AN EXAMINATION OF THE PROGRESSION TOWARDS NO-FAULT MOTOR VEHICLE INSURANCE, WITH PARTICULAR REFERENCE TO THE REPUBLIC OF SOUTH AFRICA

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PREFACE

At present in South Africa, personal compensation in relation to motor vehicle accidents is firmly based on the delictual principle of 'fault'. This gives rise to a number of questions: Is this the system best suited to the realities of the motor vehicle and its accident-causing potential in modern society? Are the interests of society best served by a system of compensation based on fault? Is this the optimum system for the handling of the vast number of claims arising out of motor vehicle accidents? Are there alternative workable schemes which could be introduced? To these questions the writer addresses herself in this thesis.

By no means will this thesis answer all the intricate and complex questions involved in the fault vs. no-fault debate. However, it is hoped that what follows will contribute to a better understanding of the basic issues involved and will facilitate further discussion with a view to improving the lot of the motor vehicle accident victim.

I certify that the whole of this thesis, unless specifically indicated to the contrary in the text, is my own work.

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1. INTRODUCTION

There is no doubt that the motor vehicle is an inescapable and fundamental feature of modern society. As such, it has exerted an enormous influence on virtually every facet of communal life. Although it was invented in the late 19th century, its socio-economic and cultural impact has been most acutely felt in the 20th century. However, although the motor vehicle has provided the world with its most popular - and arguably most economic - mode of transport, by its very nature and widespread use it has also become a source of enormous damage and destruction.

At its introduction, society experienced great difficulty in coming to terms with this hitherto unheard-of form of transport. It was initially viewed with suspicion, scornfully labelled a "horseless carriage" and dismissed as an aberration unlikely to have any permanent or widespread effect on transportation.

However, as its potential gained more widespread recognition, so societal attitudes began to change and the motor vehicle, assisted by mass production, steadily gained greater sway over the affairs of men. Roads were designed especially to cater to its requirements, macadamised surfaces appeared, towns were redesigned and suburbs sprang up around city centres. A new way of life centered around and dependant upon the motor vehicle developed. Within a few short decades of its invention, the motor vehicle had made an indelible impression upon social and economic life. By the late 20th century, life without it would be inconceivable.

The law has adapted to, but not kept abreast with, the socio-economic impact of the motor vehicle. In the realm of motor accident injury compensation in particular, it has barely advanced beyond the "horseless carriage" thought pattern. Instead, the delictual liability patterns operating at the time

of its introduction are still largely applied today, despite the fact that the basic grounds of liability then formulated were designed for situations which hardly compare to modern-day motor accidents either in frequency or in seriousness in relation to social and financial consequences.

Law cannot remain static. It must continually adapt to the needs of the society it serves. Drastic technological advances which go beyond the scope of existing laws demand drastic revisions of those laws. However, the phasing out of obsolescent laws and their replacement with a more suitable and efficient system is frequently hampered by a resistance to change, which results in anachronistic laws being distorted in order to apply to circumstances for which they were never designed. Such a situation could lead to perceived or real injustices which, if left unchecked, would result in dissatisfaction and ultimately disregard of the law.

Consequently, it is essential that the existing legal system be continually examined to ensure that it is performing at optimum efficiency on its own terms and that it adequately reflects the prevailing attitudes of society and fulfils the demands placed on it.

2. COMPENSATION LIABILITY IN ITS HISTORICAL CONTEXT

2.1 INTRODUCTION

Compensation liability and the extent of legal protection afforded by a community to the victims of the wrongful acts of others can be seen as a reflection of the prevailing attitudes of that community, and will differ at various stages in its history. Societal attitudes are moulded by a multitude of factors, including the economic development of that society, its general standard of education, its moral and political outlook, its class structure and its level of technological advancement. As technological developments take place, so societal attitudes are forced to adapt to these developments, and this alteration in attitude is generally followed by a parallel alteration in the law. This sequence of events is illustrated in an examination of society's reaction to the introduction of the motor vehicle.

The history of compensation liability can be described as an attempt to balance two fundamental conflicting interests: society's interest in security and society's interest in freedom of action. The former interest demands that a person injured as the result of the action of another should be compensated for such injury, regardless of the motive or purpose underlying such action. The latter interest, on the other hand, rules that an injured party will only be able to claim compensation if the person causing such harm had done so intentionally, or with an undue lack of concern for the injured party. The choice may also be seen (1) as one between an individualistic political philosophy, emphasising the personal responsibility of those who cause accidents, and a more socialistic doctrine which stresses that society as a whole is under a moral obligation to care for those in need of help. Advocates of the former philosophy tend to see compensation as consisting solely of cash payments (extracted as punishment from the wrongdoer) which the injured party may spend as he pleases. Conversely, those supporting the latter view emphasize the responsibility of society to offer

compensation not only in monetary terms, but also by way of help and welfare in kind.

Great Britain's progression into industrialisation embodies the struggle between these two divergent ideologies. A closer look at this process - and especially the introduction of the motor vehicle into that and other countries - in its historical context illustrates the factors influencing the resolution of this fundamental conflict.

2.2 THE PRE-INDUSTRIAL ERA

Prior to the Industrial Revolution, Britain was a predominantly agricultural society. Its social structure consisted basically of two tiers made up of the land-owning aristocracy on the upper level, and the landless peasants on the lower level. The vast manorial estates of the upper classes were worked by the peasants, who were often the live-in servants of the landowners. Relations between aristocrat and peasant were usually characterised by a type of "benevolent" despotism. The lower classes were in no position to mobilise any forceful social change as they did not have sufficient wealth, education or organisation to exert any pressure for change.

The idea of the "Christian paternalist ethic", a philosophy well-suited to the rigid class structures of the day, prevailed. This doctrine emphasized the state's obligation to serve society by accepting and discharging the responsibility for its general welfare. Unfortunately it was hampered by both economic and administrative considerations.

As far as road transportation was concerned, this was the era of the horse and carriage. A victim of a road accident in this pre-industrial era was able to receive compensation from the person who caused the injury, without being required to prove fault. This approach was, and is, known as strict liability i.e., liability imposed irrespective of fault.

2.3 THE INDUSTRIAL REVOLUTION (c. 1790-c.1840)(2)

During the period known as the 'Industrial Revolution', Britain underwent a series of industrial, economic and social changes which radically altered the appearance of the countryside and altered the structure of the community itself. Labour, land and capital were coordinated under a permissive government, and the result was the transformation of an agrarian society into a mobile industrialized nation.

> "The introduction of machinery was bringing about a world revolution which was at once industrial, economic and social. Until this time the structure of society had been dominated by the distinction between townsman and peasant. The emergence of the new towns with their massed industrial workers profoundly modified this. The rapidly developing factories required manpower; population was drained from rural areas to swell the city slums, where the new proletariat led an exhausting and wretched existence. Cheap labour encouraged the exploitation of the worker by the employer" (3).

The Industrial Revolution brought about an enormous change in Britain's social structure, and the old way of life was completely erased. The new "working class" was "obliged to accept a new and harsher work discipline in which the employer acknowledged no paternal obligation towards his faceless, dehumanised 'hands'" (4).

With the advent of this 'new machine age', with its promise of great technological advancement, the doctrine of "laissez-faire", (first propounded by Adam Smith in the late 18th century), gained predominance. This doctrine embodied the principle of abstention by the state from interference with individual action - except to provide for the enforcement of a framework of laws.

"Many old privileges and monopolies were swept away and legislative impediments to enterprise were removed. The State came to play a less active, the individual and the voluntary association a more active part in affairs. Ideas of innovation and progress undermined traditional sanctions: men began to look forward, rather than backward, and their thoughts as to the nature and purpose of social life were transformed" (5).

Under the influence of this liberal and individualistic ideology, strict liability gave way to fault liability. In terms of this new system, a person who caused harm to others was only legally obliged to pay compensation to the people he injured if it could be established that the person who caused the harm was 'at fault'. "The foundation of liability was not the damage as such but the evil intention, i.e., the fault". (6). Attention came to be focused on the 'moral' culpability of the defendant, with the law of torts being seen as an instrument for exacting retribution from those who behaved "wrongfully". Without proof of fault, a victim would have to bear his own losses, according to the prevailing doctrine of the non-interference of the state. Thus:

"During the nineteenth century the 'moral advance' of tort law vastly accelerated. In response to doctrines of natural law and laissez-faire, the courts attached increasing importance to freedom of action and ultimately yielded to the general dogma of 'no liability without fault'. This movement coincided with, and was undoubtedly influenced by the demands of the Industrial Revolution. It was felt to be in the better interest of an advancing economy to subordinate the security of individuals, who happened to become casualties of the new machine age, rather than fetter enterprise by loading it with the cost of 'inevitable' accidents" (7).

The swing towards individualism and "laissez-faire" during the

Industrial Revolution is indicative of 19th century society's supreme interest in freedom of action. There is no doubt that the emergence of 'fault' as the basis for liability was influenced by the appearance of many new machines which could prove dangerous, but also socially useful. Fault liability offered economic protection to inventors and innovators by shielding them from being held liable for all the losses they and their machines would have been responsible for under a system of strict liability. The introduction of liability based on fault was also seen as a "...morally favoured compromise between earlier strict liability concepts and the total designation of the responsibility for harm flowing from socially desirable activities" (8). This was the prevailing attitude at the time of the invention of the motor vehicle, and thus the idea of 'no liability without fault' was applied to this new machine.

2.4 EVENTS FOLLOWING THE INDUSTRIAL REVOLUTION (late 19th century onwards).

The third quarter of the nineteenth century was an era of reform, characterized after 1880 by the revival of British socialism, the rise of trade unionism, the formation of the Labour party and the growing acceptance of the view that the state should make itself responsible for the welfare of its poorer citizens. "Increased social mobility, the redefinition of the relationships between different social groups, and the growth of class consciousness... led to nation-wide movements of social protest, manifested in various campaigns for social and economic justice" (9). With social reform on the upswing and the rise of the Welfare State came the idea that advances in technology should not be produced at the expense of society: "...the focus of attention in the nineteenth century began to swing away from individual rights in the direction of social duties, and with it the emphasis shifted to the function which law fulfils in its communal existence" (10).

The technological revolution had given rise to inventions which,

though providing a technological benefit to society, also had an accident-causing potential which could no longer be ignored. Whereas previously fault could be clearly attributed to the wrongdoer, the introduction and increased use of inventions possessing the ability to wreak exceptional damage, against which 'reasonable care' was not always a sufficient precaution, heralded a movement back towards strict liability.

The motor vehicle, however, was not included in this category of 'inherently dangerous inventions', and, at least in Britain, fault liability continued to apply to this mode of transportation (11). Advances in motor vehicle technology (making greater speeds possible) and increases in the number of vehicles on the road, especially with the advent of the 20th century (12), led to problems being experienced in the application of the fault principle to automobile accidents. These problems were primarily financial. Although many victims were unaware of their legal right to claim compensation, and others lost what claims they might have had through the defence of contributory negligence (a complete defence in those days), the problem of the financial incapacity of defendants to meet the claims made against them became increasingly widespread, notwithstanding the rule of 'no liability without fault'.

Whereas inability to meet quantum of compensation is a problem which could be faced by a defendant in any delictual case, the distinguishing factor here was the immense number and extensive quantum of the claims arising out of a single isolated activity. Various governments in Europe and the Commonwealth became aware that as far as motor accidents were concerned, the delictual action as between individuals was not only failing hopelessly to compensate innocent victims, but was also causing a great deal of economic hardship, if not outright bankruptcy, to an increasing number of drivers. Faced with this generally unsatisfactory situation it became clear that a whole new class of activity had been created which would have to be dealt with on its own terms.

The response of some countries, especially the Scandinavian countries, was to impose strict liability on automobile owners or drivers. For example, strict liability statutes were introduced in Denmark in 1903, in Sweden in 1906, in Norway in 1912, and in Finland in 1925 (13).

> "Many countries of the world have of course long imposed strict liability on owners or drivers of motor vehicles, mostly originally in the infancy of motoring in the interest primarily of pedestrians, who were considered unfairly exposed to this new extrahazardous menace without participating in its benefits. Typical is the German legislation of 1907 which in effect brought the automobile into line with railways, mines, electricity and gas undertakings and, later, of aircraft. The French courts, in a celebrated sleight-of-hand, accomplished the same results by stripping CC art 1384, dealing with responsibility for things, of any fault requirement and then subsuming motor cars to this article instead of continuing to classify driving as an activity subject to the fault rule of art 1382" (14).

Britain and the Commonwealth, however, responded by introducing a new type of insurance, formulated to deal exclusively with motor vehicles. Here the prime motivation was still the protection of drivers from financial ruin.

With the addition of insurance as a supplement to the law of tort in relation to motor vehicles, the individualist philosophy underlying fault liability was seriously undermined. The burden of compensating accident victims now fell on all premium paying motorists, and the idea of retribution extracted from the individual motorist for his wrongful intent fell away. At the same time, the argument for deterrence by way of individual punishment was irreparably weakened.

Although the concept of insurance was introduced to protect

drivers and to ensure the financial liability of the fault system apropos motor vehicles, it also encompassed the idea of the social distribution of losses. This feature was in keeping with the continuing 20th century backlash against the rampant individualism of the 19th century. With the predominant interest of society being one of security, an increasingly collectivist philosophy was developing.

As noted above, the "individualist" precepts contained in the idea of fault liability were shaken by the introduction of insurance. These soon came to be shaken even further by the realization that the common law alone was not sufficient to deal with the ever-burgeoning number of accidents. Throughout the Western World, statutes promulgating compulsory motor vehicle insurance began to be introduced.

By this stage, flaws in the fault liability insurance system vis-a-vis motor accident compensation, such as the enormous cost of the system, the difficulties inherent in determining fault, and the vast number of victims left uncompensated because they fell outside the limited boundaries of those eligible for compensation under such a scheme, were growing ever more evident. Even before World War Two there was a growing realisation of the need to look beyond fault to a more equitable and socially just system of liability in relation to motor accident compensation.

Scandinavian countries introduced compulsory strict liability insurance schemes for automobile owners as early as 1916 in Denmark, 1925 in Finland, 1926 in Norway (with a private bond as an alternative) and 1929 in Sweden (15). In 1928 New Zealand passed the Motor Vehicles Insurance (Third-Party Risks) Act - the first of its kind in the Commonwealth. Although liability depended on proof of fault, even at this stage it was suggested that there should be "cover against risk, no matter how the accident happened" (16). The Hon. F.J. Rolleston, the Attorney-General to whom the suggestion was made replied: "that is a goal to which I should very much like to attain, and I hope it will

eventually be possible to extend this scheme to that extent" (17). The issue of no-fault motor vehicle insurance was to continue to be an important subject of debate in New Zealand. Britain, too, had to confront the issue, and in 1930 compulsory motor vehicle insurance was introduced (18). In 1934 a private member's bill, which purported to introduce liability for motorists without proof of fault was introduced into the House of Lords (19). However, although the bill was approved in the House of Lords, this was not the case in the House of Commons, and the issue was shelved. On the other side of the Atlantic, the Columbia University Council for Research in the Social Sciences published a report by the Committee to Study Compensation for Automobile Accidents in 1932. The report recommended the adoption of a system of compensation which would not necessarily require accident victims to establish fault on the part of drivers in order to obtain compensation. This recommendation came as a result of the committee's extensive study of the social effects of road accidents and the extent to which losses were met by the existing system of negligence-based liability.

In South Africa, a great increase in traffic was experienced after World War One, with a consequent rise in the number of persons killed and injured in road accidents. Here, too, many drivers were unable to meet the claims made against them, giving rise to an undesirable social situation. Consequently, in 1939, South Africa became the last country in the Western World to introduce compulsory motor vehicle insurance, with the introduction of the Motor Vehicle Insurance Bill. Originally, the Bill envisaged providing protection only to the victim, by the guaranteeing of compensation. The insurance company was then to recover the compensation paid out from the motorist. However, a Select Committee amended the Bill, and the Motor Vehicle Insurance Act 29 of 1942 was passed.

Four years later, in the Canadian province of Saskatchewan, the first no-fault road accident scheme was enacted. Although this momentous move, and its ensuing success, did not spark off a

rush of "no-fault law" enactments, it can be regarded as a major catalyst to a growing train of thought.

During the early 1960s various European countries such as Switzerland, Austria and Czechoslovakia adopted systems of absolute liability, coupled with compulsory insurance (20). A decade later, many American states initiated new motor vehicle insurance schemes through a wide variety of plans, which incorporated the idea of "no-fault" liability in varying degrees. In 1972, New Zealand introduced the most radical reform to date of accident compensation law: the first fully comprehensive no-fault scheme for personal injury by accident. The 1972 Accident Compensation Act extended no-fault coverage far beyond the confines of motor vehicle accident compensation. Following this, two Australian provinces, Tasmania and Victoria, also adopted road accident compensation without fault, and an Australian Committee of Inquiry suggested an even more comprehensive scheme than that of New Zealand, aimed at bringing both accident and sickness compensation under one national scheme. No fault insurance is now offered in every Canadian province, and the Pearson Commission in Britain has also proposed a national scheme of no-fault motor vehicle insurance.

Interest in a system of no-fault motor vehicle insurance for South Africa has been generated over a number of years, both by academics and by members of the legal profession. Various Commissions of Inquiry, including the 1981 Grosskopf Commission of Inquiry, have examined the issue. Until now, however, it seems as if there has been an unwillingness to abandon the old Roman-Dutch delictual principles entrenched in the South African system. Perhaps, as one American writer has suggested;

> "Long immersion in the legislative mill tends to condition veteran legislatures to thinking in terms of conflicting special interests inside the state capital rather than the broad public outside it" (21).

Today, no-one can deny that the motor vehicle plays a fundamental role in society. It is both technologically beneficial and a source of widespread damage and destruction. It is the duty of a responsible government to attempt to balance the societal benefits of this mode of transportation with the welfare requirements of that society. In order to do so, careful consideration must be given, by that government, to the arguments both for and against the various motor vehicle insurance schemes available to it, so that it may properly determine which scheme best meets the current needs of the community.

NOTES TO CHAPTER TWO

1. P.S. Atiyah Accidents, Compensation And Law 3rd ed. (1980) p.11.

2. Richard Tames Economy and Society in Nineteenth Century Britain (1972) p.94.

3. Larousse Encyclopedia of Modern History from 1500 to the present day (new revised edition) 1981.

4. Tames op cit p.102. Tames goes on to quote Marx and Engels: "The bourgeoisie ... has put an end to all feudal, patriachal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his 'natural superiors' and has left remaining no other nexus between man and man but naked self-interest, than callous 'cash-payment' ..." (The Communist Manifesto).

5. T.S. Ashton The Industrial Revolution 1760-1830 (1977) p.4.

6. Stig Jorgensen "Towards Strict Liability in Tort" Vol.7 1963 Scandinavian Studies in Law 25 at 34. Jorgensen continues: "Towards the middle of the last century, it was concluded ... that a responsibility without fault, of the kind prevailing in earlier days and in earlier legal thinking on the basis of the law of nature under primitive social conditions, was a highly objectionable principle. No suffering without guilt - Jhering's famous programme - was at the same time the epitaph of an era".

7. John G. Fleming Law of Torts 5th ed. (1977) p.8

8. Report of the Royal Commission on Automobile Insurance March, 1973 Province of Nova Scotia p.182 (hereinafter referred to as the 1973 Nova Scotia Report).

9. Tames op cit pp.136-137

10. R.W.M. Dias Jurisprudence 3rd ed. (1970) p.440.

11. Perhaps this was because its potential was not really recognised in Britain until the 20th century. France and Germany were the main pioneers in respect of the internal combustion engine, and the U.S.A. was the first country to begin large-scale production of motor vehicles. Britain, on the other hand, did not seem to take the motor vehicle seriously as a mode of transportation. The 1865 British Locomotives Act set a speed limit of 4 mph in the country and 2 mph in the towns and villages, while the 1865 'Red Flag' Act required a man carrying a red flag to walk 60 yards ahead of all "horseless carriages". This Act was only repealed in 1896. Tames op cit pp.56-57.

12. "By 1914 Britain had 200 firms producing motor vehicles, and

engineers such as Lanchester had already made important contributions to the technology of modern transport". Tames op cit p.57

13. Eero Routamo "What constitutes a traffic accident?" Vol. 14 1976 Scandinavian Studies in Law 149 at 151.

14. Fleming "The decline and Fall of the Law of Delict". 1973 CILSA 259 at 263

15. Eero Routamo op cit pp.151-152

16. D.J. White "Accident Compensation Bill" 1973 The New Zealand Law Journal p.390.

17. Ibid.

18. John G. Fleming "The Pearson Report: Its "Strategy" Vol. 42 1979 The Modern Law Review No. 3 249 at 251.

19. R. A. Lyons "Compensation Without Culpability" 1962 De Rebus Procuratoriis 140 at 142.

20. Ibid., p.141.

21. Michael S. Dukakis 'Legislators look at proposed changes' in Crisis in Car Insurance (1968) (eds. Robert Keeton, Jeffrey O'Connell and John McCord) 222 at 227.

3. TYPES OF INSURANCE SCHEMES

3.1 INTRODUCTION

The introduction of compulsory insurance for motor vehicles has gone some way towards resolving the conflict between the interests of driver and victim, but differences in the types of insurance schemes which could be applied greatly affect the nature of the balance of interests finally achieved. Before moving on to a consideration of the various merits and demerits of the alternative fault-based and non-fault based compensation systems, it is useful to briefly compare the general characteristics of the three main types of insurance which could be applied to motor vehicles today.

3.2 THIRD PARTY FAULT LIABILITY INSURANCE

Third party fault liability insurance was once the main form of insurance applied to motor vehicles, but as already noted, the last few decades have seen a move away from this type of insurance in many parts of the Western World.

While most insurance contracts concern the provision of indemnification for loss or damage caused to the person or property of the premium payer - (as is the case with life, fire, theft and various forms of accident and illness insurance) - third party insurance constitutes a notable exception to this general rule. In fact, under this type of insurance scheme, the insured is the one person who is unable to receive compensation under his insurance policy. Instead, the purchaser of the policy provides for the indemnification of the person he negligently injures. Consequently, the system is referred to specifically as "third party" insurance: the insured being the first party, the insurance company the second party and the victim the third party. Under third party insurance, the insurance company assumes responsibility for compensating the victim for the personal loss or damage

he has suffered as a result of the policyholder's negligence. Third party liability insurance usually pledges itself to full compensation of the victim: even intangible loss, such as pain and suffering, may be compensated.

