given the "social" nature of the scheme, insurance companies' profits should not have been allowed to soar. Under this working assumption, the average premium rate (p) should have decreased by 30% (in real terms) by the end of 2000.¹⁸⁹ This should have been so *a fortiori* because Amendment No. 8

187. I tested this argument in three stages. First, I calculated the real increase in the various components of compensation not directly linked to the average wage (except for non-economic damages, where the real increase is 0). The nominal increases in the prices of products and services that economic damages cover were taken from the Israeli Central Bureau of Statistics. CENT. BUREAU OF STATISTICS, 52 STATISTICAL ABSTRACT OF ISR. tbls. 13.4-13.5 (2001); CENT. BUREAU OF STATISTICS, 47 STATISTICAL ABSTRACT OF ISR. tbls. 10.3-10.4 (1996); CENT. BUREAU OF STATISTICS, 41 STATISTICAL ABSTRACT OF ISR. tbls. 10.3-10.4 (1990); CENT. BUREAU OF STATISTICS, 42 STATISTICAL ABSTRACT OF ISR. tbls. 10.3-10.4 (1991); CENT. BUREAU OF STATISTICS, 37 STATISTICAL ABSTRACT OF ISR. tbls. J.3-J.4 (1986); CENT. BUREAU OF STATISTICS, 36 STATISTICAL ABSTRACT OF ISR. tbls. J.3-J.4 (1985); CENT. BUREAU OF STATISTICS, 31 STATISTICAL ABSTRACT OF ISR. tbls. J.3-J.4 (1980); CENT. BUREAU OF STATISTICS, 29 STATISTICAL ABSTRACT OF ISR. tbls. J.3-J.4 (1978); CENT. BUREAU OF STATISTICS, 28 STATISTICAL ABSTRACT OF ISR. tbls. J.3-J.4 (1977). The prices were compared with late-1976 prices, and the nominal change was converted to real change based on changes in the consumer price index. Second, I examined the relative weight of each non-wage-related component in the overall compensation based on a random sample of court decisions. The third stage weighted the real changes in non-wage-related components, each according to the component's relative weight in the overall compensation.

188. d_y denotes $i_y * p_y - n_y * c_y$, where n_y is the number of eligible victims in year y ; c_y is the average rate of compensation paid to a victim in year y ; i_y is the number of the insured in year y ; and p_y is the average premium paid in year y .

189. Proof: We assume that $i_{2000} * p_{2000} - n_{2000} * c_{2000} \leq i_{1977} * p_{1977} - n_{1977} * c_{1977}$. Therefore $4.23 * i_{1977} * X * p_{1977} - 1.93 * n_{1977} * 1.5 * c_{1977} \leq i_{1977} * p_{1977} - n_{1977} * c_{1977}$ (where X is the maximum real increase in premium rates that conforms to the assumption). So $X \leq (i_{1977} * p_{1977} + 1.895 * n_{1977} * c_{1977}) / 4.23 * i_{1977} * p_{1977}$. Assuming that $i_{1977} * p_{1977} \geq n_{1977} * c_{1977}$, we may conclude that $X \leq (i_{1977} * p_{1977} + 1.895 * i_{1977} * p_{1977}) / 4.23 * i_{1977} * p_{1977} = 2.895 / 4.23 = 0.68$.

reduced the number of victims entitled to compensation under RAVCA (*n*).