Third party fault liability insurance is essentially an extension of the delictual liability system. Although fault law's precept of individual accountability must of necessity be sacrificed under a system of insurance (unless the insurance company is allowed a right of recourse against the insured wrongdoer) third party liability insurance still incorporates the old "laissez-faire" idea of 'no liability without fault'. It is imperative that the insured be proven to be at fault, i.e., the damages claimed must have been due to the negligence of the insured. Third party insurance is thus selective in the provision of compensation, as fault cannot be proved in all cases, and consequently the loss lies where it falls for at least some victims.

Adversary proceedings are a standard facet of this type of insurance. A person seeking compensation must either proceed to court, where as the plaintiff he will have to discharge the burden of proof that the defendant was 'at fault', or alternatively negotiate a settlement with the defendant insurance company. In any event, a detailed investigation into the determination of fault is unavoidable, often necessitating the services of lawyers, insurance investigators, and assessors. In addition, the fault principle also applies to the plaintiff, and his damages will be reduced to the extent that he is found negligent. This type of insurance scheme tends to utilise a once-and-for-all lump sum settlement, and compensation proceedings may therefore be delayed until the victim's medical condition has "settled down" sufficiently for a medical and judicial assessment of his damages.

3.3 STRICT LIABILITY INSURANCE

The concept of strict liability in our law today is usually

linked with the control of things or operations of an extrahazardous nature which require skilled supervision because of their potential to cause serious damage. Many countries originally applied strict liability insurance to the motor vehicle, because of its enormous accident-causing potential.

Strict liability insurance, or 'risk' liability insurance as it is also called, was introduced as a supplement to fault liability (22). Liability flows from a specified "risky" activity rather than from the defendant's behaviour - the defendant is held liable irrespective of wrongful intent or negligence (23). Strict liability insurance is a type of third party liability insurance: it is taken out by the insured for the benefit of the victim of his "risky activity" (in this case the driving of a motor vehicle). Although strict liability compels one who has caused an injury to compensate the victim of his act, whether such injury was caused through fault or not, an insured defendant must still be found and proven to have been 'strictly' liable, i.e., a causal link between the defendant's activity and the harm suffered must be established by the ordinary rules of procedure. Consequently, as with fault liability insurance, strict liability insurance does not cover 'pure' accidents (such as, for example, where the motorist causing the accident had a heart attack), or accidents where only the motorist is involved (24) (for example, where a motorist crashes into a wall).

Under strict liability insurance, a plaintiff will still require legal assistance in order to bring a claim. Although the need to prove fault is removed, other defences do exist to a claim under this type of insurance, and a claimant therefore falls prey to the delays inherent in an adversarial contest. If the plaintiff chooses not to take legal action, he will still have to bargain with the defendant insurance company in order to attempt to reach an acceptable settlement.

3.4 FIRST PARTY NO FAULT INSURANCE

First party no-fault insurance can be described as the standard type of insurance in operation today. It forms the basis for, inter alia, life, accident, theft and fire insurance. The last few decades have also seen the rise of the use of first party no-fault insurance for motor vehicles in some areas of the Western World.

This type of insurance is known as "first party" because under this system a policyholder is insured against injury to himself and looks to his own insurer for compensation. In motor accident cases, the motorist, his passengers and pedestrians injured by his car are all covered by his insurance policy. The underlying rationale is to provide compensation to the policyholder upon his involvement in an accident, without reference to the issue of fault. The criterion for compensation is not fault, but the fact that a person has suffered a loss (25).

Because of the "first party" nature of this type of insurance, an insured receives compensation directly from his own insurance company, and the services of "middlemen" such as insurance experts and lawyers are usually not needed. Adversarial proceedings are kept to a minimum, and therefore administration costs are kept low. The emphasis is on the speedy reimbursement of those injured in motor accidents, and on the use of as great a percentage of the premium as possible for the compensation of victims.

A claimant is compensated on an assessment of his injuries, and often a fixed schedule of benefits is provided. Compensation for non-economic loss in minor cases is often limited, and even be removed altogether. The extent of coverage under first party no-fault motor vehicle insurance may be optional to a certain degree, with a specified basic minimum being enforced. Often the standard policy requires an insured to meet a certain part of the loss himself, for example the first two weeks or so of lost

wages.

It should also be mentioned that no apportionment takes place under no-fault insurance: people are protected against their own negligence as well as that of other people.

NOTES TO CHAPTER THREE

1. "Whether strict liability may be classified as delictual liability is a question of terminology; but it would not appear inconsistent to us to recognise that in the law of delict, risk as a ground for liability may exist alongside the traditional one of fault". Hosten, Edwards, Nathan and Bosman Introduction to South African Law and Legal Theory 1977 p.497. However, strict liability has been criticised as "not an alternative to negligence at all. Indeed, strict liability is merely a negative notion in itself" Atiyah op cit. p.168.

2. Atiyah op cit. p.264 comments on the anomalous situation which arises where "the more 'strict' tort liability is, the nearer liability insurance approaches first party insurance, until it eventually reaches the point where it is evidently nothing more than first party insurance purchased by one person for the benefit of others".

3. Ibid pp.169-170. "If it were recognised that the only rational justification for 'strict liability' was that motorists are good risk bearers via insurance, and not that they ought to be held liable for accidents they have caused, it would be appreciated that there is no logical reason for giving a remedy to the victim of a non-fault caused accident where another motorist is involved, but none where no other motorist is involved".

4. In most cases, compensation will only be refused where the driver wilfully caused the accident, or was driving under the influence of alcohol or drugs.

4. AN EXAMINATION OF THE FAULT SYSTEM

4.1 INTRODUCTION

Much debate has arisen in recent years as to the effectiveness of the "fault"-based liability formula in motor accident compensation systems. The debators generally fall into one of two camps: those who criticize the fault system and cite first party no-fault compensation as a superior alternative, and those who ardently defend the concept of a fault-based system, deny the viability of "no-fault" as a suitable substitute, and who confine themselves to reform within the fault system itself.

Underlying the application of fault as a basis for liability is the rationale that an individual ought to be held personally liable for his actions, but only where there is moral culpability on his part. No-fault compensation, on the other hand, seeks to remove this perceived injustice to the victim by focussing on the plight of the injured individual, rather than on the wrongful conduct of the actor. The reasoning of those who uphold and defend the fault principle is that if compensation were awarded irrespective of culpability, standards of morality would be seriously undermined, and the incentive to exercise care on the part of the driver would be diminished, if not totally eliminated. The fault criterion, they assert, is objective, fair and just. On the other hand, proponents of the no-fault insurance system argue that fault liability insurance fails to protect the interests of those injured in road accidents. In addition, they attribute many of the deficiences of the fault system as a whole - such as high administration costs and delay in payments - directly to the imposition of the fault criterion. No-fault insurance, they insist, would present a more equitable and efficient solution to the problem of modern-day accident compensation.

This chapter addresses itself to an examination of the

traditional arguments put forward for and against the fault system as a whole.

4.2 AN EXAMINATION OF THE ARGUMENTS IN FAVOUR OF THE FAULT SYSTEM

4.2.1 OBJECTIVITY

The fault liability system, it is argued, is essentially an objective system. It is this characteristic of "objectivity" which lends the system a certain aura of solidity and fairness. As noted earlier, liability under the fault system is dependant upon a finding of 'fault' on the part of the person against whom judgment is sought. In endeavouring to ascertain whether or not a person was 'at fault', the law measures his conduct against that of the hypothetical 'reasonable man'. Thus in order to prove fault, it must be shown that the defendant deviated from the course of action which the reasonable man would have undertaken under the same circumstances, i.e., that he failed to take the degree of care which a reasonable man would have taken. Liability is thus established on a case-by-case basis. This method of judging liability has been sharply critized:

> "What is negligence? It is the failure to do what the reasonable man does. These words give the appearance of being a statement of primary fact. We first assume that the reasonable man exists, then we assume that he actually behaves in a certain way; then we measure the defendant's behaviour against his. But this hides the element of judgment, it hides the fact that the judge decides not merely how the defendant behaved but, whether he ought not to have behaved differently. In deciding that question the judge is not merely comparing the defendant's behaviour against the behaviour of the reasonable man - in the absence of common practice, there is no such man and no such behaviour in fact. The standard of behaviour against which the defendant's conduct is thus measured is a standard decided on, and inevitably decided on, by the judge himself" (1).

Having pointed out this flaw in the practical application of the reasonable man concept, with some of its implications, Atiyah further elucidates on the difficulties of gauging what a reasonable man's conduct would be:

> "The courts have never agreed that they are precluded from finding negligence even in the face of unanimous and long standing practice... If it were alleged that a driver was negligent in driving across a road junction without stopping, it would not advance his case much to prove that he had observed the crossing in question and ascertained that 90% of the drivers did the same" (2).

It would appear from the above that what is judged to be the supposed conduct of the 'reasonable man' is not necessarily a reflection of common driving practice, and that consequently the reasonable man is not everyman. One might assess the reasonable man to be that fictitious person who carries out what the presiding officer considers to be reasonable behaviour. It follows that what might be judged 'reasonable' conduct by one judge may be appraised differently by another - resulting in a certain discrepancy in the reasonable man criterion. There is also great difficulty in establishing precedent, because each case is unique. In addition, the split-second judgments demanded of drivers make it difficult to judge what the reasonable man would do under the circumstances, because tort law theory ostensibly acknowledges that even the reasonable man may occasionally make mistakes.

The application of the reasonable man criterion may result in a plaintiff experiencing:

> " ... great difficulty in ... proving that the driver failed to take reasonable care. If, for example, the accident was caused by the negligence of some other road-user, whether motorist or pedestrian, and the driver had

done all that a reasonable driver could have done, he may not be liable; or if the accident was caused by some defect in the car which no reasonable man could have foreseen or prevented, the driver will escape liability" (3).

The trend today however, would seem to be towards sympathising with the plight of the injured victim. In the full knowledge that fault must be proved to compensate such victim, the courts are tempted to stretch the definition of negligence to include more and more conduct which in reality merely amounts to the ordinary driving practices normally considered incidental to the risks of motoring.

It has been stated that:

"Traffic would probably be paralysed if drivers and police did not take a congenial laissez-faire approach to traffic regulations, and view them more as advisory than binding. It is probably just such flexibility and adaptability of the driver that allow him sometimes to stray innocently over the hazard threshold into a collison, but which in most circumstances keep him safe and optimize the pursuit of his objectives. We call this skilful driving as long as nothing happens. However, those same manoeuvres would be branded irresponsible and reckless if some unexpected occurence were to cause a mishap" (4).

It is a widely held view that a large percentage of road accidents can be attributed to what can be described as "driver error".

However :

"Driver 'error' is not always avoidable. Inferences as to culpability made from a driver's failure in any particular situation must be drawn very carefully, inasmuch as many errors are not avoidable by the average drivers even by the

exercise of reasonable care. A number of limitations on the average driver's abilities to perform his task ensure that a number of unavoidable crashes will result which will be later ascribed as driver error.

Most drivers are often 'guilty' of driver error. A certain magnitude of driver error is representative of the behaviour of the general average of drivers, and must be considered as normal, even though such behaviour departs from 'standard', 'correct', or 'ideal' behaviour" (5).

It is also true to say that ordinary drivers may have certain qualities which the courts, in their attempt to keep the standard of fault 'objective', do not take into consideration in their judgments. A defendant may be inexperienced, or have bad judgment, or be young or old, or handicapped in some way. By the same token, it is no defence that a driver was unaware of the potential harm of his conduct, or that he was not conscious of committing any fault. It is therefore not necessary to a finding of negligence that the driver's conduct was morally blameworthy in any way. It would seem that the essential objectivity of the reasonable man concept is, of necessity, lost in its application, becoming subject to the sympathies of the presiding officer. This perhaps unavoidable fact is further exacerbated by the lack of set standards for reasonableness and unreasonableness. This lack of clearly defined outlines makes the "reasonableness" criterion one which is very difficult, if not impossible, for the man in the street to comply with. When viewed in this light, the aura of solidity and fairness tends to crumble to reveal what must be described as a very vague criterion to apply when judging real traffic accidents involving real human beings.

4.2.2 DETERRENCE

Exponents of fault liability believe that the imposition of the fault requirement, with its emphasis on personal liability, acts as a deterrent to negligent driving. Although the aim of

deterring drivers from the sort of driving which is likely to lead to accidents is of course a good one, "To say that the goal of the law is deterrence (if that is true) is not the same as saying that it actually does deter" (6). "Unfortunately, the claim of a significant deterrent effect for the present automobile liability insurance system has so far proven unsusceptible to substantiation by empirical evidence" (7). On the contrary, there would seem to be some evidence that countries which utilise the no-fault system for motor accident compensation have not experienced an increase in irresponsible driving:

> "More than 10 years of motoring and accident experience in about two dozen states indicate that the highway fatality and injury rates in no-fault states exhibit no significant difference from those in traditional states" (8).

In spite of this, it is argued that in the event of the fault criterion being removed, drivers would no longer be deterred from negligent driving, incentives to exercise care would vanish, and the result would be increasingly unsafe driving habits and a probable rise in the number of accidents (9).

The validity of the view that personal liability deters motorists from driving negligently is, however, somewhat questionable. Firstly, since the act of negligence is often in reality an error of judgment, and as such not subject to conscious or moral decision, it is debatable whether a person can be deterred from acting negligently. Secondly, if a driver is not deterred from driving negligently by the fact that in doing so he may injure himself or his family, lose his driver's license or incur criminal penalties, it is unlikely that he will be deterred by the risk of incurring liability for harm caused to someone else. This view is particularly apposite when one considers that even in the event that a driver is found to be legally liable, the damages will not be met out of his own pocket, but out of the funds of his insurance company.

The supporters of fault liability claim that even fear for one's own safety is reduced by the knowledge that the accident costs will be paid for (10). This really does not seem plausible. A driver may recklessly disregard safety for a number of reasons - but surely not because he or his family would be compensated should an accident occur. There are further weaknesses in the argument that the fault liability system actually does deter negligent driving. One of these is that:

> "A motorist cannot reach even the threshold of thinking about the legal inconveniences of his carelessness until his mind admits that he is driving carelessly and that he may have an accident. But motorists are notoriously optimistic about not becoming accident statistics themselves, notoriously quick to blame the other fellow when an accident occurs, and notoriously generous in appraising the quality of their own driving. Thus we are fighting an uphill battle against human nature if we try to base a campaign for safe driving on the fear of what will happen with insurance claims" (11).

In considering the psychological outlook of the driver, it is probably true to say that the average driver is probably fairly confident of his driving prowess, and that very few drivers climb behind the wheel with the expectation that they will shortly be involved in a collision (unless they have the specific intent of bringing this about). Consequently it would be true to say that the legal liabilities of a collision are unlikely to be uppermost in the mind of the average driver, and that the fear of incurring those liabilities would therefore be unlikely to have a reforming effect on his driving.

On the other hand, the average driver, even when totally oblivious of the law of delict regarding motor accidents, probably drives with a certain amount of prudence and caution. However, it is not only "speed fiends" and "exhibionist" drivers who get involved in collisions. Instead,

" ... a road network filled with cars driven only by the most skilled, reasonable and prudent drivers will still generate accidents. Furthermore, if it is assumed that this hypothetical road network includes a representative share of high-speed roads, intersections, curves and turns, and hills and bumps, it can be confidently predicted that the system will generate a certain percentage of serious injuries and of deaths without a single reckless or careless driver being on the road" (12).

In other words, accidents are an inevitable by-product of the presence of motor vehicles on the road. This is especially true considering the driving conditions of today, with the high speeds and quick reflexes that motoring demands (13). Even 'good' drivers make mistakes, and it is only chance which determines whether an error will result in an accident or not. Along with this idea goes the view that the role of the driver is vastly over-emphasized, since it is merely one of the many components of a traffic accident. In this light the ethical correctness of awarding compensation to a victim on the basis of whether someone else can be proven to have been negligent or not seems doubtful.

The proponents of fault liability still assert that negligence is a clear-cut issue, and cite the number of cases where the courts have indeed found the defendant guilty of negligent driving. However, this view does not take into account the possibility that more and more conduct is being labelled 'negligent' simply because the accident occurred - whereas realistically such conduct could be regarded as standard driving practice. This labelling may well be motivated by the fact that a finding of fault is necessary in order to compensate a victim, but the use of a harsh criterion for compensation does not justify the distortion of the negligence concept.

Proponents of the fault system claim further that an advantage of the fault system is that a negligent driver undergoes social

censure, and that such community disapproval restrains dangerous driving. This social censure is supposed to imbue the defendant with a sense of moral guilt. However:

> "Whatever offences are created and whatever penalties are made applicable, the fact remains that the sense of moral guilt is generally absent. Few intend to kill or to cause harm: comparatively few are guilty of truly reckless or negligent driving. Infinitely the vast majority have only a split-second lapse of care or a momentary error of judgment" (14).

The absence of moral guilt has the effect that:

> "Punishment on these terms, does not deter dangerous driving. The driver whose conduct has been subject to a super-critical standard and found wanting tends to think of himself not as a properly chastised, but only as someone victimised or unlucky" (15).

If a closer look is taken at the so-called "punishment" meted out to negligent drivers (i.e., the payment of damages to the victims) it is evident that even under fault liability insurance it is not the 'guilty' driver, but his insurance company who pays up. Thus, in purely economic terms, it cannot be an effective deterrent.

To counter this, fault adherents often suggest that motorists should be prevented from insuring against the whole of their liability. The negligent defendant, they argue, should be obliged to pay a certain amount - perhaps a set percentage - of the damages out of his own pocket.

However, any measure which would increase the danger of victims not receiving a percentage of compensation due to lack of funds on the defendant's part would be a regressive rather than a progressive step. An alternative solution proposed by proponents

of the fault system is to allow the victim to claim the whole amount from the defendant insurance company, thus ensuring compensation, while at the same time, allowing the insurance company to recover the compensation paid from the negligent party.

However:

> " ... this scheme also has grave disadvantages, not least being that neither insurer nor insured would have any interest in enforcing the payment, even the insurer would find it simpler to raise the level of his premiums generally, than try to extract indemnities from individual motorists. In any event, if sums are to be extracted from the motorists as a quasi-fine after the victim is paid, this appears a more appropriate task for the criminal law, with its required procedural safeguards for an accused" (16).

It should be noted that while there is a consensus of opinion as to the lack of deterrent value of the fault criterion among critics of the system, it is recognised that the law of contributory negligence can have a deterrent effect. However, it is not the person "at fault" who suffers, but the claimant, who loses a percentage of his compensation even if he was only slightly 'at fault'. This may cause him considerable hardship if he was severely injured. This effect has been criticised on the grounds that:

> " ... the degree of sanction bears no relationship to the degree of negligence displayed. The grossly negligent who has suffered a cut finger loses ten dollars of potential recovery. The barely negligent claimant who is paralysed for life may lose hundreds of thousands. The arbitrariness of the sanction violates all principles of scientific correction" (17).

The punishment aspect of deterrence can perhaps best be summed up

by the following statement:

> "Looked at as a deterrent system, tort can be regarded as lagging far behind the law of crime. In criminal law we have learnt the necessity of individualising punishment and even, in many cases, of refraining from punishment altogether; but tort still imposes an arbitrary, mechanical forfeiture" (18).

4.2.3 MORALITY/ETHICS

The fault concept is upheld on the moral ground that to make a negligent driver compensate the victim of his 'faulty' conduct accords with the principles of basic justice. Basing liability on fault is credited with encouraging a sense of individual responsibility otherwise lacking in modern society, and it is feared that should the fault criterion be removed, this would result in a decline in the standards of morality. In respect of the ethical merits of fault law it has been said that:

> "The concept of liability on the grounds of negligence is to be defended on the ground that it is morally superior to a rule of absolute liability, and the basis of all liability is not mere logic but pure morality" (19).

The principle that justice and morality demand that an injured person should not have to bear the loss caused by another's negligence, and that the defaulter should be made to pay compensation to such injured person, should be closely examined. Glanville Williams (20) cites two alternative theories in connection with this principle. Firstly, there is the theory of ethical retribution which emphasizes the punitive aspect of the payment of compensation. The idea is that the defaulter should be made to suffer. This view has been endorsed by writers such as Salmond, who believed that:

> " ... the ultimate purpose of the law in imposing liability

on those who harmed others was to punish the wrongdoer, not to compensate the victim. In his view compensation was not the object or even a sufficient justification for imposing legal liability. It was no more than the instrument by which the law fulfilled its purpose of penal coercion. The basis of the fault principle therefore was that the wrongdoer should pay" (21).

Along with this line of argument goes the idea that fault has "a distinctive function to perform in the handling of indignation" (22). In other words, fault law gives a victim the satisfaction of extracting compensation for his damages from the "guilty" party, and thus getting his revenge.

Secondly, there is the theory of ethical compensation. What is emphasized here is the beneficial aspect of the payment of compensation: the reimbursement of the victim. Justice is seen to be done if the victim receives compensation for the harm he has suffered, and this compensation does not necessarily have to be provided by the wrongdoer himself.

Today, ethical retribution has been rejected by many because of its vindictive nature, (23) and has been rendered virtually inoperative by the institution of insurance. It is not the 'guilty' defendant who pays the bill, but his insurance company. The plaintiff is compensated out of funds collected from all premium paying automobile owners, the vast majority of which have no connection whatsoever with the particular accident in question.

One can accept the justness of the principle that a person injured by the negligence of another should not have to bear this loss himself. However, the ethical compensation theory does not subscribe to the idea of payment without proof of fault, as it is based on the principle of the innocent being compensated for harm done by the guilty (24). The question arises: can it be held to be morally "wrong" to compensate a person injured in an accident

which was not ostensibly caused by another's fault? To reply in the affirmative would be to condemn accident, life and fire insurance and other loss distribution devices as immoral.

Another aspect of the morality issue concerns the fact that the personal blameworthiness of the defendant plays no part in the determination of liability. Liability flows from an act of negligence, which in all probability results from a momentary error. Morally, a person can only be condemned if he knowingly trangresses the rules. However, as far as fault law is concerned,

> " ... negligence is not a state of mind, but conduct which falls below the standard regarded as normal or desirable in a given community. The subjective notion of personal 'fault' has long been discarded in favour of the stricter, impersonal standard of how a reasonable man would have acted in the circumstances. In this manner, while retaining a verbal link with the moral criterion of fault, the admonitory function of the principle has been largely overshadowed for the sake of compensating accident victims, regardless of the "wrong-doer's" subjective "blameworthiness"" (25).

Thus, even if a defendant is found technically to have been "at fault" this does not necessarily imply that his actions should be described as morally "wrong". In other words:

> " ... the law of tort does not perfectly reflect morality. Good motive is not necessarily a defence in tort, and bad motive does not necessarily make a tort" (26).

On the other hand, it is possible to question the morality of a system which deprives an injured victim of compensation. The view has been put forward that society has a moral duty to protect the public from the harms associated with modern methods of transportation:

"If one believes that society should protect the individual, helping him develop his personality and reach his potentialities, if one believes that society constitutes a brotherhood of men, then a fortiori one should organise society to protect people against hazards and especially road hazards, which constitute a large social problem and are caused by a special, identifiable category of things. To refuse to protect man against the motor vehicle, one of the greatest killers in industrialised societies, would amount to abandoning him to the daily possibility of tragedy and to following a purely egotist and fatalistic philosophy" (27).

4.2.4 FULL COMPENSATION AND INDIVIDUAL ATTENTION

It is argued that only under the fault system does a victim receive full compensation for his loss. Supporters of this system claim that every aspect of a plaintiff's damages is covered under fault liability law, and that in addition, fault liability insurance provides the unique feature of compensation tailored to the individual characteristics and specific deprivations of each individual case. Only under a system of fault liability, so the argument goes, will a victim be able to totally recover all his losses.

It must be acknowledged that compensation schemes under the fault system usually provide for an extensive range of benefits, including the compensation of non-economic loss such as pain and suffering. By contrast, compensation awards for non-economic loss in no fault schemes tend to be limited, and in some cases completely dispensed with (usually in respect of minor injuries). Payments under the fault system can be very high - usually in isolated cases which make the headlines. However, only those fortunate few who are able to prove fault on the part of another driver are eligible for any compensation at all. It is possible to argue that the fault system is able to make such handsome payouts because of the small percentage of motor victims to whom

compensation is available, and that for each victim adequately compensated, many others are left either under-compensated or uncompensated (28). One must also take into account the fact that by far the majority of claims conclude in a settlement with the defendant insurance company. The high percentage of settlements is largely due to the delays, uncertainty and expense involved in proving one's case in court, and the fact that the courts often apportion liability in any event. Insurance companies are able to capitalize on this risk and thus strike a bargain with the plaintiff at a figure below "full" compensation.

The fault system's dedication to full compensation has been criticized as wasteful, especially in relation to minor claims. This is especially so when those minor losses are compensated by a source other than motor vehicle accident compensation, with the result that some victims are doubly compensated. It is argued that:

> " ... huge sums can be saved by eliminating entitlement to benefits for the first few days, and these savings can be used to provide benefits to those who now receive none. There is no doubt that the 100 per cent principle, as applied in tort law today, is one of the principal factors leading to over-compensation for minor injuries, and under-compensation for more serious cases" (29).

Providing full compensation for lost wages can also deprive an accident victim of the incentive to return to work.

As far as the claims of "individually-tailored compensation" are concerned: each case admittedly receives individual attention under the fault liability insurance system. No-fault schemes, on the other hand, often employ schedules for the purpose of allocating compensation to victims. These schedules prescribe set sums of compensation according to the nature and type of the loss or impairment of bodily function, without taking the individual characteristics of the victim into account. However, it can be

argued that,far from being an advantage over scheduled awards, it is precisely this feature of 'individual attention' which appropriates an inordinate percentage of the premium price. The 'attention' is most often directed at the quantum of liability, and contributory negligence, rather than towards an examination of the particular needs of the victim. Care is taken in assessing the nature of a victims injuries, but this feature is not unique to the fault system. Although schedules of compensation tariffs are often provided under no-fault schemes (and these seem to work fairly well), there are also no-fault schemes, such as those of Michigan and New Jersey in the USA, which provide for medical and rehabilitation services that are unlimited in time as well as costs. Earnings-related compensation under the New Zealand no-fault scheme is individually tailored, as it is calculated at 80 per cent of an injured individual's loss of earning capacity. Rehabilitation programmes designed in accordance with a victim's specific needs are also offered.

It is a moot point whether no-fault schemes sacrifice individual attention to more efficient and speedy compensation, and whether victims eligible for compensation under the fault system really do receive true individual attention in every case. The view has been put forward that:

> "The present [fault] system is individualistic mainly in theory, in practice it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner" (30).

The ultimate proposition of no-fault advocates is that the best compensation system is one which benefits the largest number of individuals, and which concentrates on compensating the most seriously injured victims. No-fault insurance schemes do not provide compensation for all victims, but they do provide relief for many more victims than fault liability insurance schemes. No-fault schemes also tend to focus attention on the more seriously injured victims, although this may be at the expense of

providing full compensation for minor claims.

4.2.5 FAULT IS KNOWN AND UNDERSTOOD

Some supporters of the fault criterion contend that because the fault system has been in use for so long, the workings of the system are well known and accepted by the general public, who have not demonstrated dissatisfaction with the system. This may be true to a certain extent, but it nevertheless does not exclude the possibility that this "acceptance" is in fact due not only to a lack of public awareness regarding alternative forms of compensation, but also to a lack of understanding as to how the fault liability system operates. It can be argued that the majority of the population, lacking as it does any sort of legal education, is largely unaware of its rights in connection with third party motor vehicle insurance. People do not campaign against a system of which they have only limited knowledge, and silence cannot be assumed to indicate satisfaction.

In relation to motor accident compensation in Britain, it has been stated that:

> "There has been an upsurge of interest in some academic circles in recent years, and also to a limited extent among the professions directly concerned ... But we found no widespread appreciation of what might be involved and certainly a fairly general lack of concern among the public, except for those who had suffered injury and discovered from personal experience some of the defects of the system" (31).

Again, the general public has no choice as to the compensation systems imposed upon it. That choice is made at a much higher level - in most cases by the government acting in consultation with certain legal advisory bodies. However, a survey taken in America revealed that:

> " ... the general public prefers insurance which offers the

certainty of payment of actual loss suffered as opposed to the uncertainty of recovery of actual loss suffered plus pain and suffering, dependent on whether or not fault can be proved" (32).

One can also argue that public dissatisfaction with the law in relation to motor accident compensation is reflected in the fragmentary but significant demands for change voiced in articles and correspondence columns of the daily press, professional journals etc., although there is admittedly no cohesive and articulate public demand for change.

In conclusion, even if one accepts the fact that the general public is familar with the fault system, this does not necesarily constitute a valid argument for maintaining the system. The point at issue must remain the overall effectiveness of the system, as opposed to the public's knowledge of the inner workings of that system. An inadequate system cannot be redeemed merely on the grounds of public familiarity with it.

4.3 AN EXAMINATION OF THE ARGUMENTS AGAINST THE FAULT SYSTEM

This section examines the various criticisms levelled against the fault system, and attempts to illustrate the no-fault solution to these problems.

4.3.1 UNCOMPENSATED VICTIMS

A major criticism levelled against the fault liability insurance system is that only a small percentage of motor accident victims are reimbursed for their losses, (33) while the majority is left uncompensated. The reason for this discrepancy is that " .. the main focus of the law of delict is on the conduct of the defendant, rather than on the needs of the plaintiff, with the aim of compensation being subordinated to the fault requirement" (34). The fault system is deliberately selective with regard to whom it compensates: a victim must be able to prove fault on the

part of another motorist in order to recover damages. If such fault cannot be proved, the loss is not shifted but lies where it falls.

Setting aside for the moment cases where a victim cannot recover because of his own 'faulty' conduct, there are also many instances in which even a blameless victim will go uncompensated. Examples of these include: where a victim cannot prove fault on the part of another, due to lack of evidence; where the driver who caused the injury was not at fault (for example, where he suffered a heart attack whilst driving); where the accident was due to mechanical failure, such as brake failure; where the injured party took evasive action and there was no "contact" with the unknown negligent vehicle (35). The fault system also requires that there be both a wrongdoer and a victim for compensation to be available, and thus certain single-car accident victims are barred from compensation, whether they were 'at fault' or not (36).

Proponents of no-fault believe that the time has come to institute a change in objective from the indemnification of drivers to the compensation of victims. A first-party no-fault insurance scheme would eliminate the fault-finding requirement altogether. A victim's qualification for compensation would merely be the existence of his injuries, and thus the problem of uncompensated victims would be greatly alleviated.

Opponents of no-fault, on the other hand, contend that compensation on a no-fault basis would be unjust, in that it would amount to 'rewarding' the 'guilty' motorist. In addition, they argue that the fact that the wrongdoer is not made to pay compensation to the victim (as the victim would claim from his own insurer) would foster an irresponsible attitude on the part of drivers.

As regards the alleged injustice of such a system, it has been noted earlier that there is a fine line between those whom the courts choose to label "guilty', and those considered "innocent".

One might also question the "justice" of punishing a motorist and his or her family financially for years, for what was possibly a momentary lapse of judgment. In answer to the allegation that no-fault insurance "rewards" the guilty it should be noted that these victims can hardly be regarded as being "rewarded". Compensation would be provided for people who would have been denied relief under the fault system, but this would not necessarily constitute a 100 per cent reimbursement, and would hardly be likely to constitute an incentive to get injured. It should also be noted that even no-fault schemes exclude certain categories of drivers from receiving compensation. Such exclusions usually include motorists who deliberately and intentionally cause an accident, and motorists who indulge in wilful misconduct, such as driving under the influence of alcohol or drugs. As regards the desirability of "making the wrongdoer pay", it suffices to reiterate that under both fault liability insurance and no-fault insurance, it is the insurance company who pays and not the individual motorist.

Another objection often voiced against the institution of no-fault motor accident compensation is that as far as uncompensated victims are concerned, there are a wide variety of accidents to which a person might fall prey, and it is therefore unjust to single out and especially favour the victims of automobile accidents with no-fault compensation while victims of other accidents must struggle to prove negligence.

> "As to the victims, it would involve singling out from the universe of the needy those persons who happen to be in auto accidents. The needy man who falls while crossing the street, to say nothing of the needy man who suffers from disabling disease, would not be a beneficiary or concern of the fund" (37).

It has been suggested that the law should rather "address itself directly to the problem of poverty" (38), and that universal compensation should be insisted upon. This is without doubt a

most laudable aim, but one questions the logic of shunning a more modest type of reform pending the institution of a general national health insurance plan.

Professors Keeton and O'Connell address themselves to this objection by observing:

> "Why do we isolate automobile accidents for special consideration? The person injured in an automobile accident is, after all, only one of many kinds of victim of mischance and hazard. Why not include in our concern all of these victims ... among others, the victims of the power lawnmower, cancer and the fall at home? This question has been asked rhetorically so often that it has come to be termed the "bathtub" argument. This is the one which (asks) ... Why not compensate the man who steps and falls in his bathtub at home? A fall in the bathtub is an isolated event. It is not a social problem. It is not a product of a fast moving society which leaves thousands of victims without means of support or sustenance. The automobile accident victim, on the other hand is a very marked social problem, both because of his number and because of the sources of his injury" (39).

In spite of this, some proponents of the fault system deny that the number of injuries and deaths caused every year by motor vehicles amounts to a distinct social problem worthy of being singled out in this manner (40). Here the statistics speak for themselves:

America 1982 (41)	43,945 road accident deaths; 1,269,000 seriously injured motor accident victims
New Zealand 1983 (42)	644 road accident deaths; 16,200 injured victims

South Africa 1984 (42) 9,621 road accident deaths; 27,795 seriously injured motor accident victims

Proponents of the fault system argue that it is not the function of the fault system to perform a social welfare service. This is not a criticism of the no-fault system per se, but the exposition of a certain philosophy which denies that the law can be an instrument of social advancement in addition to being the upholder of the status quo.

4.3.2 OVER AND UNDER-COMPENSATION

It is alleged that in addition to leaving large numbers of motor vehicle accident victims uncompensated, the fault liability system often misallocates compensation in those instances where it does choose to provide indemnification. Victims with minor injuries are paid soon after rendering their claims, and are often over-compensated for their loss. On the other hand, those with more serious injuries must often endure long delays, and when they finally do receive payment they are under-compensated.

> "Studies have shown that the least injured (those with less than $500 in medical expense and wage loss) end up recovering on the average four and a half times their actual loss. By contrast, a US government study found that those with direct damages of more than $25,000 recover an average of just five cents on the dollar - ironic, because it means that the most seriously injured, who receive the greatest pain, end up getting no compensation for their 'pain and suffering'" (43).

In Britain, the Pearson Commission discovered that:

> "... minor claims, especially those for non-pecuniary loss, are relatively over-compensated, whilst in cases of serious

and lasting disability, plaintiffs often fail to achieve that restitution of their financial position which is the objective of damages in tort" (44).

This inequitable distribution of funds would appear to be directly linked to the process of litigation endorsed by the fault system. In settling a minor claim, insurance companies bear in mind the potential cost of litigating such a claim: usually it would cost more to defend the claim than to pay it out. They are therefore prepared to pay in excess of the true value of the claim in order to avoid the waste of time and money involved in litigation. However, with a more serious claim, the large amount of money at issue makes it worth the insurer's while to litigate. Furthermore, whereas the insurance company has the funds available to litigate, victims suffering severe injuries are often in dire economic circumstances, due to lost income and the added financial burden of medical treatment. Such victims are often willing to settle for less than what they might receive in court simply in order to avoid further delay. An insurance company is thus able to use the uncertainties of litigation to persuade accident victims to accept a low settlement. In such a negotiated settlement, the plaintiff is pitted against the strength of the defendant insurance company, which has little incentive to be 'generous'. In fact, the motorist who suffers serious injuries is locked in a no-win situation as:

" ... even if the claimant prevails in court, the expenses of litigation must be paid. Since the recovery is generally limited to damages for the actual injury, a plaintiff must deduct these expenses from a sum computed only on the basis of the injury" (45).

It would appear that major claims are never fully compensated. Not only is the fault liability insurance system biased in favour of minor claims, but overseas studies have shown that affluent claimants are likely to be better compensated than poor ones. It is reported that: "families with under $5,000 income emerged

with just 38 cents for each dollar of loss while those with incomes of over $10,000 got 61 cents" (46). This could be explained by the fact that the financial impact of such injuries would probably be more acutely felt by poorer families who would be tempted to agree to large discounts in the hope of prompt payments. Rich families are in a far better bargaining position, as they have the funds to hold out for a court decision. (They will also be able to afford better attorneys, and have the ability to bring more pressure to bear on the insurance company involved than a poor family).

No-fault proponents claim that such disparity in awards, which is not related in any way to the merits of a case, would not occur under a first-party no-fault insurance system. As far as minor claims are concerned, many no-fault schemes enforce a basic minimum of two or three weeks during which a victim must shoulder the loss himself. This is done mainly in order to avoid duplication of benefits to the victim, as this period is often compensated for by employers. It is also done to avoid fraudulent claims and to reduce costs. Insurance companies would no longer be influenced by the threat of litigation in such cases, as the right to sue in tort would be abolished, even under a dual or 'threshold' no-fault system. Regarding major claims: as victims would now be claiming from their own insurance companies, there would be an incentive for such companies to adequately compensate their clients. The discrepancy in payments as between rich and poor families would also be eliminated, due to the fixed schedules often employed by no-fault schemes. Also, because no-fault schemes usually stipulate a 'floor' of compensation, ruling out certain minor claims (especially for pain and suffering), and because of the general administrative savings under such a system, more money would be available to grant compensation to those who really need it : the seriously injured victims.

4.3.3 DELAY

Fault liability insurance has been criticised on the grounds that it offers compensation too late. It affords the victim no interim relief while he is in hospital or receiving treatment, with the result that he must struggle to pay his bills - including his medical bills - himself, and at the same time support his family if he is a breadwinner.

> "The length of time from injury to settlement is very important to injury victims. During that time there is likely to be hesitation to obtain the fullest desirable medical treatment, for fear of the burden of paying for it. If the victim is a wage earner, the family may well go on reduced rations, and even become a "relief case" while awaiting the settlement" (47).

If a victim decided to go to court, he may have to wait years until he receives compensation (48). Although only a small percentage of motor accident cases go to court, it has been said that " ... exposure to the court mechanism may be the inherent cause of most of the delay" (49). The delays under the fault system are, according to its antagonists, bound up with the determination of fault. It takes time to assess statements and discover whether or not fault can be established. The question of apportionment must be considered, necessitating an analysis of the degree of fault on the part of each party. Consultations with the motorists involved may prove difficult, particularly if one or both parties are confined to hospital for any length of time. Cases where a party suffers from amnesia are not uncommon. Witnesses have to be summoned and their evidence examined, along with 'in loco' inspections of the site of the accident and an examination of the position of the vehicles, skid marks, etc., appearing on police and other plans. A certain amount of legal wrangling and negotiation ensues, with each party attesting to his own innocence and the fault of the other party.

Even if a plaintiff does not go to court, as is often the case, an investigation into the question of fault still has to be carried out. Although many accident victims are tempted to reach a settlement with the wrongdoer's insurance company in order to receive compensation more speedily, there is little incentive on the part of an insurance company to provide compensation timeously. It has been suggested that:

> " ... there is a built-in motivation for delay in that insurance companies of any size operating in this field have the advantage of retaining in their hands for investment purposes large sums of money in relation to claims commenced but not yet finalised. It is not suggested that reputable insurance companies take undue advantage of this factor and the considerations involved do not all speak in favour of delay, but nevertheless this element on the whole is unfavourable to speedy settlement claims" (50).

To give an idea of the time periods involved, D.H. Botha (51) refers to a study in Britain which revealed that only 42 per cent of seriously injured victims received any compensation, and 25 per cent of these had their damages reduced by contributory fault. Of these 42 per cent, only 2 per cent received compensation in the first year after the accident, 20 per cent received compensation during the second year, 6 per cent in the third year and 3 per cent in the fourth year. He adds that our practitioners will know whether these figures reflect the situation in South Africa. Defenders of the fault system concede that there is an inordinately large time gap between the accident claim and the compensation received, but argue that this factor could be improved without having to resort to a change to no-fault. However, reformers such as Atiyah feel that: "No doubt there is room for improvement in present procedures, but it seems unlikely that much can be done to reduce the time taken to try personal injury cases, or even to settle them. The problems are inherent in the system" (52).

Under a first party no-fault system, so the argument goes, a determination of fault and all its concomitant delays can be avoided. An accident victim claims from his own insurance company, which assesses his loss simply on the injuries he has sustained and his economic loss. Proponents of no-fault agree that this direct form of compensation " ... is much more efficient, benefits flowing from the fund to the victim without eference to the injurer or his responsibility for the accident"). It is claimed that the absence of adversary proceedings greatly speed up the payment process, as would the fact many no-fault plans contain prompt payment clauses (54). lauses stipulate that where the insurance is not paid out ertain time period (usually 30 days), interest will be This provides an incentive to insurance companies to e victim as soon as possible. These features have Department of Transportation to state that "Faster of benefits is definitely recognised as one of the ntages of all forms of no-fault auto insurance" (55).

4.3.4 LUMP SUMS AND REHABILITATION

An investigation into the issue of fault not only involves a certain amount of delay, but is also by its very nature surrounded by a great deal of uncertainty. The amount of compensation a victim may receive depends on how well he is able to discharge the burden of proof that the other motorist was at fault. Many external factors, such as the availability of witnesses, are involved, and thus the outcome of the 'adversarial contest' is not always predictable. This combination of delay and uncertainty often has an adverse effect on the rehabilitation of the victim, and 'litigation neurosis' has become a well-known ailment.

Even where a decision has been made in favour of the victim, there may be further delay before he receives any compensation. This is due to the fact that the fault liability system utilises lump sums as a standard method of compensation. These lump sums

not only cover the damages that have already occurred, but also seek to make a once-and-for-all settlement in respect of all future damages. Consequently, a claimant must wait until his condition has stabilised sufficiently for the quantum of the lump sum to be determined in regard to possible future treatment requirements (56).

Another disadvantage in the use of lump sums is that these predictions as to the future medical and rehabilitative needs of the victim lead by their very nature to a great deal of imprecision. This is aggravated by the fact that amounts so determined cannot usually be re-evaluated. It has been established that where, for example, brain injury has occurred, it is possible that epilepsy or some other disorder may occur years after the accident (57). If compensation is based on the expectation that some disorder will occur in the future, such compensation may prove either to be a legitimate necessity, or an inappropriate windfall. If one takes the opposite stance, one risks the event of a claimant being grossly under-compensated. To take the middle route and offer compensation that falls somewhere between the two extremes is really no solution at all.

Difficulties also arise in calculating the extent of the loss of future earnings especially in the light of modern-day inflation rates.

Another disadvantage of lump sum compensation is that there is no guarantee that the money will be used for the purpose for which it was intended, i.e., the payment of the costs of rehabilitation and the supplementing in whole or in part of future wages. Atiyah comments:

> " ... the recipients may be inexperienced in the handling of large sums of money, and ... may invest it in reckless and hopeless enterprises. They are, of course 'entitled' to do this if they wish, but since the money is largely found by society, and since society will have to bear the burden - or

some of the burden - of maintaining these people if they should be reduced to poverty again, society has some right to say how the compensation should be paid" (58).

As far as the question of rehabilitation is concerned, there can be no doubt that the delays involved in determining fault and in computing a victim's present and future compensation needs have a negative effect.

> "Because many rehabilitation techniques must be started promptly after an injury has been sustained, delays often greatly hinder medical recovery. Yet, for the seriously injured victim, no money may be available for rehabilitation until many months after the accident. Further, when compensation does come, it does so in a single settlement, so that future rehabilitation costs have only been estimated and the money may not be sufficient or available when needed" (59).

Time is usually of the essence in rehabilitation programs, and it is to the victim's advantage that he embarks on such a program as soon as possible. However, uncertainty as to his future economic prospects may deter him from entering into such a program timeously, and this delay could in turn permanently affect the extent of his rehabilitation. One may even go so far as to argue that: "The action in delict discourages rehabilitation; the claimant who appears in court with a useless cut-off ugly bared stump of an arm is likely to fare better than one who has already equipped himself with a functional artificial limb" (60).

All these factors have the result that people suffering bodily injury in motor accidents are placed in a highly unsatisfactory position in relation to their social and physical rehabilitation. In addition, it must be borne in mind that certain victims are excluded altogether from receiving compensation for their injuries or rehabilitation aid under the fault liability system. Although this may be in keeping with the principle of 'no

liability without fault', the " ... cost to society of leaving motoring victims without rehabilitation and unable to earn a living is also substantial" (61).

Under a first party no-fault system, it is claimed, there would be no need for any delay or uncertainty as a determination of fault is not a necessary prerequisite to compensation. Delays caused by the computing of a once-and-for-all settlement would also be avoided by the institution of periodic payments. Proponents of no-fault argue that the prompt payment requirements which form an inherent part of no-fault schemes facilitate rehabilitation, and that the fact that payments are made periodically ensures that more accurate compensation is made, i.e., payments suited to the present medical condition of the victim.