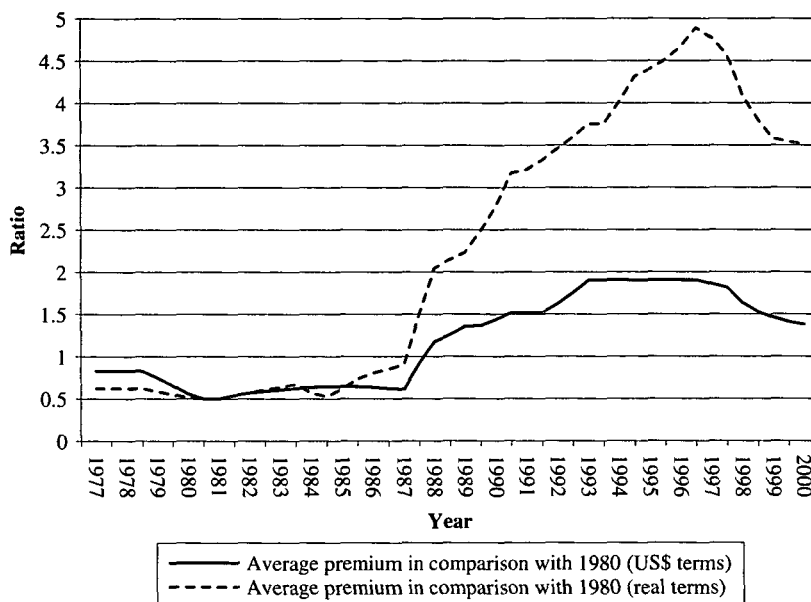
Nonetheless, systematic examination of the orders and regulations establishing mandatory auto insurance premiums reveals a radically different picture. Instead of going down, premium rates steadily went up (in real terms), as depicted in Figure 4.¹⁹⁰ The choice of the 1980 premium rates as the benchmark requires explanation. As mentioned above, a 1978 amendment to RAVCA provided that damages for loss of earnings and earning capacity would be determined in accordance with the victim's after-tax income, subject to a 25% tax deduction limitation.¹⁹¹ This amendment significantly altered the average compensation (*c*) and naturally had an impact on premium rates (*p*). Thus, "crude" premium rates set before the amendment could not serve as a benchmark for examining the real change in premium rates over the years. Absent clear data on the amendment's distinct influence on premium rates (given other relevant variables), reliance was placed on premium rates determined after the amendment as the benchmark. Arguably, the real change in premium rates between 1977 and 1980 closely reflects the decrease in damages for loss of earnings and loss of earning capacity in the wake of the amendment. So adopting the 1980 premium rates as the basis for comparison does not effectively detract from the accuracy of the findings.¹⁹²

190. This Figure and all related calculations are based on numerous Orders and Regulations issued from time to time, all bearing a similar title: Road Accident Victims Compensation Order (Premium Rates) (between 1977 and 1993) or Road Accident Victims Compensation Regulations (Premium Rates) (between 1997 and 2000). These were published in (<year>, <series> <volume>, <first page>): 2000, KT 6050, 824; 1999, KT 5984, 984; 1998, KT 5917, 1098; 1997, KT 5866, 140; 1993, KT 5540, 1068; 1990, KT 5318, 365; 1989, KT 5212, 1274; 1988, KT 5135, 18; 1987, KT 5020, 718; 1985, KT 4888, 326; 1985, KT 4744, 470; 1983, KT 4548, 333; 1982, KT 4407, 1663; 1980, KT 4158, 2292; 1977, KT 3674, 1120. All orders and regulations are linked to the fixed rates of the consumer price index, so the real increase between two consecutive orders was 0.

191. See *supra* note 76 and accompanying text.

192. Road Accident Victims Compensation Order (Premium Rates), 1980, KT 4158, 2292 was the first to adjust premium rates following the 1978 amendment. So there was no real reduction in premium rates between 1978 and 1980, despite the amendment.

FIGURE 4. RATIO OF AVERAGE PREMIUM IN A GIVEN YEAR TO AVERAGE PREMIUM IN 1980 (IN REAL TERMS AND IN USD TERMS).