The awarding of periodic payments for wage loss, so the argument goes, discourages overspending, and substitutes one source of monthly income with another, thus causing as little dislocation to the claimant as possible. The Minogue Report suggests that "To encourage rehabilitation, payments should not be reduced on a dollar for dollar basis as the accident victim recovers earning capacity, but a formula should be used which would permit a net benefit to be derived from a return to gainful employment" (62). Of course, the awarding of lump sums possesses the great advantages of speed, convenience and finality. These advantages were considered by the Pearson Commission before it concluded that: " ... the uncertainties implicit in weighing the future and expressing the result in a once-and-for-all payment outweigh the convenience of such a quick and final settlement" (63). On the other hand, no-fault compensation systems do not necessarily award periodic payments in every case - there is a place for lump sum awards in certain select circumstances (64). Some writers feel that a claimant should be given the right to plead his case for receiving a lump sum (65), while others feel that in cases of serious and lasting injury periodic payments should be mandatory (66).

Consequently, it is argued that a no-fault scheme has the advantage that a victim does not have to worry about the outcome of an investigation into fault, but is able to begin rehabilitation procedures without delay. He does not have to impress a court with the pathos of his situation, and can therefore concentrate on regaining his health, secure in the knowledge that his bills are being paid. He is also given an incentive to return to work due to the fact that payments for wage loss are not compensated on a 100 per cent compensation basis.

4.3.5 ADMINISTRATION OF THE SYSTEM: THE COST

Another criticism levelled at the system of fault liability insurance is that it is economically inefficient. It is asserted that an excessively large percentage of premium income is expended in administrative costs, leaving limited sums available for the compensation of victims. These high administration costs are attributed to the procedures involved in the determination of fault.

> "The charge is that in the fault system too much time, money and effort are devoted to an investigation of blame in an environment where that investigation contributes nothing to the avoidance of injury, and that those resources could and should be channelled to curing and compensating the injured" (67).

The cost-efficiency of an automobile insurance system is reflected in the percentage of the premium fee collected from policyholders which returns to claimants as benefits. One American study (68), demonstrated that only 14,5 cents out of each premium dollar goes towards the compensation of a traffic victim's actual out-of-pocket expenses. The other 85,5 cents is distributed as follows: 33 cents to insurance companies and agents for administrative costs, advertising, profit, etc.; 23

cents to claim's investigators and lawyers (with the impact of legal fees falling most heavily where injuries are most serious); 8 cents to duplicate recovery, (i.e., where an award is made for damages which have already been compensated by some other source) and 21,5 cents to pain and suffering. In Britain, the Pearson Commission described the operating costs of the fault system as "absurdly high", and estimated that 45p out of every insurance pound went towards such costs. Of this, only 40 per cent went towards the handling of claims by insurers and general administration. The rest was expended on broker's commissions, claimant's legal fees and profit (69).

Opponents of fault liability insurance argue that the system is inherently inefficient and expensive to operate because of the complex procedures which the investigation of claims demands. Such investigations generally entail legal costs as well as the services of an adjuster. These costs are not necessarily linked to the court process, as only a small percentage of claimants proceed to court. The settlement process itself involves a detailed investigation into the causal factors of the accident. Time and money is spent in obtaining evidence from witnesses and taking statements, as well as in assessing the nature of the injuries reflected in the medical reports and in computing the quantum involved. Damages for pain and suffering - a particular feature of the fault system - are notoriously difficult to compute. Because of the adversary relationship between the parties, these legal costs are often duplicated as each party seeks legal advice in negotiating his claim.

The criticism of the high costs involved in maintaining the fault system is further strengthened by the fact that many motor accident victims are either under-compensated or not compensated at all. It was this factor which caused the State of New York Insurance Department to remark:

> ".. in our judgment the profligacy of the operating costs of the fault insurance system and its wantonness in mismatching

limited resources with serious human needs would be enough to bring the whole system down, someday, even if there were nothing else wrong with it" (70).

In this regard it has also been argued that the extent of the administration costs of the fault system render it inefficient in relation to other compensation systems, which provide for more extensive cover on a far lower adminstrative budget, like for example, Workmen's Compensation Schemes.

Proponents of no-fault insurance contend that a no-fault scheme would be economically more efficient and would also afford compensation on a broader basis. In dispensing with the fault-finding requirement, a larger proportion of the administration costs would be directed towards compensation, as expensive "middlemen" such as lawyers and insurance adjusters would no longer be needed. The economic advantages to the policyholder are recorded in the 1985 US Department of Transportation report:

> "According to the 1983 results, a no-fault system is 16,2% more efficient than a traditional system, with respect to returning money paid as premiums to victims in the form of benefits or damages (71).

Under a system of first-party no-fault insurance, victims are compensated solely on an assessment of their injuries. Most no-fault schemes presently in operation do not provide compensation for minor non-material loss. Loss of this nature apparently accounts for the majority of claims, and is usually over-compensated, due to the 'nuisance' value of such claims. Fleming describes these losses as ones which " ... in a literal sense at least, money can never repair and the award is a windfall, so to speak, for the victim" (72).

Defenders of the fault system argue that under a system of no-fault insurance there will be many more successful claimants, and therefore extra funds will be needed to meet these costs, making

no-fault a more expensive system. They question how these extra funds will be raised, and usually conclude that an extra burden will be imposed either on the taxpayer or on the premium purchaser. However, most of the advocates of no-fault aver that the amount of capital saved by eliminating the investigation into fault plus the funds created by the abolition of "nuisance" claims for minor non-material loss plus the administrative saving brought about by the utilisation of 'first-party' compensation will set off this extra expense. Others believe that a no-fault insurance system will cost more, but insist that the benefits to society will far outweigh the additional costs. They contend that society's goal should be the compensation of injured victims, rather than the maintenance of low premiums. However, a study conducted for the American Insurance Association offers evidence that premiums can actually be reduced under no-fault schemes. Between 1972 and 1975 the change in liability insurance costs, adjusted for inflation, was up by 29.4% in Washington (a "fault" state), while in Michigan (a "no-fault" state) it was down by 16.1%" (73).

4.3.6 COURT CONGESTION

The fault system has been criticised on the grounds that although only a small percentage of all motor accident cases reach the courts, those that do form a large portion of the total number of cases on the court calendar. It is alleged that because the courts are "clogged" with motor accident litigation, they are prevented from spending enough time on more important matters, and the result is a deleterious effect on the administration of justice generally. It is also alleged that the delays inherent in third party 'fault' liability compensation are exacerbated by delays resulting from overloaded courts. Professors Keeton and O'Connell point out that:

> "Most disputed cases - by far the greater percentage - involve injuries that are not severe, and in these small cases it often happens that more is spent in fighting a claim than it would be worth if valid. Added to this, of

course, is a fortune in tax dollars used to maintain the courts whose time is consumed by these cases" (74).

On the other hand, it is claimed that, with regard to the court process:

> "Many of the defects of the existing law and the attacks on the existing system governing compensation are not peculiar to cases where negligence must be proved but are general features of litigation itself whatever the basis might be of liability" (75).

While it is true that many reforms could be carried out within the framework of the present system, it can also be argued that there are defects which are inherent in the system. With regard to the issue of delay, a certain amount of blame could be held to lie with the litigation process per se. However, the no-fault insurance system does not aim to speed up the court process, but rather to abolish litigation concerning 'fault' in relation to motor accident compensation, to a greater or lesser degree, depending on the type of scheme implemented. It is therefore striving, in this way, to eliminate delay altogether, at least for some cases.

New Jersey Chief Justice Joseph Weintraub has been recorded as estimating that auto accident cases amount to 51 per cent of noncriminal cases, and take up 80 per cent of all the civil court trial time (76). C.L. Gaylord comments that a review of any of the US Supreme court reports reveals a large amount of motor accident cases, and that:

> "In most of these the court has had to decide arguable issues of fault. When one considers potential investigations and preparations, the trials in the lower courts, the appellate preparation and the work of the supreme courts, the total judicial and lawyer time devoted to haggling over whose fault the incident was in just these

reported cases, is cause for dismay" (77).

In this regard it is argued that not only could judicial and lawyer time be spent more profitably, but also that of the witnesses and the participants involved.

A "pure" no-fault system, i.e., one in which the fault liability action is completely abolished, would, so the argument goes, eliminate the problem of clogged courts. However, even a "threshold" no-fault system, (i.e., one in which the fault liability action is banned below a certain level of loss), would relieve a certain amount of the court's burden. Of course, the higher the threshold the smaller the amount of motor accident litigation. An example of the effectiveness of a threshold no-fault scheme in reducing clogged courts is demonstrated by the Massachusetts experience. Here:

> "Between 1970 (the last year of "fault" auto insurance) and 1975, when no-fault had been in effect for three years, motor vehicle cases in the state's district-courts plummetted from nearly 34,000 to just over 4,000. Their proportion of all court cases dropped from about 35 to about 6 percent at the district court level, and from 66 percent to 25 percent at the superior court (appellate) level" (78).

4.3.7 EVIDENCE

Another issue connected with the fault criterion is the question of evidence. Under the third party liability insurance system, an injured person must discharge the legal burden of proof that the motorist who injured him was at fault in order to be compensated.

In practice, numerous difficulties are encountered in respect of this requirement. Motor vehicle accidents are by their very nature sudden, unexpected events occurring over a very brief period of time - usually only a few seconds. While a number of

people may witness the actual impact, the probabilities are that few, if any, will be able to accurately and specifically relate the vital events leading up to the collision.

Added to this is the fact that these cases are often heard months, or sometimes even years, after the accident. Witnesses may have difficulty in remembering the specific details of the collision, or may recall them incorrectly. A witness' recollection of the event may be consciously or unconsciously coloured by sympathy for one of the motorists concerned. One also cannot overlook the possibility that a witness may lie. In addition, the motorists involved are obviously interested parties and are unlikely to present an unbiased view. Even if they are convinced that they are being completely honest, there is a natural tendency to reconstruct events in one's own favour. Dean Prosser has described the process of fact finding to determine negligence as:

> "A cumbersome, time-consuming, expensive, and almost ridiculously inaccurate one" (79).

One disillusioned British writer has estimated that:

> "The chances of a court's making a finding of the relevant facts concerning a road accident, which accurately correspond with what happened, must surely rate at no more than 50 per cent" (80).

Criticism of the evidential aspect of a motor accident claim is largely directed at the difficulties of proving fault. A victim may, through no fault of his own, be unable to provide sufficient proof to satisfy the court, and therefore go uncompensated. There may have been no witnesses to the accident, and therefore insubstantial proof as regards the details of the collision. This is especially so where there are no witnesses in a loss of support action. In such cases, the insurance company concerned may either lead the evidence of the surviving motorist, who will

simply give his version, or, where the evidence on the part of the plaintiff is so lacking that it cannot be held to satisfy the onus of proof, the insurance company may elect not to call any witnesses at all. In both events, the court may find it very difficult to determine who was actually at fault. There are also cases where victims suffer from amnesia, or from brain damage, or where, for some reason, victims " ... by virtue of their injuries, have difficulty in identifying and enlisting the co-operation of any independent witnesses" (81). Evidential difficulties also arise where a person is injured by an unidentified, or 'hit-and-run' driver. Fault on someone's part must still be established, and thus if:

> "... there are no witnesses of the accident and the physical facts (such as the position of the vehicles etc) do not themselves amount to evidence of negligence, the plaintiff will fail. In practice, this simple lack of evidence is a very common problem" (82).

A successful trial under the third party fault liability system would thus appear to depend on such peripheral factors as the number of people present to witness the accident, and their ability to accurately describe the details of the incident in court. Those injured in an accident occurring in a deserted area or at night would seem to be unjustifiably prejudiced.

It would appear from the above that, setting aside for a moment the number of victims whose claim founders on the fault criterion, even in situations where one driver was at fault, there is still no guarantee that fault will be established and compensation paid out.

The uncertainty and capriciousness of the evidence requirement has been severely criticised by opponents of the fault liability system, along with the expense involved in assembling the evidence in order to determine fault. Every action, whether successful or unsuccessful, is costly in terms of time and money

to the parties involved, the witnesses and the state. It is argued that by dispensing with the intricacies of the evidence requirement as it applies under tort law, and by basing compensation simply on an assessment of the victim's injuries, the no-fault system offers a cheaper, quicker, more efficient, and - in the end result - more accurate system of compensation.

4.3.8 TEMPTATION TO DISHONESTY

It is claimed that the fault liability insurance system "encourages dishonesty and overreaching by both claimants and insurers" (83). Because liability under the fault system depends upon someone being found to be at fault before compensation is paid, and because compensation is paid in proportion to the extent of fault so proven, a powerful incentive is provided for each party to attempt to put the blame on the other party, even if this necessitates resorting to fabrication. In addition, people may exaggerate their losses in the hope of achieving an increased award. "The prevailing practice of settling claims for minor injuries at extraordinarily high multiples of out-of-pocket loss has an impact in turn on the way a claimant is likely to describe his injuries" (84). Claims for non-economic loss, i.e., pain and suffering, especially in relation to minor injuries, by their very nature present an avenue for exaggeration or fraud.

> "Many lawyers, as well as the majority of laymen, are familiar with the infamous "whiplash" injury and the supposed "goldmine" upon which the victim of such an injury sits. Although a whiplash may be a serious injury and cause great discomfort, this type of injury can be easily feigned in hopes of a lucrative settlement with an insurance company" (85).

Insurance companies, in their turn, may delay payment in order to pressurise claimants into accepting a less favourable settlement. The situation is concisely summed up by Professors Keeton and O'Connell:

> "To the toll of physical injury is added a toll of psychological and moral injury resulting from pressures for exaggeration to improve one's case or defense, and even for outright invention - or perjury - to fill any gaps and cure any weaknesses. The inducements strike at the integrity of driver and victim alike, all too often corrupting both and leaving the latter twice a victim - physically injured and morally debased" (86).

Although there will always be those who set out to defraud an insurance company, no-fault proponents believe that a system of no-fault insurance would help to diminish the routine exaggeration of claims. For example, claims for pain and suffering are often disallowed under no-fault insurance if the injuries are minor. Schedules which allocate a set quantum to specific injuries are a feature of many no-fault plans, and these also help to guard against the exaggeration of claims. It is argued that because there is no need to apportion blame under a no-fault system of insurance, and because claims are made against one's own insurance company, the entire claims procedure may be undertaken in a more forthright and direct manner.

NOTES TO CHAPTER 4

1. Atiyah, op cit., pp.41-42.

2. Ibid., p.42.

3. Gerald Gardiner and Andrew Martin Law Reform now 2nd ed (1964) p.71. In this connection it has also been stated that "The reasonable driver makes errors regularly in response to the demands that driving puts on him, and it is often only fate that determines whether an accident results. Moreover, vehicle design and maintenance, driving environment, and other factors ignored by the fault system frequently cause accidents and determine their severity. To base the determination whether a victim of that system is compensated for his loss on such anachronistic concepts of fault is at the least unfair to him". Bernard J. Carl "A Social Insurance Scheme for Automobile Accident Compensation" Vol.57 1971 Virginia Law Review No.3 408 at 413.

4. John Versace "The Driver and Safety", in Eno Foundation for Highway Traffic Control, Traffic Safety: A National Problem (1966) pp.25-46, at p.31 quoted by H. Laurence Ross in Settled Out of Court revised 2nd ed (1980) pp.252-253.

5. Department of Transportation, Driver Behaviour and Accident Involvement: Implications for Tort Liability 99 (1970) quoted in Compensating Accident Victims A Follow-up Report on No-Fault Auto Insurance Experiences, US Department of Transportation May 1985 p.143 (hereinafter referred to as the 1985 DOT Report.

6. Glanville Williams "The Aims of the Law of Tort" 1951 Current Legal Problems 137 at 149.

7. Department of Transportation Study, Motor Vehicle Losses and Their Compensation in the United States pp.53-54 quoted in 1973 Nova Scotia Report p.192. The quotation continues: "Nor does significant evidence exist to support the common belief that most accidents are caused by improper and avoidable human error. Two investigations conducted during the course of the Department's study, however, indicate that most accidents are caused by environmental or personal factors which are external to the individual's conscious control and that punishment or its threat, therefore, is ineffective as a deterrent to deviant behaviour ..."

8. 1985 DOT Report p.6. "Neither theoretical nor empirical evidence exists to support the claim that the adoption of no-fault laws has increased fatal crashes in the United States". Zador and Lund, No-fault Auto Insurance and Fatal Crashes: Re-examination of Landes' Empirical Investigation, Insurance Institute for Highway Safety (1983) quoted in 1985 DOT Report, p.142.

9. See R.A. Lyons op cit p.143; David J. Sargent and Philip H. Corboy "The Basic Protection Plan- Panacea or Inequity" Vol.44 1968 Notre Dame Lawyer 50 at 51; Thomas A. Ford "The Fault with "No Fault" Vol.61 1975 American Bar Association Journal, 1071 at 1072.

10. Samuel Stoljar "Accidents, Costs and Legal Responsibility" Vol.36 1973 Modern Law Review No.3 233 at 235.

11. Robert E. Keeton and Jeffrey O'Connell "The Basic Protection Plan for Traffic Accident Losses" Vol.43 1967 Notre Dame Lawyer 184 at 191.

12. H. Laurence Ross, op cit., pp.251-252.

13. " ... a paper submitted to the World Health Organisation estimates that a driver makes 200 observations per mile, 20 decisions per mile and 1 error every 2 miles. These errors result in a near collision once every 500 miles, a collision once every 61,000 miles, a personal injury to some individual once every 430,000 miles, and a fatal accident once every 16 million miles". Norman, Road Traffic Accidents - Epidemiology, Control and Prevention 51 (World Health Organisation, Public Health Papers, No.12 1962), quoted in 1985 DOT Report p.8. n.2.

14. The Rt. Hon. Lord Parker of Waddington "Compensation for Accidents on the Road" 1965, Current Legal Problems 1 at 10.

15. Robert E. Keeton and Jeffrey O'Connell "Basic Protection - A Proposal for Improving Automobile Claims Systems" Vol.78 1964 Harvard Law Review 329 at 341.

16. Atiyah, op cit., p.566.

17. H. Laurence Ross op cit., p.255.

18. Glanville Williams op cit., p.147

19. R.A. Lyons op cit., p.143.

20. Glanville Williams op cit., pp.140-142.

21. Salmond, textbook on Torts (1907), 1st ed. quoted by D.J. White in "Accident Compensation Bill" 1973 The New Zealand Law Journal p.390.

22. Walter J. Blum and Harry Kalven Jr. "The Empty Cabinet of Dr. Calabresi" Vol.34 Chicago Law Review 239 at 272.

23. It is also seen as a rather primitive form of justice, especially for this type of delict.

24. Again, the practical fulfilment of this theory depends on

the wrongdoer or some other willing person being able to adequately compensate the victim. Without insurance, the provision of compensation would be left largely to chance.

25. John G. Fleming The Law of Torts 4th ed. (1971)103-4 quoted by D.A. Botha in "Culpa - A Form of Mens Rea or a Mode of Conduct" 1977 SALJ p.29.

26. Glanville Williams op cit., p.144.

27. Andre Tunc "Traffic Accident Compensation in France: The Present Law and a Controversial Proposal" Vol.79 1966 Harvard Law Review 1409 at 1421.

28. An examination of the fault system of compensation for road accidents by the Pearson Commission revealed that only about one-quarter of motor accident victims receive any compensation under this system - F.A. Trindade "A No-fault Scheme for Road Accident Victims in the United Kingdom" Vol.96 Law Quarterly Review 581 at 582. "It has been estimated that in Australia 40 % of road casualties have no tort rights whatsoever, that contributory negligence affects at least 15% and that their damages are reduced by an average of 40%". John G. Fleming Law of Tort 5th ed. 1977 p.386.

29. Atiyah op cit., p.203.

30. H. Laurence Ross op cit., p.22.

31. Lord Allen of Abbeydale "Introduction" Accident Compensation after Pearson (eds D.K. Allen, C.J. Brown, J.H. Holyoak) 1979 p.4.

32. D.H. Botha 'No-Fault Motor Vehicle Accident Insurance' 1975 THRHR 162 at 166.

33. Some surveys estimate this figure to be as low as 25 per cent. See n.27 supra.

34. D.B. Hutchinson "Accident Compensation: New Zealand shows the Way" 1985 (48) THRHR 24 at 29.

35. Certain American States, which implement third party liability insurance, have abolished the "contact" rule.

36. According to the 1985 DOT Report p.127: "Single-car accidents accounted for 48% of victims who were catastrophically injured in Michigan from 1978 to 1983. This figure means that almost half of the most seriously injured auto accident victims in one of the Nation's large states would have been completely unable to collect any compensation for their injuries from the traditional system, if that is all that had been in effect".

37. Walter J. Blum and Harry Kalven Jr. 'Public Law Perspectives on a Private Law Problem - Auto Compensation Plans' Vol.31 1964 University of Chicago Law Review No.4 641 at 675.

38. Walter J. Blum and Harry Kalven Jr. 'The Empty Cabinet of Dr. Calabresi' p.272.

39. Keeton and O'Connell Basic Protection for the Traffic Victim - A Blueprint for Reforming Automobile Insurance 2nd ed. 1965 pp.3-4 quoted in 1973 Nova Scotia Report pp.194-195.

40. See W. David Griffiths "don't abolish tort law in auto accident compensation" Vol.12 1969 Canadian Bar Journal No.1 pp.189-190.

41. 1985 DOT Report p.7.

42. Figures supplied by the Department of Statistics, Pretoria.

43. Philip M. Stern "No on No-fault: Adding Insult to Injury" Lawyers on Trial 1980 p.115.

44. C.J. Bourn 'The Pearson Proposals in Outline' Accident Compensation after Pearson, p.21.

45. Barry W. McCormick and Lynn Franklin Taylor II, 'No-Fault Automobile Insurance' Vol.23 1974 Kansas Law Review 141 at 162.

46. Philip M. Stern op cit., p.115.

47. A. Conard, Automobile Accident Costs and Payments; Studies in the Economics of Injury Reparation 221 (1964) quoted by Bernard J. Carl op cit., p.416.

48. " The Pearson Commission found that on average it takes three years for a personal injury claim to be disposed of by a court of law; and that of the claims settled in negotiation nearly 5 % take more than four years to reach finality". D.B. Hutchinson op cit., p.32.

49. 1973 Nova Scotia Report p.237.