The Figure shows that despite the expectation of a gradual real reduction in premium rates, they actually increased—in real terms—by a factor of 1.86 (or by a factor of 4 in dollar terms) by the end of 2000. Furthermore, between 1993 and 1998, prior to the commencement of the mandatory insurance premiums reform of 2000 (further explained below), premium rates were 2.3–2.4 times higher (in real terms) than the rates of 1980. Undoubtedly, the substantial increase in premium rates over the years was the result of aggressive lobbying by the insurance companies.¹⁹³ Combining forces, they managed to secure an incredible cash flow for themselves. An expert opinion prepared for Israel's Association for Motor Vehicle Casualty Insurance, Ltd. (AVNER) at the beginning of 2003 reveals that the mandatory auto insurance branch raked in a positive cumulative cash flow of NIS 17.5 billion between 1976 and 2000 (in late 2002 terms, including “special collection for past losses” and investment profits).¹⁹⁴

This depressing picture (from the public's perspective) was supposed to change at the beginning of the twenty-first century. In the summer of 1997, the Knesset enacted the Motor Vehicle Insurance Act (Insurance Under Conditions of Supervised Competition and Arrangements for the

193. See, e.g., Benny Barak, *Mandatory Insurance: Reform?*, YNET, June 25, 2002, <http://www.ynet.co.il/articles/1,7340,L-1961559,00.html>.

194. See generally Memorandum from Yehuda Kahana, *supra* note 56. The insurance companies contended that they accumulated substantial actuarial deficits. But given the nature of actuarial valuations, the numbers were probably inflated. Perry, *supra* note 33, at 218-19 n.294.

Transition Period) (hereinafter the Insurance Act).¹⁹⁵ The goal of the Insurance Act was “to prescribe that insurers engaged in auto insurance will operate, upon the termination of the transition period, under conditions of supervised competition.”¹⁹⁶ The Insurance Act provided, *inter alia*, that section 17 of RAVCA would be abolished as of March 31, 2001,¹⁹⁷ and that AVNER’s participation in victims’ compensation would be gradually reduced until it was totally eliminated with respect to victims covered under policies issued as of January 1, 2003.¹⁹⁸ Presumably, the insurance companies were extremely wary of the transition from operating as a (legally sanctioned!) cartel to nearly free competition. So it comes as no surprise that their representatives (together with the representatives of AVNER, which was doomed to dissolution) made every effort to prevent, or at least delay, the reform.¹⁹⁹ The insurance companies failed to prevent the passage of the Insurance Act, but as a result of the protracted negotiations they conducted with the Supervision of Insurance Department of the Ministry of Finance, the Knesset ultimately agreed to extend the transition period and established additional stages on the way to completing the reform.²⁰⁰

Ironically, the “supervised competition” did not impair insurance companies’ profitability for several years. During the first stage (April 1, 2001–December 31, 2002), premiums were determined in accordance with the Supervision of Insurance Business Regulations (Premiums that an Insurer is Permitted to Collect for the Insurance of a Motor Vehicle) (Temporary Provision).²⁰¹ Each insurer was permitted to determine the premium for each insured within a range of 90%–110% of the sums specified in the supplement to the regulations. For most of the insured, the base sums (including the transfer to Karnit) were higher in real terms than the sums collected previously. Needless to say, the insurance companies made almost no use of the possibility of charging sums that were

195. Motor Vehicle Insurance Act (Insurance Under Conditions of Supervised Competition and Arrangements for the Transition Period), 1997, S.H. 205.

196. *Id.* § 1.

197. *Id.* §§ 10, 16; *see also supra* note 175.

198. *Id.* §§ 4, 10B. In the past, AVNER received 70% of the premiums and paid 70% of the compensation.

199. These pressures were mentioned by MK Meir Shitrit, the Minister of Finance in 1999. *See* DK (1998-99) 849-50; DK (1999-2000) 2723; DK (2000-01) 1653-54; DK (1999-2000) 2720 (statement of MK David Tal); DK (1989-99) 845-46 (statement of MK Nissim Dahan).

200. *See* Motor Vehicle Insurance Bill (Insurance Under Conditions of Supervised Competition and Arrangements for the Transition Period) (Amendment No. 2), 2000, HH, 299 (introductory notes); DK (2000-01) 1647 (statement of the Minister of Finance, Avraham Shochaht). The agreement between The Ministry of Finance and the insurance companies was concluded on November 13, 2000. *See* Ministry of Finance, Document of Understanding (Nov. 13, 2000), *available at* <http://ozar.mof.gov.il/hon/2001/insurance/memos/2002/DOU.pdf>.

201. 2001, KT 6091, 514. These regulations were issued under section 37(a)(1) of the Supervision of Insurance Business Act, 1981, S.H. 208, because RAVCA section 17 had already been abolished.

lower than the base sums.²⁰²

During the second stage (beginning January 1, 2003), the insurance companies began to determine premium rates independently in accordance with a few guidelines issued by the Superintendent of Insurance²⁰³ and subject to his approval. Currently, most companies utilize a database, established for statistical evaluation of risks in the auto-insurance business, based on diverse variables.²⁰⁴ Insurance companies are permitted to take into account a relatively limited number of variables that relate to the characteristics of the motor vehicle and its drivers,²⁰⁵ but the list may be expanded in coming years.²⁰⁶ At this stage, competition should have reduced mandatory insurance premiums. But a sample taken in the summer of 2003 showed that, for a considerable number of the insured, the transition to competition did not immediately lead to a real reduction in insurance premiums, as compared with the standard premiums set by the regulator in the summers of 2000 and 1999.²⁰⁷ It was quite the opposite: there was a significant rise in premiums paid by owners of motor vehicles with small and medium engine capacity (up to 1,500 cc).²⁰⁸ Moreover, mounting numbers of insureds (primarily motorcycle owners and dangerous drivers) were instructed to purchase insurance from "The Pool," a residual mechanism that sells insurance at high rates to motor vehicle users who cannot obtain coverage from insurance companies at standard rates.²⁰⁹ So even if there was a slight reduction in

202. See Barak, *supra* note 193; Benny Barak, *The Reform Has Failed: Mandatory Insurance Rates Rose 5%*, YNET, Feb. 19, 2002, <http://www.ynet.co.il/articles/1,7340,L-1677148,00.html>.

203. See Ministry of Finance, Circular No. 2003/6, Insurance Rates in the Mandatory Auto Insurance Branch (Mar. 18, 2003), available at <http://www.mof.gov.il/hon/2001/insurance/memos/2003-6.doc>.

204. Motor Vehicle Insurance Ordinance [New Version], 1970, N.H. 320, § 11A.

205. The variables included are the vehicle's engine capacity; the presence of air bags; the youngest driver's age, gender, and years of experience as a licensed driver; the number of claims by all drivers of the vehicle during the last three years; and the number of suspensions or revocations of those drivers' licenses during the last three years. See Ministry of Finance, Parameters that Insurance Companies Use to Determine Mandatory Insurance Rates (July 3, 2006), available at http://ozar.mof.gov.il/hon/2001/insurance/memos/4_35param2006-7.pdf [hereinafter Ministry of Finance, Parameters that Insurance Companies Use].

206. The database also contains data about the type of motor vehicle, the manufacturer, year of production, expected use of the vehicle (for example, freight transport, public transportation, leasing, or driver's education). See Motor Vehicle Insurance Regulations (Establishment and Operation of Databases), 2004, KT 6310, 242.

207. See Ministry of Finance, Parameters that Insurance Companies Use, *supra* note 205.

208. *Id.* In this sense, the reform was anti-social: owners of larger, and hence more expensive, vehicles paid less than before (because the drivers and passengers are exposed to relatively smaller risks), and owners of smaller vehicles paid more than before. See Shilo, *supra* note 16, at 6.

209. Motor Vehicle Insurance Regulations (Residual Insurance and the Method for Determining the Rate), 2001, KT 6111, 873. This phenomenon is well known in the United States. See LITAN, *supra* note 3, at 10, 12 ("By artificially restraining premiums, state premium controls have caused many more higher-risk drivers in states where these controls are present to obtain their insurance from so-called 'residual risk' markets or plans because insurers cannot profitably sell insurance to these drivers at the controlled premiums.").

premiums paid by certain groups, it was at least partially offset by an increase in premiums paid by other groups.