50. Report of the Law Reform Committee of Tasmania Recommendations for the Establishment of a No-fault System of Compensation for Motor Accident Victims 1972 p.10 (hereinafter referred to as the 1972 Tasmania Report).

51. D.H. Botha op cit., p.166.

52. Atiyah op cit p.315

53. J.G. Fleming The Law of Torts 5th ed. (1977) p.12

54. For example, 13 American no-fault statutes contain prompt

payment clauses. These clauses stipulate that benefits are overdue if not paid within a certain time limit (usually 30 days) after the insurer has received reasonable proof of injury and amount of expenses incurred. Insurers will then be charged interest on such overdue payments, at a certain percentage per annum. The amount of interest varies. The Georgia statute, for example, stipulates that "After reasonable proof by injured party, payment for medical and disability must be paid within 30 days. If payment not made timely, a penalty of up to 25 % plus attorneys fees can be assessed unless insurer proves good faith. Insurer may be subject to punitive damages for failure to pay within 60 days of receiving proof of Loss". Analysis of Automobile No Fault Statutes, GAB Services, Inc. August 1, 1981 p.9.

55. 1985 DOT Report p.81.

56. The victim tends " ... to be treated from a forensic rather than a clinical point of view. By this it meant that the diagnosis, therapy and prognosis are all formulated with a future claim to compensation in mind rather than with a focus on returning the victim to productive employment. This forensic approach tends to persuade the injured person to believe the worst and thereby impedes his or her ultimate recovery". R. P. Schaffer referring to the discoveries made by the Ontario Law Reform Commission, "The Minogue Report on Motor Vehicle Accident Conpensation, Fault - No-Fault Revised" Vol.53 1979 The Australian Law Journal 200 at 202.

57. Harry Street 'Compensation for Road Accident Victims' 1968 SALJ 49 at 52.

58. Atiyah op cit p.187

59. Bernard J. Carl op cit pp.416-417. "One insurance executive remarked that it is a brutal fact that we possess knowledge and means to minimise injury and suffering but the tort liability system tends to preclude action until legal liability is established". National Association of Insurance Commissioners, "Automobile Insurance Study Background Memorandum", in Special Committee on Automobile Insurance Problems, Report 96-97 1969' p.108 quoted by Bernard J. Carl op cit p.416. n.33

60 Harry Street op cit p.52

61. Bernard J. Carl op cit p.417

62. R.P. Schaffer op cit p.203

63. C.J. Bourn op cit p.26

64. The New Zealand Accident Compensation Act, 1982, for

example, has instituted periodic (weekly) payments for loss of earning capacity and permanent incapacity, but also provides for lump sum awards to be made for non-economic loss, payments to surviving dependent spouses, children and other dependents, etc. Section 71 of the Act even provides for the commutation of periodic payments to a lump sum payment in very exceptional circumstances.

65. For example, C.J. Bourn op cit p.26

66. David Kretzmer 'No-Fault Comes to Israel' Vol. 11 1976 Israel Law Review No.2, 288 at 306. Kretzmer argues: "There is no doubt that under the present system damages awarded to accident victims are generally not saved and invested for future use. A victim whose earning capacity has been severely reduced by an accident may find himself without means of support at some time after receiving a lump sum damage payment. If this problem is to be solved a certain amount of paternalism is called for - it cannot be assumed that every victim can rationally determine whether he would be better off receiving a large immediate payment or a guaranteed monthly income. The temptation of receiving a large sum of money might in many cases be too great to resist. Thus for a system of periodic payments to be successful it must make such payments mandatory in cases of severe loss of earning capacity ... "

67. R.P. Schaffer op cit., p.204

68. Bernard J. Carl op cit p.420

69. J.G. Fleming "The Pearson Report - Its "Strategy" Vol.42 1979 The Modern Law Review 249 at 252.

70. State of New York Insurance Department, Automobile Insurance ... For Whose Benefit? (1970) p.37 quoted in 1973 Nova Scotia Report p.240

71. 1985 DOT Report p.83

72. J.G. Fleming 'The Decline and Fall of the Law of Delict' op cit p.265

73. Philip M. Stern op cit p.119

74. Robert E. Keeton and Jeffrey O'Connell "Basic Protection Automobile Insurance" Crisis in Car Insurance p.43

75. R.A. Lyons op cit p.142

76. Philip M. Stern op cit pp.116-7

77. C.L. Gaylord "Fault, No-Fault or Strict Liability" Vol.58 1972 American Bar Association Journal 589 at 592.

78. W. Prosser Torts 580 3rd ed. 1964 quoted by Bernard J. Carl op cit p.45

80. Harry Street op cit p.50

81. C.J. Bourn op cit p.16

82. Atiyah op cit p.241

83. 1973 Nova Scotia Report p.240

84. Robert E. Keeton 'The Case for No-Fault Insurance' Vol.44 1973 Mississippi Law Journal 1 at 5

85. Barry W. McCormick and Lynn Franklin Taylor, II op cit p.166

86. Keeton and O'Connell "Basic Protection Automobile Insurance" Crisis in Car Insurance p.43.

5. THE ALLOCATION OF THE COMPENSATION COSTS OF MOTORING

5.1. INTRODUCTION

The motor vehicle has proved to be an enormous benefit to society, and has played a crucial role in the advancement of standards of living to the levels enjoyed today. However, its introduction has also given rise to serious social problems, including an increased toll of death and serious injuries to all road-users. It was realised early on in its development that the cost to society of compensating the victims of motor accidents had to be apportioned in some way. Two main mechanisms have evolved for this purpose: loss shifting and loss distribution. The question of how the burden of these motoring costs should be distributed in relation to the whole community remains an important topic of debate, especially in relation to the issue of fault liability insurance vs. no-fault insurance.

5.2. LOSS SHIFTING

The concept of loss shifting has been described as : " ... a segment of tort law which arose as an outgrowth of the industrial revolution, and the increasing complexity of society, which multiplied sources of risk and loss as between its citizens" (1). Originally, the cost of compensating the victims of motoring fell on the individual motorist, who was held personally liable for his wrongful conduct. In this regard, the idea encompassed by the term 'loss shifting' was that the loss suffered by a person as the result of the negligent conduct of another should be shifted from the victim to the wrongdoer. Thus, 'loss shifting' upheld the moral principle that an innocent injured individual should not have to suffer loss because of the wrongful act of another, and also provided for the financial punishment of the negligent party. Such punishment, it was thought, would in its turn have a deterrent effect on negligent behaviour.

NOTES TO CHAPTER FIVE

1. Fleming Law of Torts, p.103.

2. 1972 Tasmania Report, p.13, para 45.

3. Fleming Law of Torts, p.9.

4. Keeton and O'Connell 'Basic Protection - A Proposal for Improving Automobile Claims Systems' op cit., p.345.

5. Ibid., p.347.

6. Bernard J. Carl op cit., p.430.

7. Guido Calabresi 'Views and Overviews' Crisis in Car Insurance 240 at 241.

8. Fleming Law of Torts p.10.

9. Bernard J. Carl op cit., p.430.

10. Guido Calabresi op cit., pp.240-251.

11. 1973 Nova Scotia Report p.270.

12. Atiyah op cit., p.537.

13. Ibid., footnote 47.

14. Atiyah op cit., p.537.

15. 1973 Nova Scotia Report p.537.

16. Keeton and O'Connell op cit., p.364.

17. Fleming "The Pearson Report - Its Strategy" Vol.42 1979 Modern Law Review, No.3 249 at 265.

18. Atiyah op cit., p.265.

19. Ivor Strahl op cit., p.220

20. Harry Street op cit., p.59.

6. THE LEGAL PROFESSION

6.1 INTRODUCTION

In considering the possibility of the introduction of a no-fault system of motor vehicle insurance, a clearer perspective may be gained by examining the attitude to reform exhibited by an institution which at the moment plays a major role in relation to motor vehicle accident claims: the legal profession. Under the third party fault liability insurance system, an investigation into and a determination of the legal issue of the delictual liability of the parties involved in a motor accident is an essential prerequisite to the awarding of compensation. Consequently, the legal profession is intrinsically involved in the third party system - not just in the litigation process, but also in negotiations with insurance companies.

In investigating the attitude of the legal profession towards the introduction of no-fault motor vehicle insurance, it may be useful to survey the situation in the U.S.A. and in New Zealand, where this issue has been of immediate relevance to the legal profession.

6.2 THE ATTITUDE OF THE U.S. LEGAL PROFESSION

During the 1960s there was a revival of interest in the concept of no-fault motor vehicle insurance in the United States. A multiplicity of no-fault plans were vaunted, the most notable of which was probably the Basic Protection Plan advocated by Professors Keeton and O'Connell (1). There was a growing awareness of the deficiencies of the fault system, and of the existence of viable alternatives. In relation to the attitudes of the legal profession, it was noted at the time that:

"The bar, although it might be expected to play the role of

the experienced conservative and thus to supply a sharp challenge to the reform, has been bluntly hostile when not apathetic. At most an occasional spokesman has sallied forth in the journals to stigmatise the plans as socialistic departures from the American way of life" (2).

However, when it became evident in the late 1960s that the implementation of no-fault plans were being seriously considered by State legislatures, the American bar became far more militant in its denunciation of no-fault motor vehicle insurance. There is no doubt that they were, and still are, able to exercise tremendous influence:

"With such powerful arguments of fairness, economy and clearing of court congestion on its side, the fact that no-fault auto insurance has been adopted in only a handful of states is a tribute to the heels-dug-in opposition and the political clout of the Organised Bar in general, and the Association of Trial Lawyers of America (ATLA) in particular" (3).

One of the reasons given for the attitude exhibited by the legal profession, and especially by the American bar was that:

" ... perhaps a third of the legal fees of the United States bar comes from litigation over automobile accidents. The simple fact is the American bar has no interest in getting rid of the source of so much of its income' (4).

Despite lawyer opposition to no-fault insurance, on January 1, 1971 Massachusetts became the first State to put a no-fault automobile insurance plan into effect. However, this enactment was only achieved after four years of bitter debate over the concept of no-fault, which had begun in 1967 when the Massachusetts legislature nearly enacted the Keeton-O'Connell Basic Protection Plan (5). Philip M. Stern describes how:

"Even in that first legislative battle, the hand of the ATLA was present, although disguised in a highly deceptive manner. Soon after the Massachusetts House had passed a no-fault bill, a spate of full-page anti-no-fault newspaper ads appeared around the State, ostensibly paid for by the Teamster's Union. It was later revealed, though, that the ads were paid for not by the Teamsters but by the State's trial lawyers" (6).

He goes on to relate methods used by lawyers in other States to prevent reform:

"The Texas trial bar dunned each of its members $10 a month for a political fund supporting no-fault opponents. The El Paso Trial Lawyers newsletter proudly reported that the fund was "responsible" for the nomination of six of the eight candidates it had backed for the State Senate" (7).

It is asserted in those States where no-fault bills have been passed, trial lawyers have attempted to make such legislation "costly and unworkable". This applies especially to the no-lawsuit no-fault States, in which the right to a tort action is curtailed by a threshold, thus limiting the involvement of the legal profession. The trial lawyers' aim in these States has been to boost a claimant's medical bills over the medical expense threshold, thus entitling such claimant to a tort action:

"Senator Frank Moss of Utah charged that New York State lawyers actually circulated a letter that "encourages accident victims to seek larger medical expenses" so as to push them over the $500 cutoff mark. The senator said that the letter also offered a carrot to doctors to go along with the higher charges: attorneys offered, without charge, to collect the doctor's fees from the insurance company. In Miami, a doctor indicted for conspiring with a lawyer to defraud an insurance company was the proud owner of a boat he named Whiplash" (8).

In recent years, the battle has shifted to the federal level. Proponents of no-fault have sought to bring about the enactment of a bill prescribing federal minimum no-fault standards for all States. Needless to say, the ATLA have strongly opposed such a bill. In addition, Robert W. Meserve, the President of the American Bar Association (ABA), also opposed such a bill, and instead urged Congress to await the results of State experiments with a variety of plans (9). Two years later, in 1975, James D. Fellers, the then President of ABA, also opposed the imposition of national no-fault standards, urging instead that the States be permitted to develop their own reform plans (10). The situation today is that:

> " ... proposals to reform the industry by establishing a nationwide system of "no-fault" coverage (to pay accident victims promptly regardless of fault) have been defeated every time they have come before Congress. Principal opponents of reform are trial lawyers (who make $2 billion per year on accident cases)... " (11).

This obvious economic interest has led to a certain amount of public cynicism regarding lawyer opposition to the institution of no-fault plans. Organisations such as the ATLA have been denounced as having:

> ...obviously most to lose from the demise of tort litigation. Although their concern is transparently with their own bread-and-butter, in public debate they have donned the mantle of championing the man-in-the street as one who is once more being gouged by the voracious insurance industry" (12).

This focus on lawyer's negative reactions to no-fault, headed by the organised plaintiff's bar, should not be allowed to negate the fact that there are many lawyers in the U.S.A. who support the idea of no-fault, in spite of their economic interest in

maintaining the status quo. In fact the first president and cofounder of the ATLA has stated that:

> "[I am] convinced the No Fault is the only way out of the wasteful, irrelevant, burdensome and exasperating procedure now employed...[I] feel it is probable that when the dust has all cleared, No Fault will be conceded by all to be substantially speedier, less wasteful and more fair than our present system" (13).

6.3 THE ATTITUDE OF THE NEW ZEALAND LEGAL PROFESSION

With the introduction of the Accident Compensation Act in New Zealand in 1972, the delictual action for 'personal injury by accident' was effectively abolished. With this abolition, the services of the legal profession were severely curtailed. However, lawyer opposition to no-fault was for some reason not nearly as widespread as it would appear to have been in the United States. Although the legal profession opposed the use of fixed schedules for the compensation of non-economic loss, suggesting instead that a judicial-type assessment of loss be retained, and although the introduction of the bill was viewed with mixed feelings, there was no all-out antagonism to its enactment.

> "The legal profession was divided at the design stage of the system and to its great credit, the organised profession did not oppose the change. While there is still some occasional nostalgia for tort liability and some criticism of particular features, the legal profession has come to live with the new system" (14).

6.4 POSSIBLE REASONS FOR LAWYER OPPOSITION TO REFORM

Terence G. Ison in his expose of 'The Politics of Reform In Personal Injury Compensation' (15) cites several reasons for lawyer opposition to reform. The primary reason given is that

the legal profession is opposed to the awarding of periodic payments - an essential feature of most no-fault plans.

> "Once medical attention has been provided for, the most significant financial consequence of disablement is usually a loss of earnings. What anyone needs as compensation for loss of income is obviously the provision of income. For lawyers, however, compensation by way of lump sum, rather than periodic payments, has two advantages. It provides an immediate fund from which a substantial fee can be paid, and it provides a capital figure with which the fee can be compared and by reference to which may seem reasonable" (16).

Secondly, Ison feels that there is a conflict of interests between a section of the legal profession and the general public in relation to the issue of damages for pain and suffering.

> "If there is a public will that compensation should be paid for pain and suffering, and for loss of amenities of life, this item of compensation could be calculated most efficiently through the establishment of tables indicating dollar amounts for various losses of faculty. For the legal profession, however, retaining the concept of general damages for pain and suffering, and for loss of amenities of life, assures that compensation cannot be measured in any precise or automatic way. The assessment requires an intuitive judgment, and the uncertainty and mysticism involved in this create a demand for advocacy" (17).

There may also be a conflict in respect of the forum to be used.

> "The litigation bar has an interest in having as many issues as possible determined by courts of general jurisdiction. It is here that the lawyer is perceived as the natural advocate. Administrative processes and administrative tribunals might be able to function without generating the

same recognised and broad-scale need for legal services" (18).

Lastly, Ison argues that:

> " ... the theoretical retention of the fault principle might seem to portray the legal profession as engaged in the pursuit of virtue, and some of this image may linger however much it is demonstrated that tort liability in practice is not the social implementation of a moral precept" (19).

Although the reasons cited above may seem unduly harsh, it should be mentioned that arguments for the retention of delictual liability by lawyers are not necessarily motivated by self-interest. The law may be regarded as essentially a conservative profession.

> "Lawyers, by definition, look to the past - prior cases, past customs and practices, and other precedents. Looking to the future without the baggage of the past is difficult for any lawyer, and law reform suffers, therefore, from a perspective that is, in a sense, inconsistent with its goal" (20).

Ison concludes by saying that"

> "It has been argued above and elsewhere that the retention of tort liability for personal injury claims is not in the public interest. But in the long run it may not even be in the interests of the legal profession. To attempt the preservation of a system that is so utterly indefensible must surely be a negative influence on public confidence in the profession, and a negative influence on the public perception of the profession as willing and able to play a positive role in the evolution of an alternative system" (21).

NOTES TO CHAPTER SIX

1. See Robert E. Keeton and Jeffrey O'Connell 'Basic Protection A Proposal for Improving Automobile Claims Systems' Vol.78 1964 Harvard Law Review at 329.

2. Walter J Blum and Harry Kalven Jr. 'Public Law Perspectives on a Private Law Problem - Auto Compensation Plans' Vol.31 1964 The University of Chicago Law Review No.4 641 at 645.

3. Philip M. Stern op-cit., p.117

4. Daniel P. Moynihan 'Changes for Automobile Claims?'in Crisis in Car Insurance p.2

5. John G. Ryan 'Massachusetts Tries No-Fault' Vol.57 1971 American-Bar Association Journal at 431.

6. Philip M. Stern op cit., p.117

7. Ibid., pp.117-118

8. Ibid., p.118

9. 'President Meserve States American Bar Association Opposition to National No-Fault Insurance Act' Vol.59 1973 American Bar Association Journal, at 607.

10. 'President Fellers Expresses the Association's Opposition to National No-Fault Standards and Urges Reform at State Levels' Vol.61 1975, American Bar Association Journal, at 701.

11. Arthur E. Rowse, (ed.) Help: The Indispensable Almanac of Consumer Information 1981, (1980) p.375.

12. Fleming 'The Decline and Fall of the Law of Delict' op cit., p.267.

13. Attorney Benjamin Marcus, quoted by Philip M. Stern, op cit., p.122.

14. T.G. Ison, Accident Compensation: A Commentary on the New Zealand Scheme (1980) p.194.

15. Terence G. Ison 'The Politics of Reform in Personal Injury Compensation', Vol.27 1977 University of Toronto Law Journal, at 238.

16. Ibid., p.392

17. Ibid.

18. Ibid., pp.392-393

19. Ibid., p.393

20. Law in America (1979). Prepared by the Editors of Encyclopaedia Britannica, p.234.

21. Ison op cit., p.402

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same recognised and broad-scale need for legal services" (18).

Lastly, Ison argues that:

" ... the theoretical retention of the fault principle might seem to portray the legal profession as engaged in the pursuit of virtue, and some of this image may linger however much it is demonstrated that tort liability in practice is not the social implementation of a moral precept" (19).

Although the reasons cited above may seem unduly harsh, it should be mentioned that arguments for the retention of delictual liability by lawyers are not necessarily motivated by self-interest. The law may be regarded as essentially a conservative profession.

"Lawyers, by definition, look to the past - prior cases, past customs and practices, and other precedents. Looking to the future without the baggage of the past is difficult for any lawyer, and law reform suffers, therefore, from a perspective that is, in a sense, inconsistent with its goal" (20).

Ison concludes by saying that"

"It has been argued above and elsewhere that the retention of tort liability for personal injury claims is not in the public interest. But in the long run it may not even be in the interests of the legal profession. To attempt the preservation of a system that is so utterly indefensible must surely be a negative influence on public confidence in the profession, and a negative influence on the public perception of the profession as willing and able to play a positive role in the evolution of an alternative system" (21).

NOTES TO CHAPTER SIX

1. See Robert E. Keeton and Jeffrey O'Connell 'Basic Protection A Proposal for Improving Automobile Claims Systems' Vol.78 1964 Harvard Law Review at 329.

2. Walter J Blum and Harry Kalven Jr. 'Public Law Perspectives on a Private Law Problem - Auto Compensation Plans' Vol.31 1964 The University of Chicago Law Review No.4 641 at 645.

3. Philip M. Stern op-cit., p.117

4. Daniel P. Moynihan 'Changes for Automobile Claims?'in Crisis in Car Insurance p.2

5. John G. Ryan 'Massachusetts Tries No-Fault' Vol.57 1971 American-Bar Association Journal at 431.

6. Philip M. Stern op cit., p.117

7. Ibid., pp.117-118

8. Ibid., p.118

9. 'President Meserve States American Bar Association Opposition to National No-Fault Insurance Act' Vol.59 1973 American Bar Association Journal, at 607.

10. 'President Fellers Expresses the Association's Opposition to National No-Fault Standards and Urges Reform at State Levels' Vol.61 1975, American Bar Association Journal, at 701.

11. Arthur E. Rowse, (ed.) Help: The Indispensable Almanac of Consumer Information 1981, (1980) p.375.

12. Fleming 'The Decline and Fall of the Law of Delict' op cit., p.267.

13. Attorney Benjamin Marcus, quoted by Philip M. Stern, op cit., p.122.

14. T.G. Ison, Accident Compensation: A Commentary on the New Zealand Scheme (1980) p.194.

15. Terence G. Ison 'The Politics of Reform in Personal Injury Compensation', Vol.27 1977 University of Toronto Law Journal, at 238.

16. Ibid., p.392

17. Ibid.

18. Ibid., pp.392-393

19. Ibid., p.393

20. Law in America (1979). Prepared by the Editors of Encyclopaedia Britannica, p.234.

21. Ison op cit., p.402

7. THE OVERSEAS EXPERIENCE: A CONSIDERATION OF THE NO-FAULT SCHEMES PRESENTLY IN OPERATION IN AMERICA AND NEW ZEALAND

7.1 INTRODUCTION

The purpose of this chapter is to examine the impact which the introduction of no-fault motor vehicle insurance has had on various overseas systems which have adopted it. These systems all incorporate the idea that a person injured in a road accident should be able to claim for at least some of his damages without having to satisfy the fault requirement. The intention is to concentrate on the 24 American "no-fault", States, and on Accident Compensation Coverage in New Zealand, as no-fault automobile insurance has been in operation in these countries for over a decade, and therefore enough time has elapsed in order to realistically assess the value of this reform.