Insurance companies can now set premiums according to a rough estimate of individual risk and refer more and more high-risk insureds to The Pool. This enables insurance companies to maintain considerable profit in the mandatory auto insurance branch. However, premiums have decreased significantly in recent years,²¹⁰ showing that competition ultimately serves the social goal better than rate regulation.

IV. LESSONS FOR A FEDERAL SYSTEM

The most important conclusion to be drawn from the preceding analysis is that the desirability of regulating the content of insurance contracts, as opposed to solvency or antitrust regulation, is questionable. On the one hand, regulation is a costly venture.²¹¹ It entails endless collection of data, analysis, discussion, decision-making, and implementation. On the other hand, as the Israeli experience shows, an attempt to control the insurance market may be counterproductive. Absurdly, regulation may catalyze and legitimize socially harmful cartelization. In trying to regulate insurance markets, the government reduces insurers' incentive to compete and induces them to cooperate vis-à-vis the government itself to the detriment of consumers. Before and after the Israeli reform, insurance companies established a unified front and aggressively negotiated both the nature and the particulars of the scheme with government and parliamentary officials. They enjoyed considerable success. Policymakers should be aware of the plain fact that regulation may be a costly and counterproductive enterprise. Policymakers should not avoid regulation altogether, but must be cautious in their aspirations and efforts.

For instance, one view is "that insurance rates must be subject to oversight, if not outright control, to protect consumers."²¹² In the past, "concern over collusion in the insurance industry was well founded."²¹³ The primary instance of collusion in the United States occurred during the 1930s, when insurers operated as a cartel.²¹⁴ This led to the *South-Eastern Underwriters* case, in which the appellees were indicted under the Sherman Act for fixing and maintaining arbitrary and non-competitive premium rates on fire and other lines of insurance in several states.²¹⁵ The idea that rate regulation is necessary to prevent cartelization is no longer valid. On the contrary, as argued above, rate regulation may generate a different, but equally harmful, type of cartelization that leads to

210. See Ministry of Finance, Parameters that Insurance Companies Use, *supra* note 205 (reporting a reduction of more than 20% between 2003 and late-2005).

211. See, e.g., John Bernhardt, Note, *Is National Gas Pipeline Regulation Worth the Fuss?*, 40 STAN. L. REV. 753, 762, 770 (1988) (explaining that regulation is costly).

212. See LITAN, *supra* note 3, at 12.

213. See Cummins, *supra* note 10, at 6.

214. *Id.*

215. See generally *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

excessive prices.²¹⁶ This Article thus provides additional empirical support for deregulation of premium rates. In Israel, just as in California, strict control over auto insurance premiums curtailed rate reduction despite the decline in claim costs;²¹⁷ and just as in New Jersey and South Carolina, the move away from strict price controls has actually benefited consumers.²¹⁸

Israeli experience is clearly relevant for American policymakers. First, the Israeli economy is comparable to an average U.S. state economy in size, structure, and political environment. Israel is an advanced market economy with a GDP of around \$200 billion (akin to Connecticut or Louisiana) and a GDP per capita of nearly \$30,000 (like Utah or West Virginia). Israel is a parliamentary democracy with three main branches of government: the executive, the legislative, and the judiciary. The first two have been subject to lobbying for decades, albeit probably less institutionalized than in the United States through the surveyed period. More specifically, the Israeli insurance regulatory system is similar to that of a typical U.S. state. The legislature directly controls several aspects of insurers' activities, including the limits of their liability. Other aspects are controlled by government agencies and officials. For example, an insurance commissioner oversees insurers' solvency, approves insurance forms, supervises insurers' conduct to protect consumers from unscrupulous practices, oversees the activities of insurance agents, and approves insurance premium rates.²¹⁹ Second, cumulative evidence from numerous jurisdictions shows that the Israeli experience is not unique. Presumably, insurance companies operate as an interest group in all western countries, and make similar achievements.²²⁰ So the above analysis only lends additional support to general arguments that are applicable to various jurisdictions.