However, these are not the only countries which have implemented a no-fault system of motor accident insurance. All the Canadian States operate either compulsory or optional no-fault schemes, and two Australian States, Tasmania and Victoria, have also adopted no-fault motor vehicle insurance plans. In Israel, the Compensation for Victims of Road Accidents Law was passed in 1975, and was effective from September 25, 1976. In 1975, Sweden became the only European country to enact a compulsory no-fault scheme for motor vehicle injuries. The enactment, known as the Traffic Damage Act, does not abolish the tort action at all. Instead this scheme offers awards at the same level as tort compensation actions, even in relation to non-economic loss such as pain and suffering, loss of expectation of life and loss of amenities. Consequently the incentive to claim in tort is usually eliminated. In Britain, the 1978 Report of the Pearson Commission recommended that a limited type of compensation be introduced for motor vehicle victims. The Commission recommended a system where no-fault benefits would cover pecuniary loss and limited pain and suffering, with the tort action being retained

for compensation beyond the "threshold" of the new scheme, and for property damage. A government-administered scheme financed by a levy on petrol was recommended.

The United States and New Zealand schemes, however, enjoy a further distinction for the purpose of this study in that the 'add-on' and 'no-lawsuit no-fault' schemes of the United States, and the 'pure no-fault' scheme of New Zealand can be viewed as three consecutive steps on the road to complete no-fault reform.

7.2 USA: THE NO-FAULT EXPERIENCE (1)

7.2.1 BACKGROUND

As noted earlier, the interest in no-fault motor vehicle insurance which was generated in America during the 1920s resulted in an investigation into the whole question of compensation for motor vehicle accidents being conducted by the University of Columbia in 1928. When the committee submitted its report in 1932, its general recommendation was that the fault issue be abolished and that a type of insurance scheme similar to workmen's compensation be established for motor vehicles. This idea formed the backbone of the compensation scheme proposed by the report (2). Although no immediate efforts were made to put such a scheme into action in America, the Columbia Plan served the function of pointing the way towards a practical no-fault system. In fact, the effects of this early plan were far-reaching; in that many of its features have consequently been incorporated into many modern no-fault schemes.

Since that time there have been many proponents of no-fault reform, among the most prolific being Professors Keeton and O'Connell. In the early sixties they devised the so-called 'Basic Protection Plan' (3), which once again drew attention to the possible potential of a system of no-fault insurance for motor vehicles. As its title implies, this plan aimed at providing a certain basic level of compensation to automobile

victims regardless of the issue of fault. It recommended that compensation be speedy, with the tort remedy being reserved only for those with serious injuries. Injuries were to be compensated by periodic payments, although lump-sum payments were to be retained for certain injuries. The plan also recommended that optional extra coverage should be made available to the public, enabling them to make an individual choice regarding the amount of cover they desired.

These and other recommendations involved dramatic changes to the existing fault system, and further heightened the fault vs no-fault debate. The Keeton-O'Connell plan was said to have "made no-fault automobile insurance a topic of international concern" (4), and in many ways, it helped to further the cause for reform. It is a plan which has had an effect, in one way or another, on all the American States which have adopted no-fault laws.

In 1968, the 90th American Congress authorised "the Secretary of Transportation to conduct a comprehensive study and investigation of the existing fault system for motor accident losses" (5). The results of this study by the Department of Transportation, which were published in 1971, highlighted the inadequacies of the fault system. It was concluded that:

> " ... the existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. Both on the record of its performance and on the logic of its operation, it does little if anything to minimise cash losses" (6).

These findings led one writer to comment:

> "The tragic and wasteful defects of the present tort liability system, researched and empirically documented in the studies conducted for the Department of Transportation

must be eliminated ... implementation of a new system is needed; piecemeal or stop-gap reform of the old system is not enough" (7).

The Department of Transportation's Final Report contained certain guidelines for a recommended new system of compensation for auto accident victims. During the 1970s twenty-four States adopted some form of no-fault compensation scheme for motor vehicles. All of these schemes incorporated some, if not all, of these recommended features. In 1977 a follow-up report was published by the US Department of Transportation, entitled: "State No-fault Automobile Insurance Experience 1971-1977". This report examined the changes that had occurred during this crucial time of reform. In 1983, the Secretary of Transportation was asked to update the 1977 report, in order to detail the full impact of no-fault insurance. Thus in May 1985 the Department of Transportation presented its report entitled "Compensating Auto Accident Victims - a Follow-up Report on No-fault Auto Insurance Experiences".

7.3 REFORM IN AMERICA

Until 1971, American personal injury automobile insurance was dominated by traditional "fault" liability auto insurance, consisting primarily of bodily injury liability insurance (BI). BI insurance provided indemnification to the policyholder up to the policy limit for claims made against him by accident victims. However, compensation could only be claimed where it could be proved that the accident was due to the policyholder's "faulty" or negligent conduct. In addition, BI insurance provided no compensation for single car accidents, thus eliminating the victims of approximately two-fifths of injury accidents from the compensation process (8).

Then, on January 1, 1971, the Massachusetts no-fault bill came into effect. It was the first US jurisdiction, other than Puerto Rico, to implement a no-fault plan. This move was followed by a wave of no-fault reform, until today in 1985 there are 24 so-

called "no-fault" States. These States all statutorily endorse the payment of compensation to accident victims without regard to the issue of fault (9).

These 24 States define no-fault insurance in different terms, but they do have certain elements in common. All no-fault States require insurance companies to offer personal injury protection (PIP) insurance to all motorists, although the purchasing of PIP insurance is not compulsory in 6 of these States (10). Being a first-party insurance scheme, PIP provides benefits to the policyholder, the passengers in his car, and to any pedestrians he may injure (11). These benefits usually consist of a sum covering medical and rehabilitation expenses, lost wages, the cost of replacement services (for performance of tasks which the victim would have carried out except for his/her injuries) and, in the case of fatal accidents, funeral expenses and survivors' loss. The extent of benefits under the various no-fault plans differ greatly. For example, Michigan and New Jersey provide for unlimited medical and rehabilitation expenses, while South Carolina only provides a maximum of $1,000 for medical expenses.

No-fault States are in agreement that PIP benefits are to be paid promptly and many States provide penalties for late payment of claims. Specific time limits for payment are set out in the statutes.

Although there are 24 American States which can be described as having instituted no-fault automobile insurance, these States may be further divided into what are known as "no-lawsuit" no-fault or "mixed" schemes, and "add-on" no-fault schemes.

7.4 "NO-LAWSUIT" NO-FAULT AUTOMOBILE INSURANCE

There are many variations of "no-lawsuit" no-fault schemes, but they all endorse the concept of a "threshold" or limit below which the tort action is eliminated. A "threshold" usually refers to the type or level of injury that a motor accident

victim must have sustained, or the level of medical expense such a victim must have incurred as a result of the accident, that must be reached before a tort action is allowed. This restriction is considered a "trade-off", in return for which assured no-fault benefits (usually of a fairly substantial nature), are provided. PIP insurance is a "substitute" for no-fault liability insurance here. 16 jurisdictions fall into the category of a "no-lawsuit" no-fault State. They are, as of October 1, 1984:

1. Colorado
2. Connecticut
3. District of Columbia
4. Florida
5. Georgia
6. Hawaii
7. Kansas
8. Kentucky
9. Massachusetts
10. Michigan
11. Minnesota
12. New Jersey
13. New York
14. North Dakota
15. Puerto Rico
16. Utah (12)

It is within these jurisdictions that no-fault reform has taken the greatest steps.

The threshold system operates as follows:

> "The victim is allowed to maintain a lawsuit (1) for any economic loss not compensated by PIP benefits and (2) for non-economic loss if the injury suffered or cost of treatment equals or exceeds the applicable statutory measure generally referred to as the threshold. If the threshold is "met", the victim can have both no-fault benefits (PIP benefits) and a lawsuit. If the threshold is not met, the victim can have only no-fault benefits. A lawsuit gives the victim the opportunity to recover compensation for excess economic loss (economic loss not compensated by PIP) and, if the threshold is met, compensation for pain and suffering and other non-economic loss" (13).

Thus, there are in fact two lawsuit thresholds in each scheme: one relating to economic loss, and one relating to non-economic loss (14). The system is at its most effective when the savings enabled by the disallowment of minor tort claims for economic and non-economic loss are "balanced" by the extent of no-fault benefits available. The higher the threshold, the greater the 'lawsuit' saving effected. However, even low threshold no-lawsuit systems may be "balanced', and even achieve very high savings on lawsuits. This is because the vast majority of claims involve minor injuries, and consequently the bulk of cases under such plans would probably fall within the amount of the compulsory 'no-fault' section of the compensation threshold, resulting in a substantial saving on claims. The overcompensating of "nuisance claims", an inherent weakness in the fault system, no longer applies here, the tort action being reserved for the relatively few cases involving serious injury.

7.4.1 TYPES OF THRESHOLDS AVAILABLE

As mentioned above, a no-lawsuit no-fault statute usually has more than one type of threshold, and the meeting of any one of these thresholds is sufficient to allow the claimant to bring a lawsuit in tort. Although all 16 no-lawsuit no-fault statutes incorporate different threshold levels, these thresholds may be described as falling into three general categories.

7.4.1.1 The 'Medical Expense' Threshold

A common type of threshold is the "medical expense" or "dollars of loss" threshold. If the medical bills of a claimant are found to equal or exceed the statutory minimum, a lawsuit is allowed. Medical expense thresholds are incorporated into 13 of the 16 no-lawsuit jurisdictions - only in Florida, New York and Michigan are they omitted.

One of the problems of using a medical expense threshold is that most statutes do not provide for the automatic adjustment of the

dollar values according to the rate of inflation. Only those of Hawaii and the District of Columbia prescribed methods for adjusting dollar values in this way. However, that is not to say that the thresholds in the other 14 States are not occasionally reviewed and adjusted. Colorado has recently raised its medical expense threshold from $500 to $2,500 with effect from January 1, 1985 (15).

Another problem is that of constitutionality. In Dimond vs District of Columbia (16), the medical expense threshold of $5,000 was held to be unconstitutional, on the ground that it violated the "equal protection rights embodied in the due process clause". The amount of $5,000 was held to be an arbitrary and irrational classification for the justification of being able to bring a tort lawsuit. However, the court did not hold any portion of the statute's verbal threshold to be unconstitutional.

7.4.1.2 The 'Days of Disability' Threshold

This type of threshold stipulates a certain number of days for which the victim must have been disabled before he is allowed to bring a lawsuit in tort. The 'days of disability' threshold is used the least frequently - it has only been incorporated into four statutes. The number of days stipulated varies. The Georgia Statute provides that a person must have had more than 10 days of disability before he is allowed a tort claim, while Minnesota and North Dakota require 60 days or more of disability. The New York Statute prescribes that a victim must have incurred as many as 90 days of disability or inability to perform his usual pre-accident daily activities during the 180 days following the accident.

7.4.1.3 The 'Verbal' Threshold

This type of threshold involves the allowing of a tort action in certain stipulated circumstances, including for example, where the victim was fatally injured, or where the victim suffered a

"permanent" injury and/or a "serious" disability. Other verbal standards also exist, such as dismemberment, permanent loss of use of a body organ or member, significant limitation of use of a bodily function or system, permanent disfigurement or scarring, a fractured bone (some statutes specify that it must be a "weight-bearing" bone), and permanent loss of sight or hearing. All no-lawsuit no-fault statutes except Puerto Rico contain verbal thresholds, but only three have exclusively verbal thresholds: Michigan, Florida and the District of Columbia.

7.5 "ADD-ON" NO-FAULT AUTOMOBILE INSURANCE

"Add-on" no-fault plans offer more modest reforms than "no-lawsuit" plans: here no-fault benefits merely supplement the fault system. The right to sue in tort is not curtailed in any way. Consequently, the extent of no-fault benefits provided by the average add-on no-fault state is much less than the extent of such benefits provided by the average no-lawsuit state. There are eight add-on no-fault states, four of which enforce the compulsory purchase of PIP insurance, and four of which merely stipulate that insurance companies must offer PIP insurance to all their policyholders.

The four compulsory add-on States are: Delaware, Oregon, Maryland and Pennsylvania.

The four non-compulsory add-on States are: Arkansas, Texas, South Carolina and Washington.

The varying attitudes towards no-fault insurance are demonstrated by the percentage of motorists in these latter four states who actually take out PIP insurance voluntarily. In Arkansas 28,1 per cent of all vehicles are covered by PIP insurance, while in South Carolina the number is as high as 73,9 per cent; 59,2 per cent of Texas drivers and 66,2 per cent of Washington motorists carry PIP insurance.

It should be mentioned that there are four other States in which insurers are obligated by statute to offer PIP insurance in prescribed minimum benefit packages to all policyholders. Each of these four additional States is listed as an add-on State in the 1983 Summary of Selected State Laws published by the American Insurance Association, although they are not classified as such in the 1985 Department of Transportation Report. They are, with the prescribed amount of PIP insurance coverage: New Hampshire ($1,000), Wisconsin ($1,000), South Dakota ($5,720) and Virginia ($7,200).

7.6 THE COST FACTOR: THE ISSUE OF "BALANCE"

Probably one of the most important issues in relation to no-fault reform, and indeed in relation to any system of automobile accident insurance, is the issue of cost. This is a factor which concerns the motorist, the insurance company and the State legislature alike. The cost efficiency of a no-fault statute depends on whether or not it is in "balance". "Balance" refers to the equilibrium that should exist between the savings which arise as a result of restrictions imposed on the tort system and the amount of no-fault benefits offered under a no-fault statute.

In a no-lawsuit no-fault state, balance is achieved when the savings from restrictions on lawsuits are greater than or equal to the cost of first party benefits. In an add-on no-fault state balance is achieved when the amount of third party compensation available is less than the average amount offered in the traditional 'fault' insurance States, to the extent that no-fault benefits are paid for out of these savings. Both types of no-fault statutes implement the idea of a "trade-off" to provide for no-fault benefits without resorting to a large increase in premium. Measures introduced in various state which can have a "balancing" effect include:

> " ... a deductible, which reduces payout from the insurance system; statutory authorization to an applicable insurer to

require an auto accident victim to submit to a physical examination by an independent physician, which discourages frivolous litigation; a maximum fee schedule for physicians, which reduces the amount of PIP payments for medical benefits;" (17).

A table summarising data from 51 States (Puerto Rico is omitted) in the 1985 Department of Transportation Report (18), demonstrates that between 1976 and 1983 the average auto insurance premium increased almost twice as much in the average no-fault State as in the average traditional fault liability state (91 per cent vs 50 per cent). However, in no-fault States which were found to be in balance, the average rate of increase was almost the same (54 per cent vs 50 per cent), while in the no-fault States which were found to be not in balance the average rate of increase was found to be extremely high (126 per cent vs 50 per cent.

Another chart in the Department of Transportation's Report (19) based on information supplied by the Alliance of American Insurers, arranges no-fault States according to their threshold - a factor which emerges as an important feature in determining whether or not a system is in balance. The chart reveals that all three States which have an exclusively verbal threshold (Florida, Michigan and New York) and three out of the four States which utilise high-dollar thresholds, i.e., dollar thresholds of $1,000 or more, (namely, Minnesota, Kentucky and North Dakota) are in balance. In fact, these States actually had lower auto insurance costs in 1982 than they would have had if no-fault laws had not been enacted. However, only three out of the eight States which have a low-dollar threshold (below $1,000), namely Kansas, Utah and Massachusetts, and only one State (Oregon), out of the three no-threshold States charted are in balance. (It should, however, be borne in mind that this increase in cost is counter-balanced to a certain degree by the fact that in 1983 alone, almost twice as many injured accident victims received some compensation in no-lawsuit no-fault States as in traditional

fault States, and 160 per cent as many victims received auto insurance benefits in add-on no-fault States as in traditional States (20)).

The charted figures reinforce the idea that the type of threshold utilised in a State will have an enormous bearing on whether or not that State will be in balance as far as cost-efficiency is concerned. However, it should be noted that:

> " ... there are factors other than lawsuit thresholds which have an effect on balance: e.g., difference in the behavioural characteristics of the people of the various States which lead to fewer or more lawsuits, less (or more) fraud, and less (or more) adverse cost impact ... It is clear that what it takes to achieve balance in one State may not achieve balance in another State, because the States differ with respect to litigiousness of the population, medical costs, wage rates, and other still unknown factors" (21).

These "other factors" lead to the situation where Oregon, an add-on State, provides over $20,000 in no-fault benefits yet is still in balance, while Connecticut, a no-lawsuit no-fault State (albeit with a low-dollar threshold) offers a maximum of $5,000 in PIP benefits but is still not in balance.

However, it must also be acknowledged that States with an exclusively verbal threshold appear to enjoy particular success. In Florida, for example, the effect of changing from a dollar threshold to an exclusively verbal threshold has been remarkable. No-fault auto insurance was introduced in Florida on January 1, 1972, with a medical expense threshold of $1,000. During 1972, a great reduction in costs was experienced, but in subsequent years costs escalated rapidly. When the cause of this was investigated by the Florida Insurance Department, it was discovered that first-party benefits were overutilised by people who wanted to pierce the $1,000 threshold in order to obtain the right to sue

in tort for intangible loss. In fact:

> "In a review of Florida BI liability claims files, reviewers concluded that the threshold was not overcome properly in 23% of the cases and was questionable in another 21% of the cases" (22).

There was a consensus among insurers that the increase in insurance costs in Florida was due not only to the effect of inflation on the relatively low dollar threshold, but also to intentional efforts on the part of some claimants to deliberately overcome the threshold by various means, including fraud. Sometimes these fraudulent claimants were aided in their inflation of claims by lawyers and doctors. Taking note of these abuses, the Florida legislature amended its no-fault statute so that an exclusively verbal threshold would operate from October 1, 1976. Since then, there have been no further complaints of excess litigiousness, and in fact PIP insurance costs actually decreased in Florida between 1977 and 1980.

The experience of States with high-dollar thresholds is better, from a cost point of view, than that of States with low-dollar or no thresholds, but it is still not as good as that of States with an exclusively verbal threshold. The District of Columbia, which had the highest dollar-threshold ($5,000) enjoyed the most success among the "mixed" schemes, but this State changed to an exclusively verbal threshold by court order in 1984.

In light of the above, it is surprising that more no-fault States have not adopted an exclusively verbal threshold, with its obvious cost advantages.

7.7 IMPLEMENTATION OF A "PURE" NO-FAULT SYSTEM

At the moment there are no American States which eliminate all tort lawsuits for automobile accident injury in return for no-fault benefits. However, it has been concluded that:

"The elimination of all law suits would (certainly in theory and substantially in practice) save those amounts [i.e., benefits based on proof of fault] along with the costs of services necessary to prosecute and defend those lawsuit claims. Depending on the size of such savings, and they would certainly be large, insurance premiums could be held stable or even lowered even if PIP benefits were increased to high levels and even if pain and suffering benefits were made available on a no-fault basis" (23).

7.8 OTHER EFFECTS OF NO-FAULT AUTOMOBILE INSURANCE

The implementation of no-fault insurance in the United States has not only affected the actual financial compensation of victims, but has also had an impact on other areas connected with the compensation process. Two areas which have benefited enormously from the introduction of no-fault insurance are the rehabilitation of accident victims and the congestion of courts.

7.8.1 REHABILITATION

The importance of the need for rehabilitation cannot be overemphasized:

"Rehabilitation can turn maimed and severely injured victims back to productive and healthy lives. The capacity of an auto insurance system to encourage, to practice and to pay for this powerful tool should be one of the important criteria of the effectiveness of a State auto insurance system" (24).

No-fault insurance is better able to assist the rehabilitation of victims, due to its role of making a significant amount of money available to the victim immediately after the accident. This factor has an enormously beneficial effect, as rehabilitation programmes should be embarked upon as soon as possible in order

to be most effective. The assurance of no-fault aid also lifts a great burden from the victims mind, and consequently he is able to channel all his efforts into his re-entry into society, rather than into preparing for an adversarial contest or bargaining with an insurance company. As one doctor and psychiatrist observed:

> " ... it should be appreciated by all concerned that the adversary nature of a tort or compensation action subsequent to injury heightens the patient's sense of grievance, entitlement to redress, and revenge - which tends to foster his aggressive drives and to shift his attention away from goals of rehabilitation and eventual regained independence" (25).

He also added that:

> " ... it should be recognised that the delays so frequently encountered in settling personal injury litigation tend to keep the patient trapped for months, even years, in a limbo of indecision and idleness in which dependency needs are fostered. During this time it frequently becomes so pointless to try to work toward rehabilitation that, practically, the patient remains an invalid until legal elements emanating from his injury are resolved" (25).

No-fault schemes also provide more money for rehabilitation than traditional schemes, as guaranteed no-fault aid is available in conjunction with a tort lawsuit (although in a no-lawsuit no-fault state the threshold would have to be met first). Initial large outlays for rehabilitation expenses can of course reap great benefits in the long run, as people who have been unable to support themselves and thus have been wholly dependant on insurance benefits are often, after rehabilitation treatment, able to support themselves again at least to some extent.

A Report compiled by The Insurance Bureau of the State of Michigan reveals the value of rehabilitation to insurers:

" ... recent estimates have shown that for every dollar spent on rehabilitation, $9 are returned through increased productivity and that for every rehabilitated spinal cord injury, $60,000 in future medical and nursing home costs are saved. However, a successful rehabilitation is generally possible only if an individual gets appropriate treatment as soon after the accident as possible. Placing a ceiling on PIP payments will serve to introduce uncertainty for the injured individuals on whether or not he or she can afford rehabilitation treatments. This uncertainty inevitably causes delay and markedly reduces the possibility of successful rehabilitation" (26).

When no-fault motor vehicle insurance was first introduced in the early 1970s, occupational therapy and rehabilitation were not utilised enough, either by insurers or victims. However, the importance of rehabilitation is being increasingly realised both by insurance companies and by society, and statistics indicate that the percentage of victims using vocational rehabilitation is growing rapidly.

7.8.2 COURT CONGESTION

No-lawsuit no-fault auto insurance by its very nature relieves the court's burden of motor vehicle accident cases by prohibiting lawsuits for minor cases which do not reach the required threshold. The no-lawsuit States which have investigated the impact the introduction of no-lawsuit no-fault has had on the court calendar reported that the change has been significant.

In Minnesota, for example, a report compiled by the State Insurance Department on the basis of records maintained by the Hennepin County District Court over the period 1977-1980 noted that although the number of complaints filed over that period had risen by 14 per cent, the number of complaints filed in 1980 was

still over one-third less than the number of complaints filed in 1974 - the year before no-fault legislation was adopted (27).

When the State of Michigan's no-fault statute went into effect in 1973, it also experienced a decline in the number of court cases filed in its circuit courts. According to a report made by the Michigan Insurance Bureau in 1978, the number of lawsuits filed between July 1975 and June 1977 actually showed a decline of approximately 31,3 per cent (28).

When Florida's no-lawsuit no-fault law was first adopted in 1972, it had a $1,000 medical expense threshold which ultimately proved to be too low. However, the number of lawsuits filed still declined quite significantly. After Florida changed to an exclusively verbal threshold in 1976, litigation declined even more dramatically. In December 1981, Florida's Commissioner of Insurance reported:

> "Florida no-fault has dramatically reduced litigation resulting from traffic accidents. With the adoption of a verbal threshold in 1976, the percentage of automobile negligence suits to total cases decreased 58.3 percent in Dade County and 39.3 percent in Duval County circuit courts over the four-year period ending in 1980" (29).

Litigation connected with motor vehicle accidents also dropped substantially in Massachusetts and New Jersey following their introduction of no-fault insurance. Even the Oregon add-on no-fault statute is credited with bringing about a decline in automobile claims. An "independent survey for the first 36 months revealed a 33.4 percent decline in the frequency of auto bodily injury claims" (30).

All these statistics demonstrate the undeniable success no-fault insurance has had in curbing the number of motor vehicle injury court cases. This success can be attributed not only to the lawsuit thresholds employed by the no-lawsuit no-fault States,

but also to the payment of first-party economic loss benefits to all victims in add-on no-fault States, which have had the effect of making a tort claim unnecessary.

7.9 CONCLUSIONS OF THE 1985 U.S. DEPARTMENT OF TRANSPORTATION REPORT ON NO-FAULT AUTOMOBILE INSURANCE

The investigation by the Department of Transportation into the performance of the various no-fault systems in the United States provides possibly the most concrete basis for comparison between no-fault and traditional fault systems available to date. Bearing in mind that its conclusions are based on over a decade's experience in 24 no-fault jurisdictions, it goes some way towards providing definitive answers to many of the criticisms levelled at the no-fault system.

The general conclusions of the Department of Transportation's Report were as follows:

"1. Significantly more motor vehicle accident victims receive auto insurance compensation in no-fault States than in other States.

2. In general, accident victims in no-fault States have access to a greater amount of money from auto insurance than victims in traditional States.

3. Although no-fault States, on average, have higher insurance premiums then traditional States, this seems to be due to the inclusion in the average of no-fault States with laws that are out of balance.

4. "Balance" in no-fault systems seems to be closely linked to the presence of an exclusively verbal or high medical-expense dollar threshold.

5. Compensation payments under no-fault insurance are made far more swiftly than under traditional auto in-

surance.

6. No-fault insurance systems pay a greater percentage of premium income to injured claimants than do traditional liability systems.

7. State auto insurance laws which provide high no-fault benefits would appear to better facilitate the rehabilitation of seriously injured motor vehicle accident victims than traditional laws, although the lack of good data on rehabilitation experience under traditional laws precludes a good quantitative estimate of the difference.

8. No-fault has led to reductions in the number of lawsuits and, thus, to significant savings in court and other public legal costs paid by the taxpayer.

9. Typical auto insurance benefits in both no-fault and traditional States fall short of the needs of catastrophically injured victims.

10. The percentage by which other cost of payments to accident victims in no-fault States exceeds the cost of such payments in traditional auto insurance States has increased from 1976 to 1983.

11. No-fault auto insurance laws do not lead to more accidents " (31).

7.10 NEW ZEALAND : THE NO-FAULT EXPERIENCE (32)

7.10.1 BACKGROUND

It has already been noted how, on the introduction of compulsory motor vehicle insurance in New Zealand in 1928, the then Attorney-General expressed the hope that eventually a motor insurance scheme not dependent on proof of fault might be introduced. A great deal of interest in this idea was generated in 1932, when the Columbia Report was published, resulting in a bill being drafted along the lines suggested by the Report in 1937. However, this bill was never introduced. Nevertheless, the idea of no-fault motor vehicle insurance continued to receive attention, despite great opposition.

In 1962 a "Committee on Absolute Liability" was appointed under the chairmanship of Sir Richard Wild. His aim was to investigate the desirability of introducing absolute liability for death and bodily injury arising out of the use of motor vehicles. The Report of this Committee, issued in 1963, indicated an openness to the no-fault concept, but also expressed the opinion that there was no public demand for such an absolute liability scheme. In addition, the Committee considered it unacceptable to single out motor accident victims for special privileges. It was recommended that the matter be investigated by another Committee (33).

In 1966, the New Zealand government set up a Royal Commission under the chairmanship of Mr. Justice Woodhouse, Judge of the Supreme Court (34). The Commission was instructed to investigate the compensation law relating to injury or death arising out of accidents (including diseases) suffered by persons in employment. However, in its report, issued in 1967, the Commission made recommendations pertaining to the compensation of all accidents, whether they occurred at work or on the road or elsewhere. The report, entitled Compensation for Personal Injury in New Zealand, stated:

"We have made recommendations which recognise the inevitability of two fundamental principles -

First, no satisfactory system of injury insurance can be organised except on a basis of community responsibility:

Second, wisdom, logic and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment. There must be comprehensive entitlement.

Morever, always accepting the obvious need to produce something which the country can afford, it seemed necessary to lay down three further rules which, taken together with the two fundamental matters, would provide the framework for the new system. There must be complete rehabilitation. There must be real compensation - income-related benefits for income losses, payment throughout the whole period of incapacity, recognition of permanent bodily impairment as a loss in itself. And there must be administrative efficiency" (35).

The report concluded that the tort system was capricious in operation, as well as cumbersome and inefficient. Only a very small number of injured persons received full compensation, and most received nothing. It was held that the fault system as related to motor vehicle accidents was unable to cope with the present needs of society.

The Woodhouse Commission recommended the creation of a new independent authority to administer the scheme, and that in order to reduce administration costs, private insurance companies should be excluded from the scheme.

Following the publication of the Woodhouse Report, two further committees were appointed to examine the details of the proposed

scheme, and especially to consider its viability in relation to the cost factor.

Finally, on October 20, 1972 the Accident Compensation Act was passed and thus an entirely new system was introduced whereby the action in tort is completely abolished and under which anyone injured in any type of accident, in New Zealand, irrespective of the issue of fault, will be entitled to compensation. Originally, the Act provided for two compensation schemes. One was to provide compensation for all earners, no matter what type of accident they were involved in. The other was to cover those who suffered personal injury in automobile accidents. This left non-earners not injured in an automobile accident without compensation. To rectify this situation, an amending Act was passed in 1973. The Accident Compensation Amendment Act (No.2) 1973 provided for a third scheme, known as the Supplementary Scheme, to provide cover for all persons suffering personal injury by accident who would not have had cover under the Earners' Scheme or the Motor Vehicle Accident Scheme.

The Earners' Scheme was to be funded by a levy imposed on employers and self-employed persons, as a percentage of wages, relating to the degree of risk of the particular activity. The Motor Vehicle Accident Scheme was to be funded initially by levies imposed on motor vehicle owners, and the Supplementary Scheme was to be financed from national funds. These three schemes were to be independently administered and financially self-contained. The advantage of having three separate schemes was that the principle of cost internalisation could be applied. Increases in the cost of an activity, such as motoring, would be borne by an increase in the levies imposed on that activity. A further amendment defined which injuries and diseases would be encompassed by the term "personal injury by accident" and which would not.

The Accident Compensation Commission, comprising a chairman and two other members, was established by the first commencement

order made on October 30, 1972 as a body corporate to administer the schemes. The aim was to reduce administration costs by utilising a special government agency to run a single national scheme. The charge of operating a cumbersome government bureaucracy was later levelled at the New Zealand scheme. However, private insurance companies were in fact consulted at the time and asked to estimate their administration costs for a no-fault scheme, but their estimate was much higher than could be achieved under a government body (36). However, private insurance companies were still allowed to play a supporting role, as provision was made for them to be appointed as agents to the Commission, along with certain other bodies. The Act also delegated the collection of levies and the handling and payment of claims to these bodies. Thus the new scheme would be able to benefit from the experience and manpower of the insurance companies and their widespread distribution of offices, and insurance companies would be placed in contact with a large number of potential clients for other types of insurance.

Levies on employers and self-employed persons were to be paid to the Commissioner of Inland Revenue, and levies on motor vehicle owners were to be collected by the Post Office. It was arranged that the State Insurance Office would act as the Commission's agent, within certain prescribed limits, by processing certain claims. The more complicated claims (such as permanent disability assessments) were to be handled by the Commission. The Commission was granted authority under the Act to make recommendations each financial year to the Minister of Labour concerning adjustments to levy rates and other matters.

The amended Act came into effect on April 1, 1974 and thus statutory compensations was provided for anyone suffering personal injury by accident in New Zealand, regardless of the question of fault. The common law action for personal injury and death consequently ceased to be available, except in the very limited circumstances recognised by S5 of the 1972 Act (37). If a person was covered by the Act, he or she could no longer bring

a tort action for damages. If they were not covered under the Act, they could proceed with a tort action, or seek social security compensation (Workers' Compensation had been abolished).

In 1979 a Committee was set up under the chairmanship of Mr. D.F. Quigley, M.P., to review the operation of the Act during the past five years. The Quigley Report, submitted in October 1980, recommended certain changes with regard to the benefits provided, and to the administration of the Act. Consequently, a number of Amendment Bills were introduced. The first of these replaced the Commission with the Accident Compensation Corporation (ACC), although the Act declared the Corporation to be the same body as the Commission. The Corporation is made up of a chairman and five other members, which act as a Board of Directors and are responsible for policy. The Corporation's Chief Executive Officer is its Managing Director, who supervises the administration of its functions.

In 1981, the Corporation undertook to review the Act with a view to a general overhaul of the Act. The resulting Bill incorporated some important changes, and involved a streamlining of the 1972 Act (up to 60 sections of the former Act were eliminated). This bill became law on December 17, 1982 and took effect from April 1, 1983.

7.11 THE SCOPE AND APPLICATION OF THE 1982 ACT
A PRACTICAL VIEW OF A 'PURE' NO-FAULT COMPENSATION SCHEME

7.11.1 PERSONAL INJURY BY ACCIDENT

Compensation under the New Zealand Accident Compensation Act centres around the concept of "personal injury by accident" (S2[1]). The Act can be described as a code for 'personal injury by accident' in that:

> " ... where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so

suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment" (S27[1]).

It is a function of the ACC to determine whether or not a person can be classified as having suffered 'personal injury by accident'. Section 27(3) provides that the Corporation has exclusive jurisdiction in this matter, and that its decisions are conclusive. The only exceptions to this rule are (i) where there is a claim arising from an overseas accident, (ii) where a claim arises out of a breach of a contract of insurance, and (iii) where there is a claim in respect of an accident or death occurring before April 1, 1983.

The 1982 Act does not give an exhaustive definition of the term 'personal injury by accident', but S2(1)(a) of the Act gives specific inclusions, and S2(1)(b) gives specific exclusions. Items expressly included are:

(i) The physical and mental consequences of any such injury or of the accident.
(ii) Medical, surgical, dental, or first aid misadventure.
(iii) Incapacity resulting from an occupational disease or industrial deafness to the extent covered by S28 and S29.
(iv) Actual bodily harm (including mental or nervous shock) resulting to the victim from certain criminal offences.

Unless included in the above, the following are expressly excluded:

(i) Damage caused by a cardiovascular or cerebrovascular episode (heart attack or stroke), unless as a result of effort, strain or stress that is abnormal, excessive or

unusual for the person suffering it and which arises out of and in the course of his or her employment.

(ii) Damage to mind or body caused exclusively by disease, infection or the ageing process.

The term 'personal injury by accident' is taken to convey the idea of an unexpected and undesigned injury. The injury must be a sudden one as far as the victim is concerned, i.e., not a disease.

It should be noted that even a deliberately-caused injury to a claimant by another person is treated as an accident (38). However, claimants who intentionally injure themselves are not covered (S90) although the ACC has the discretion to award their dependents some compensation. Section 90(2) provides a statutory presumption against wilfully self-inflicted injury or suicide, in the absence of proof to the contrary. The ACC also has the power under S92 to refuse compensation and rehabilitation assistance in whole or in part where the claimant suffered his injury and incapacity in the course of criminal conduct. This new section specifies that the provision should only apply where the offence for which the claimant has been convicted involves sentencing to imprisonment, and that it would be "repugnant to justice" for cover to be granted.

7.11.2 COVER

'Cover' is defined in S2(1) as the entitlement which any person or his dependents would have to rehabilitation assistance and compensation under the Act if he suffers personal injury by accident or dies as a result of the injury so suffered.

Cover for earners is financed through levies payable by employers on the earnings of their employees, and through levies on self-employed people. Cover for motor vehicle accidents is financed by levies on motor vehicles. However, the payment of levy does not ensure compensation (S113), as Accident Compensation is not

an insurance scheme. By the same token, cover cannot be denied on the grounds that levy has not been paid.

Cover for motor vehicle accidents is extended to people injured by accident by, through, or in connection with, the use of a motor vehicle. All people injured in such circumstances have cover, whether they are earners or non-earners.

7.11.3 SOURCES AND APPLICATION OF FINANCE

The previously existing statutory funds: the Earner's Fund, the Motor Vehicle Fund and the Supplementary Fund, and their related schemes which applied under the 1972 Act have been abolished by the 1982 Act. However, the Corporation Administration still uses separate accounts for the purpose of levy-setting. (Thus cost internalisation is preserved). From April 1, 1983 all claims involving motor vehicles were to be charged to the motor vehicle account. As far as the funding of the system is concerned:

> "The ACC, until the 1982 Act, operated a fully-funded system, as opposed to a pay-as-you-go system. This implied that the levies received in any one year should, on investment, be sufficient to meet the run-off claims filed in the same year, including compensation and costs of rehabilitation arising from those claims and payable in future years. In these circumstances, it was necessary for the ACC to build up reserve balances to meet the situation.
>
> However, under the 1982 Act the Corporation may operate either a fully-funded or a pay-as-you-go system, or a system combining both approaches. The Corporation has, with effect from 1 April 1984, set levy rates at a level sufficient to maintain reserves for five years' outstanding liabilities for accidents to earners and self-employed and for four years' outstanding liabilities for motor vehicle accidents" (39).

7.11.4 THE MAKING OF A CLAIM

The process of lodging a claim under the Accident Compensation Act greatly simplifies the common law process. All the claimant has to do is satisfy the ACC that he has in fact suffered personal injury by accident. This is done by the injured party claiming benefits by means of a simple claim form (C1) and a supporting First Medical Certificate (C14) which he lodges at his local ACC Office:

> "On the basis of that form, a first medical certificate and an employers certificate of earnings, a decision is made on the claim, normally within a few days. The average interval between receipt of a claim and the first cheque being posted to the claimant is now about ten days. Continuation of compensation payments is dependent upon the production of further medical certificates" (40).

Section 98 provides that there is a time limit of one year on the making of a claim under the Act. However, failure to bring a claim during that period will not be a bar if such failure has not prejudiced the Corporation, or if the failure was occasioned by mistake of fact, or by mistake of any matter of law other than the provisions of this section, or by any other reasonable cause (S98[2]).

7.11.5 EARNINGS-RELATED COMPENSATION

To claim earnings-related compensation, a person suffering personal injury by accident must establish that at the time of the accident he or she was an earner - whether self-employed or an employee - and that he or she is prevented from earning his or her pre-accident level of earnings due to the injury. (Exceptions are made in certain cases. For example, S63 provides for compensation for loss of potential earning capacity in certain cases e.g., students, and S69 provides for extension of entitlement to earnings-related compensation, where a person has

ceased to be an earner. In both cases the discretion to make an award lies with the Corporation).

First-week compensation is only provided for employees injured in the course of their employment. Such compensation is payable by employers at 80 per cent of total lost time (including overtime) (S57[2]). Earnings-related compensation after the first week (for temporary loss of earning capacity) is paid at the rate of 80 per cent of lost earnings capacity. This amount is calculated by taking the sum of a person's pre-accident ('relevant') earnings, less the sum of his earnings during his period of incapacity (S59[2]). The maximum amount of earnings-related compensation is now $700 a week (Prescribed Amounts Order SR 1984/140). Thus, if a person suffers total loss of earning capacity because of his or her injury, his or her average weekly earnings (termed 'relevant' earnings) will represent his or her actual loss of earning capacity, and earnings-related compensation will be payable at 80 per cent of that loss. One of the reasons full cover is not provided is in order to give the injured person an incentive to return to work, while at the same time cushioning him against financial loss. In fact, the Act in general aims to offer a generous level of compensation - not full indemnity.

7.11.5.1 Notional Earnings Assessments

It has been mentioned that the payment of earnings-related compensation relates to a person's loss of earning capacity, and not necessarily to a person's inability to earn. Thus, once an injured person is once again able to be employed, he is expected to seek employment. The Corporation will assist the prospective employee insofar as rehabilitation and retraining is concerned. However, if the employee has not found selected or alternative employment after 13 weeks have elapsed, the Corporation may decide to make an assessment of 'notional earnings'. Section 59(2) of the Act permits the Corporation to deduct an amount, known as 'notional earnings' from his relevant earnings.

"Provided that if the Corporation considers, having regard to the medical and other evidence available to it, that the earner is -

(a) Not endeavouring to work or earn in paid employment to the extent of his capacity; or

(b) Not working or earning in paid employment to the extent to which he would be able to do so if the only factor affecting his ability to work or earn in paid employment were his incapacity for work due to the injury, -

may fix the amount to be so deducted at such figure as it considers appropriate" (S59[2]).

Thus, the people penalised are those who choose not to be employed at a level commensurate with their capabilities, and those whose capacity to earn is affected by factors other than their injury. In practice 'notional earnings' are calculated by determining the remuneration an injured person would reasonably be capable of receiving if he were working to full capacity, taking into account any limitations his injury might place on him. Once this sum has been calculated, it will be deducted from a person's relevant earnings, and a lower level of compensation will be paid out. Notional earnings are reviewed in order to account for changes in an injured person's circumstances, such as an improvement or deterioration in his medical condition.

7.11.6 COMPENSATION FOR PERMANENT INCAPACITY

A special code, set out in S60 applies to the assessment of permanent incapacity. It applies where an injured person is medically regarded as unable to completely recover from his accident incapacity, after his condition has stabilised (medically), and where full rehabilitation and retraining steps have been taken. The Corporation will base the amount of compensation to be provided for such person by comparing:

" ... the amount the claimant would have been earning at the date of the assessment, in his pre-accident employment, but for the accident, with the amount he is now capable of earning. That figure is then related back to relevant earnings to determine any permanent loss of earning capacity" (41).

The permanent weekly compensation will thus be 80 per cent of the figure so determined.

The Act has been criticised on the grounds that compensation for earnings is regulated by a person's pre-accident earnings, and the loss of career prospects is disregarded. This may work well in terms of short-term benefits, but would perhaps be prejudicial to those incapacitated for a long period of time. It has been suggested that:

" ... a loss is properly assessed by comparing what the victim has been able to earn against what he can establish on the balance of probabilities he would have been earning. This allows for rises in earnings and improvement in occupational status he would have had but for the accident. It is, admittedly, difficult to build this into a pension scheme, but it is nonetheless relevant - the more so in respect of a person disabled for a long period of time" (42).

The 1982 Act does make provision under S62 for employees under the age of 20, apprentices or improvers under awards or industrial agreements, and employees under contracts of service requiring training for qualifications in their occupation to receive certain increases in earnings-related compensation if, in terms of their employment, they would have been entitled at subsequent stages of that employment to increments in earnings. However, if the employee's relevant earnings exceed the maximum prescribed weekly amount for such cases ($395), the prescribed amount becomes his relevant earnings. It must be acknowledged

that this is only a minimal reform in respect of a recognition of a motor victim's erstwhile future prospects, but it is a step in the right direction. On the other hand, the recommendation of the Woodhouse Commission to the effect that earnings-related payments be reviewed to keep pace with changes in the cost of living has been incorporated into the 1982 Act, under S56(6). The amount of permanent compensation received will not be reduced if a person undergoes a future increase in earning capacity, but it may be increased if a person's condition and capacity to earn deteriorates further as a result of the accident.

7.11.7 BENEFITS AVAILABLE UNDER THE ACT

A brief outline follows of the various types of benefits available under the 1982 Act to persons suffering personal injury by accident.

1. Earnings-related compensation.

2. Medical Treatment: The ACC will be liable for medical treatment where a person suffers personal injury by accident in respect of which he has cover, and treatment is needed (S75). The cost of each treatment will be met by the ACC if (i) the injured person is not entitled to Social Security benefits, (ii) the amount paid for such treatment is considered reasonable by New Zealand standards by the Corporation. The same applies to dental treatment.

Medical and Dental treatment (and Related Costs) include:

(i) Reasonable cost of medical or dental treatment (SS75,76).
(ii) Reasonable cost of transport to a doctor or hospital for initial treatment, or to home (S72).
(iii) Reasonable cost of meals, accommodation and transport to receive medical and rehabilitative treatment in certain cases (S73).
(iv) Reasonable cost of transport by ambulance (S74).

3. Damage to Artificial Limbs or Aids or Clothing: Compensation for damage to, or loss of, any clothing, spectacles, contact lens or artificial limb or aid used or worn at the time of the accident (including dentures) (S77). However, no compensation for such damage or loss will be made unless the person also suffers personal injury by accident for which medical or hospital treatment is required (S77[3][a]).

4. Compensation for Pecuniary Loss not related to Earnings: the following are provided:

(i) Actual and reasonable expenses and proved losses necessarily and directly resulting from the injury (S80[1]).

(ii) Compensation to a member of the household for quantifiable loss of service of a domestic or household nature through injury or death by accident (S80[2][a]).

(iii) Compensation to anybody who can show actual and reasonable expenses or losses incurred in helping an accident victim (S80[2][b]).

(iv) Payment for the reasonable cost of necessary constant personal attention following injury (S80[3]).

Section 80(1) gives a list of specific exclusions in relation to compensation for each pecuniary loss, the most important of which relates to any expense or loss in respect of damage to property.

5. Benefits relating to dependents:

(i) Reasonable funeral expenses (S81).

(ii) Lump sum payments for a dependent spouse (including de facto) and children (including children to whom the deceased stood in place of a parent), if death is a result of an accident (S82).

(iii) A spouse (including de facto) and other dependants may also qualify for earnings-related compensation if death

occurs as a result of an accident (S65).

(iv) Payment may also be made to dependants for loss of support due to a reduction of superannuation, pension, and the like, as a result of death by accident (S80[4]).

6. Lump Sums: Non-economic loss is compensated by lump sums in the case of -

(i) Permanent physical disability (S78); and

(ii) Pain and suffering, disfigurement, and loss of amenities and enjoyment of life (S79).