Thus far, this Article has demonstrated that a *local* insurance lobby can exercise considerable influence on a *single* state government and has

216. Regulation may also cause other economic distortions, such as cross-subsidization and rate-suppression. See, e.g., Cummins, *supra* note 10, at 12-13. These distortions, however, are beyond the scope of this Article.

217. See *id.* at 13 ("There is evidence that premiums in California, for example, would have fallen significantly during the 1990s had California retained competitive rating rather than adopting prior approval."). California had a different regulatory system, which was based on prior rate approval rather than rate-fixing by the regulator. See *id.* Cummins notes that "prices in regulated states are likely to include a charge for regulatory risk that is not present in competitive markets." *Id.*

218. See LITAN, *supra* note 3, at 12.

219. *Id.* at 9 (presenting the roles of an insurance commissioner in the United States).

220. See, e.g., Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 11 (2007) (discussing the insurance lobby's impact on tort reform in Ohio); Katherine M. Jones, *Law, Politics, and the Political Safeguards of Federalism: The Case of Insurance Regulation and the Commerce Clause, 1938-1948*, 11 CONN. INS. L.J. 345, 391 (2004) ("A cynical view would suggest that the course of insurance regulation was largely determined by the exceptional strength of the well-organized and financed insurance lobby."); Charlene Davis Luke, *Beating the "Wrap": The Agency Effort to Control Wraparound Insurance Tax Shelters*, 25 VA. TAX. REV. 129, 142 (2005) ("The insurance lobby is powerful.").

urged policymakers to take this into account. The foregoing analysis can be taken one step further to develop an additional theoretical justification for federal regulation of the American insurance market.²²¹ Assuming that regulation is the product of bargaining between the government and interest groups, the ability to realize specific goals through regulation depends on the relative power of regulators, on the one hand, and the regulated industry, on the other. In this respect, the United States differs significantly from Israel.

First, in a federal system of government, state-based regulation enables insurance companies to effectively implement a “divide and rule” strategy. They can use their combined power to negotiate the terms of regulation with one state legislature or agency at a time. In this respect, each state is analogous to Israel: it endures similar pressures and is likely to make similar concessions. The federal government is much more powerful than discrete state governments.²²² Hence, associations and representative organizations of insurance companies, like other interest groups, have much greater leverage over state governments than they have over the federal government.

Second, and closely related, insurance companies can utilize not only the relative weakness of state governments (as compared with the federal government), but also interstate competition for investment and business activity. A state-based system triggers a race to the bottom. Insurance companies can reduce their investment and business activity in states that implement more rigorous regulation and extend their activities in states that adopt more lenient regulatory schemes. In this way, insurance companies encourage specific states to gradually reduce state intervention in the insurance market. Federal regulation diminishes the viability of this strategy.

Third, as opposed to local interest groups, insurance companies in the United States frequently operate on the national level and are organized on that level.²²³ Consequently, any lessons taught by the Israeli experience arguably apply *a fortiori* to state regulation in the United States. While the relative power of a single state government equals, on average, that of the Israeli government in its regulatory attempts, the Israeli government only faced pressures by representatives of local companies, not by national associations of multi-state colossi.

221. For the traditional justifications, see LITAN, *supra* note 3, at 10-11 (discussing expeditious approvals of policy changes and new products, preemption of state regulation of rates, attracting sophisticated expertise, and more efficiently spreading the costs of regulation).

222. See, e.g., Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 648 (2003).

223. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 541 (1944) (observing that the insurance business “is not separated into 48 distinct territorial compartments which function in isolation from each other” and that “[i]nterrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies’ methods of doing business”).

CONCLUSION

The financial crisis has exposed some of the main flaws in existing regulatory systems, and rekindled the debate on the importance and scope of regulation of the financial system. Insurance merits special attention, because it is the only financial industry not regulated on the federal level. This Article proposes a fresh viewpoint on the inherent weakness of regulation at the state level: an interest-group theory with a strong comparative bent. The state system of insurance regulation in the United States makes the use of foreign experience extremely and incomparably valuable because, in the absence of federal intervention, individual states operate much like small foreign economies. Israel serves as an excellent example because it is analogous to an average U.S. state. In particular, American scholars and policymakers can benefit considerably from the history of the Israeli road accident victims compensation scheme, a thirty-year experiment in governmental interaction with the insurance industry.

The official motive for the enactment of RAVCA in 1975 was social. According to the traditional view, the Act was meant to guarantee a prompt and proper remedy for all victims of road accidents. The legislature sought to achieve this goal through a threefold reform. It imposed absolute liability on any person using a motor vehicle for personal injuries caused to others in a road accident in which the vehicle was involved; it expanded mandatory insurance to cover any liability under RAVCA itself, and any personal injury that a driver might suffer while using the vehicle; and it established "Karnit," which compensates accident victims who are entitled to compensation under the Act but cannot recover from an insurance company.

Unfortunately, the government played a secondary role in the implementation of the social initiative. Before and after the initial reform, insurance companies established a unified front and energetically negotiated the terms of the scheme with government and parliamentary officials. They have done so continuously and successfully for decades. The greatest achievement of the insurance lobby seems to be the government's bewildering decision to withdraw the original plan to nationalize compensation for road accident victims (as actually happened in the sister-jurisdiction of New Zealand).

Next, the insurance companies persuaded the legislature to restrict and gradually reduce mandatory auto insurance coverage. The Act subjected both economic and non-economic damages to rigid caps that had not previously existed, and victims were deprived of their traditional rights of action in torts. Shortly after the Act came into force, it was amended so that compensation for loss of earnings and earning capacity would be determined in accordance with the victim's after-tax income. The right to receive interim (immediate) payments was much flimsier than originally intended. The courts' power to award periodic payments was restricted, and insurance companies were empowered to apply for such payments

irrespective of victims' will or interest. Finally, Amendment No. 8 excluded liability in various cases on questionable grounds.

At the same time, insurance companies demanded and obtained official standing in the premium-setting process and exerted continuous and unrelenting pressure on the government to raise premium rates. Premium rates rose significantly without any true economic justification. Following a revolutionary amendment which took full effect only in January 2003, regulated competition began in the mandatory auto insurance market. The steep reduction in premium rates in subsequent years shows how inflated the regulated rates were.

The primary conclusion from this analysis is that the desirability of regulating the content of insurance contracts, as opposed to solvency or anti-trust regulation, is questionable. Policymakers should be aware of the simple fact that regulation may be a costly yet counterproductive enterprise. They should not avoid regulation altogether, but must be cautious in their aspirations and efforts. Moreover, these initial findings suggest an additional theoretical justification for a shift to federal regulation of the U.S. insurance market. Assuming that regulation is the product of bargaining between the government and interest groups, the ability to realize specific goals through regulation depends on the relative power of regulators, on the one hand, and the regulated industry, on the other. A U.S. state government is comparable to the Israeli government in the sense that it is weaker than the federal government in its interaction with the insurance lobby. In a way, a state government is even weaker than the Israeli government because it has to compete with sister states for national insurers' investment and business activity. At the same time, a U.S. state faces a much stronger adversary than the Israeli government, namely nationwide conglomerates rather than local companies. The federal government is better equipped to withstand the pressure.

This Article does not purport to provide conclusive answers. It merely endeavors to advance the ongoing debate over insurance regulation in America by offering a fresh, unconventional viewpoint on an extremely complex and highly controversial subject.

Casenotes