The present maximum amount of compensation available for permanent disability is $17,000. The First Schedule of the 1982 Act sets out the percentages of this maximum figure available for loss of various parts of the body and certain other disabilities. An assessment is usually provided by means of specialist medical attention. Section 78(6) provides a statutory threshold of 5 per cent disability that must be met before any lump sum compensation for permanent disability can be made. Section 79 sets a $10,000 maximum for lump-sum compensation for pain and suffering, disfigurement and loss of amenities and enjoyment of life. Payment is to be made as soon as practicable after the ACC considers the medical condition of the accident victim to be sufficiently stabilised, but certainly within two years from the date of the accident.

7. Rehabilitation and retraining assistance (S37[3]).

7.12 REHABILITATION

Rehabilitation has always been a high priority issue to the ACC, and this is reflected in sections 36 and 37 of the Act. Section 36(1) reads as follows:

> "The Corporation shall place great stress upon rehabilitation and shall take all practicable steps to promote a well coordinated and vigorous programme for the medical and vocational rehabilitation of persons who have

cover and who became incapacitated as a result of personal injury by accident and are for the time being in New Zealand".

These rehabilitation programmes promoted by the ACC are required, according to S36(2), to have the following objectives:

(a) The restoration of the injured persons as speedily as possible to the fullest physical, mental and social fitness of which they are capable, having regard to their incapacity; and
(b) their restoration to the fullest vocational and economic usefulness of which they are capable; and
(c) their reinstatement or placement in employment.

Section 36(3) gives the ACC the discretion, notwithstanding subsection (1), to provide for rehabilitation outside New Zealand for an earner suffering personal injury by accident outside New Zealand. Thus the fullest measures are provided for the prompt and adequate rehabilitation of injured accident victims, so that they may regain their place in society.

One aspect of rehabilitation in New Zealand is the Alternative Work Scheme promoted by the ACC. This scheme mainly assists partially incapacitated employees to return to work. Employers are requested by the ACC to designate work which can be carried out by partially incapacitated persons.

Section 37 sets out the function of the Corporation in relation to its promotion of rehabilitation. These include the sponsoring, supporting and fostering of groups concerned with rehabilitation and the consideration of the extent to which rehabilitation may be promoted by fiscal and other measures.

In pursuing these statutory objectives the Corporation has appointed rehabilitation officers to all ACC offices throughout New Zealand. The function of these officers is to help injured

persons assess their rehabilitation needs and see to it that these needs are met. Rehabilitation officers work, in accordance with (S37[1][a]), in cooperation with hospitals, rehabilitation agencies, government departments and employer and employee organisations, in order to promote and help organise the provision by them of all services necessary for the discharge of the Corporation's functions vis-a-vis rehabilitation. The rehabilitation officer, in consultation with an accident victim, will endeavour to design a rehabilitation programme especially tailored to suit the needs of the injured individual. This programme will be based on an in-depth assessment of the injured person's present and future needs, with an emphasis on speedy rehabilitation. Rehabilitation programmes will then be reviewed in accordance with the injured person's progress.

Section 37 also provides that the Corporation may become a direct provider of resources in clearly defined circumstances. These resources may include housing alterations (S37[3][c]), the provision of a wheelchair or other aid for daily living (S37[3][f]) and/or the adaptation or purchase of a motor vehicle (S37[3][g]).

The effectiveness of a rehabilitation programme or measure will of course depend largely on the cooperation of the injured victim. Section 87 imposes a duty on the person claiming compensation to submit to medical examination and medical or surgical treatment for the purpose of rehabilitation, and provides that an unreasonable refusal to comply with this duty may result in such person being denied further assistance.

7.13 CONCLUSION

What has been examined here is the practical functioning of a unique system which has taken the radical step of completely abolishing the fault requirement not just in relation to motor vehicle accidents, but to all accidents. New Zealand

" ... is the only country which has made anything like such a wide-ranging reform of its accident compensation system, and as such it stands as the sole representative of the most radical form of alternative compensation strategies which are commonly discussed" (43).

Despite criticisms as to the impracticality of such a system by the defenders of the fault system, not only does the New Zealand Accident Compensation Scheme work, but as the last eleven years have demonstrated, it also works well.

In relation to the cost of the scheme:

" ... in effect all the moneys previously flowing into workmen's compensation and compulsory third party motor vehicle insurance have been diverted into a single fund which is topped up to some extent by parliament. Thus the overall cost of the new system is much the same as the previous one, despite the generosity of the benefits and the vastly enhanced entitlement to compensation" (44).

This lack of increase in cost has been attributed to the saving in administration costs brought about by the abolition of the entire 'investigation into fault' process, and by the utilisation of a state-run scheme. The method of funding the scheme has also been applauded as cost-efficient. Benefits provided under the scheme are wide-ranging, and demonstrate a real effort to achieve what ought to be the goal of any compensation scheme: provision for the physical, economic, social and rehabilitative needs of the injured person in the fullest sense.

In fact it has been remarked that "The range of benefits provided by the scheme are similar to those promised, though not often paid, by the delict system" (45).

"Of course, nobody receives fantastic lump sum payments any more but the system of periodic payments guarantees generous

compensation for life, which in a world beset by inflation is arguably better than a capital sum that might prove inadequate for one's future needs, even if wisely invested. Nor should one forget that very few claimants under the old system ever received the huge sums promised by the law of delict" (46).

The efficiency of the scheme is demonstrated by the fact that the average time gap between the documentation of a claim and the first payment thereof is ten days (47). This efficiency has been aided greatly by the fact that since 1981 there has been a planned policy of decentralisation, with the ACC's officers being given a greater measure of delegation and responsibility. This policy of decentralisation is aimed at bringing the ACC closer to its victims, and has undoubtedly been successful.

Since its inception the ACC has committed itself to the priorities of (i) accident prevention (ii) rehabilitation and (iii) realistic compensation. These priorities serve as an indication of how far removed this innovative system is from focusing attention on the establishment of fault. Recognising that accident prevention is of primary importance, the Corporation has adopted the "whole-man" approach in its promotion of safety activities.

"Just as there are many causative factors involved in every accident, so accident prevention must be viewed as multi-dimensional in its scope. More and more it is becoming clear that good human relations are intertwined with safety and good safety practices. Human relations in the sense of safety embrace the whole person: covering such factors as environment, attitudes, behaviour, identity, self-esteem, performance, supervision, motivation, medical and mental health, even the understanding of ethnic backgrounds; there is no end. Coming to grips with this is the ACC's greatest challenge" (48).

Finally,

> "Viewed overall, the new system seems to be a great success. It has cured most, if not all, of the defects of the old system: it pays compensation quickly, reliably and economically to those who really need it, for as long as that need lasts. And it does so at much the same cost as the previous inefficient system" (49).

NOTES TO CHAPTER SEVEN

1. For information relating to the US no-fault experience. I am especially indebted to Compensating Auto Accident Victims A Follow-up Report on No-fault Auto Insurance Experiences US Department of Transportation, May 1985.

2. The Columbia plan involved the following points: "1. Motor Vehicle Owners should be liable for all personal injury and death caused by the operation of the vehicle, regardless of fault. To secure such liability every owner should carry third-party insurance covering himself and every person driving the vehicle with his consent. 2. The suggested compensation should provide the following: (a) Medical expenses for the whole period of disability; (b) a weekly allowance based on the wages or other income, or the replacement cost of services such as housework; and in the case of unemployed persons such as students, a minimum amount; (c) the amount would be two-thirds of the average weekly earnings. In the case of partial disability, two-thirds of the difference between the average earnings before and after the accident. There should also be a schedule of dismemberment allowances; (d) no compensation for the first week of disability". 1972 Tasmania Report, pp.15-16. J. Green recorded that the "unreliability of witnesses and the delay and expense involved in bringing an issue to trial, seem to be the chief reasons for the Columbia group concluding that the moral value of establishing liability according to fault is lost in the practical application of the rule". J. Green 'Automobile Accident Insurance Legislation in the Province of Saskatchewan' Vol.31 (1949) Journal of Comparative Law, p.40.

3. In considering how the burden of motoring, (i.e., the costs of compensation) could best be allocated, Keeton and O'Connell came up with five basic points: "We propose first, that the burden of a minimum level of protection against measurable economic loss - let us call it basic protection - be treated as a cost of motoring. The cost of providing this minimum level of compensation for traffic victims would be distributed generally among persons who benefit from motoring, without regard to fault in particular arguments. Second, we propose to distribute this cost through a form of compulsory motor vehicle insurance closely comparable to the medical payments coverage of present automobile policies. Third, we propose that the burden of non-economic hardship (principally pain and suffering) resulting from injuries that cause damages below a limit equal to the basic protection limit be borne by each victim without any compensation other than that he chooses to arrange for himself by voluntarily purchasing a special type of added insurance coverage for this purpose. Fourth, we propose that the fault principle and present rules of tort law developed under its guidance be preserved as the basis of allocating the burden, both economic and non-economic, in

cases of more serious injury, that is, the economic burden that lies beyond basic protection, and the pain and suffering resulting from injuries that cause economic loss beyond basic protection. Fifth, we propose, for both the new form of compulsory insurance and the insurance motorists may carry to protect against tort liability for the more severe injuries, that an attempt be made to formulate a system of involvement rating that will be administratively practical and will cast upon those most frequently involved in accidents - a class roughly consisting of those who are the most dangerous drivers - a somewhat heavier burden than that cast on other motorists". Robert E. Keeton and Jeffrey O'Connell, 'Basic Protection - A Proposal for Improving Automobile Claims Systems' op cit., pp.356-357.

4. 1973 Nova Scotia Report p.170.

5. Public Law No. 90-313, 82 Stat. 126 (May 22, 1968).

6. Department of Transportation, Motor Vehicle Crash Losses and their Compensation in the United States 100 (1971) quoted in 1985 DOT Report p.14.

7. Robert L. Bombaugh, 'The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform Vol.71 Columbia Law Review 207 at 240.

8. 1985 DOT Report p.2.

9. Brief mention should be made here of other reforms which have had the effect of making the American traditional fault system more "compensationist". A major reform was the change from the doctrine of contributory negligence to that of comparative negligence effected in 42 States. The doctrine of contributory negligence prohibits a victim who negligently contributed to the accident in which he was injured in any way, however small, from receiving any compensation whatsoever. Under the comparative negligence rule, such a victim may still receive some measure of compensation, provided he is found to be less at fault than (or possibly as equally at fault as) the other party. Another recent change is that 30 States have abolished the "contact" rule, by which a person injured in a "hit-and-run" accident had to prove that there was a collision with another vehicle. Now victims are able to claim that such a vehicle forced them off the road. Also, traditional insurance States often offer a limited form of insurance that pays behefits without regard to the issue of fault. This is known as "medical payments" (MP) insurance. It provides for the payment of medical expenses to all injured occupants of a policy holder's car, up to the limits of the policy (usually fairly low). These and other reforms have greatly extended the ambit of compensation of victims under the "fault" system.

10. It should be noted that the purchasing of motor vehicle insurance has not been made compulsory in all American States. However, "Financial responsibility" laws exist in all States, and these enforce a certain statutory minimum of liability insurance or its equivalent for all motorists. Thirty-three states have actually made the purchase of BI insurance cover compulsory.

11. Most States provide for the exclusion of certain victims from PIP benefits. These include those who intentionally cause injury, thieves, would-be suicides, those driving under the influence of alcohol or drugs, owners of uninsured vehicles, etc.

12. Nevada was also a no-lawsuit no-fault State until January 1, 1980. The main reason for the repeal of this law was the Nevada plan's lack of "balance". "The Nevada law provided $10,000 in no-fault benefits for each victim and prohibited lawsuits in tort unless the victim's medical benefits exceeded $750. The frequency of BI liability claims in Nevada was considerably higher than the BI liability claim frequency in other no-lawsuit States with similar thresholds. The frequency and size of PIP claims in Nevada also exceeded the average for such claims in other no-lawsuit States. As a result of these factors indicating lack of balance, there were sharp increases in automobile insurance rates in the State and Nevada's law became increasingly unpopular with the State's legislators". 1985 DOT Report, p.24. Pennsylvania also had an out-of-balance no-lawsuit no-fault law repealed and replaced with an add-on no-fault law, effective as of October 1, 1984.

13. 1985 DOT Report, p.3.

14. No American jurisdiction to date provides for no-fault benefits for non-economic loss (pain and suffering) incurred by victims. Thus a victim would have to incur non-economic loss of a certain degree of severity to be compensated for it at all. Kansas is considering amending its no-fault statute in 1985 to include compensation for pain and suffering.

15. The level of dollars of loss medical expense thresholds varies from $400 in Connecticut to $4,000 in Minnesota.

16. No. 83-1938 (D.C.D.C. 1984).

17. 1985 DOT Report p.16.

18. Ibid., p.68.

19. Ibid., p.87, p.96.

20. Ibid., p.73.

21. Ibid., p.100.

22. Ibid., p.100.

23. Ibid., p.105.

24. Ibid., p.107.

25. Nemiah, Psychological Aspects of the Injured., 7 TRIAL 61, 62 (April/May 1971) quoted in 1985 DOT Report, p.112.

26. Insurance Bureau, Michigan Department of Commerce, No-fault Insurance in Michigan: Consumer Attitudes and Performance, 77 (1973) quoted in 1985 DOT Report, p.110.

27. Minnesota Department of Commerce, Insurance Division, Automobile Insurance in Minnesota: Affordability and others Issues, (1983), p.55 quoted in 1985 DOT Report., p.113.

28. Insurance Bureau, Michigan Department of Commerce, No-fault Insurance in Michigan: Consumer Attitudes and Performance (1978) quoted in 1985 DOT Report., p.114.

29. Gunter, Yes, No-fault 3(1981) quoted in 1985 DOT Report, p.115.

30. Fritz, The "Oregon Plan", p.6 (1978) quoted in 1985 DOT Report p.116.

31. 1985 DOT Report, pp.3-6.

32. For information relating to the New Zealand no-fault experience, I am especially indebted to J.L. Fahy Accident Compensation Coverage 8th ed. 1984, and the New Zealand Accident Compensation Act (181) of 1982.

33. A powerful dissenting report was filed by the chairman of the Committee, Sir Richard Wild - the then Solictor-General and later Chief Justice of New Zealand.

34. Now the Right Honourable Sir Owen Woodhouse KBE DSC., President of the Court of Appeal.

35. J.L. Fahy, op cit., p.9.

36. D.R. Harris 'Accident Compensation in New Zealand: A Comprehensive Insurance System' Vol.37 1974 Modern Law Review 361 at 364.

37. Now covered by S27 of the 1982 Act.

38. Jocelyn Afford, Stephen Kos and Bill Napier, The Law and You 1st ed 1981, p.39.

39. Fahy, op cit., pp.36-37. The "pay-as-you-go" system has been

described by Judge C.W. Harris as: "basically [a system] in which the outgoings of any particular year are completely met by the income of that year. Nothing is brought in from previous years. Nothing is put aside for future years. In the present funded system, the outgoings of a year are partly paid out of moneys set aside in previous years and brought forward (including interest on investments); furthermore, some of the year's income is set aside to meet the liabilities of future years. Two propositions are fundamental for a pay-as-you-go system: (i) there must be a guaranteed source of income for each year; and (ii) no provisions are to be set aside in any year for future liabilities". R.P. Schaffer op cit., p.210.

40. D.B. Hutchinson op cit., p.39.

41. Fahy op cit., p.72.

42. Ken H. Marks 'A First in National No-Fault', Vol.47 1973 The Australian Law Journal, at 523.

43. Jon Holyoak 'Accident Compensation in New Zealand Today' Accident Compensation after Pearson p.180

44. D.B. Hutchinson op cit p.40

45. Ibid p.38

46. Ibid p.41

47. D.B. Hutchinson op cit p.188

48. Fahy op cit p.104

49. D.B. Hutchinson op cit p.41

8. SOUTH AFRICA - THE 'FAULT' SYSTEM

8.1. INTRODUCTION

In 1942, South Africa became the last country in the Western World to adopt compulsory motor vehicle insurance. Consequently, it had the benefit of surveying and evaluating the extensive overseas experience in this field before formulating the principles which would govern this country's motor insurance system. The sytem chosen, third party fault liability insurance, has maintained a conservative course over the years, although reforms within the system have taken place. At the same time, however, South Africa has also encountered the universal problems inherent in the use of the motor vehicle as a mode of transportation. Once again, it has had the benefit of observing the various solutions to these problems which overseas systems have implemented. South African legislators are thus faced with the choice of maintaining the present fault-based system, and bolstering it with continual reforms, or of breaking completely new ground for South Africa by following a trend towards no-fault automobile insurance already evident overseas.

Before examining the possibilities of a change of that nature, it may be profitable to examine the background to fault liability motor vehicle insurance in South Africa in greater detail, and also to survey the particular problems inherent in the present system.

8.2 BACKGROUND

During the 1930s there was a growing concern felt in South Africa in relation to the rising number of motor vehicle accidents and the widespread inability of negligent drivers to pay the amount of damages awarded against them. In an attempt to solve this problem, a Bill was submitted to Parliament in 1939. Due to the

outbreak of war this Bill was shelved until 1942 when the Motor Vehicle Insurance Act 29 of 1942 was passed. As mentioned earlier, the Bill originally provided no indemnity to the wrongdoer, it being proposed that the insurer should be entitled to recover the damages it had paid from such wrongdoer in every case. However, it was decided prior to the inception of the Act to provide the wrongdoer with financial immunity from liability, except in a few specified instances where the insurer would be granted a right of recourse. Despite this innovation, the common law liability of the negligent driver was not affected, but was merely shifted onto his insurer. Consequently the insurer's liability was not absolute - he would only be liable if the insured would have been liable under the common law, i.e., if it could be established that the damages claimed were caused by his negligence or 'fault'.

The Act was brought into operation from 1 May 1946, by Proclamation 28 of 1946 (in the same year Saskatchewan enacted the first no-fault motor vehicle insurance plan). Thus a statutory obligation was imposed on all ordinary motorists to obtain insurance against the risk of injury to third parties, on pain of criminal penalties. Under the 1942 Act, insurance companies offering third party insurance operated for their own gain, with the State's function being merely to ensure that all motor vehicle owners complied with the law, and occasionally, at the request of insurance companies, to determine tariffs for the insurance of motor vehicles.

The provisions of the 1942 Act allowed a motorist to escape liability completely if contributory fault on the part of the plaintiff could be proved, or if it could be established that an act of the plaintiff was the proximate cause of the collision, or that the plaintiff had had the last opportunity of avoiding the collision. The hardship that resulted from this rule was alleviated by the introduction of the Apportionment of Damages Act 34 of 1956, which provided that such contributory negligence was no longer a complete defence. As a result, persons

previously excluded under the act could now claim for partial compensation - the degree of compensation allowed being related to the degree of fault of the claimant. In other words, if it was found that the claimant was himself 25 per cent to blame for the accident, he would receive three-quarters of the amount of compensation that would have been allotted in that particular case, had he not been negligent.

In 1965 the Motor Vehicle Assurance Fund (MVA Fund) was created in order to act as a reinsurer of the risks of authorised insurers, and as an indemnitor for those injured in hit-and-run cases, and those injured in a collision with an uninsured vehicle.

Meanwhile, the 1942 Act was repeatedly amended until in 1972 it was replaced by the present Act, the Compulsory Motor Vehicle Insurance Act 56 of 1972. (The same year the Accident Compensation Act was passed in New Zealand). This Act repealed and re-enacted the 1942 Act and its amendments. The general purpose of this Act is reflected in its title:

> "To provide for the compulsory insurance of certain motor vehicles in order to ensure the payment of compensation for certain loss or damage unlawfully caused by the driving of such motor vehicles; for the payment of compensation where the loss or damage is caused by the driving of an uninsured or unidentified motor vehicle; and for incidental matters".

The Act can be seen as something of a social measure in respect of its provisions for the compensation of injured persons and the dependants of those killed in motor accidents. However, S21(1) of the new Act echoes the requirements of S11(1) of its predecessor, in that the damages claimed must be "due to the negligence or other unlawful act of the person who drove the motor vehicle". Consequently only the victims of a fault-caused accident may recover any damages and no-one may recover for damages suffered as a result of his own negligence. The onus is

on the injured party to prove the negligence of the other driver, and only when he is successful in establishing such proof will he be eligible for compensation under the Act. In addition, Sections 22 and 23 of the present Act provide for the limitation and exclusion of the insurer's liability in certain cases, although these restrictions are not related to the fault requirement. These provisions make the obtainment of compensation more onerous for road users, so that only a small proportion of these stand to benefit under the Act.

In recent years, the question has been raised whether motor vehicle accident insurance should retain the fault requirement as an essential element for the provision of compensation. Adherence to the fault criterion has increasingly come to be seen as the cause of many of the deficiencies of the present system.

8.3 THE CALL FOR STATUTORY REFORM

As early as 1955 a memorandum was submitted by Mr. A.C. Suzman QC., a member of the Johannesburg bar, to a Commission which had been appointed by the then Governor-General to inquire into various aspects of motor vehicle insurance. In it Mr. Suzman stated:

> "Motoring accidents have become so frequent a hazard of modern daily life that it is submitted that the time has arrived for a radical departure from our existing law under which a person who is injured, or the dependants of a person who is killed, must establish negligence in order to receive compensation" (1).

The memorandum continued by outlining proposals for a system of collective responsibility irrespective of fault, based upon an extension of the principles of the Workmen's Compensation Act of 1941 [Act 30 of 1941].

In 1962 the Du Plessis Commission of Inquiry into Motor Vehicle

Insurance reached the conclusion that the purpose of such insurance should be regarded as being:

> " ... legislation for the protection of the poorer and weaker people who cannot make provision for their own difficulties, and we consider it as necessary legislation because there are many people who cannot provide for themselves when they are involved in an accident or when they are injured" (Para 52).

The Commission considered the proposal that compensation should be awarded irrespective of negligence, but rejected it on the ground that the price of premiums would have to be drastically increased, putting them beyond the means of many motor vehicle owners. This finding was criticised in the Annual Survey of the same year.

> "It is felt that the benefits of keeping third-party premiums low, and the woes of motorists and insurance companies, have sometimes weighed with the Commission disproportionately to their importance. Many of the Commission's cures are worse than their woes" (2).

The writer went on to submit that a more careful investigation into the benefits of a 'no-fault' scheme might have convinced the Commission that such a scheme had great merit. The Commission's finding was further criticised in the Financial Mail:

> " ... the scheme can be shown to be inefficient and wasteful, and to operate in such a way as not to fulfil the needs of our society or the aims of the legislature.
> There seem to be two reasons for this unhappy state of affairs. Firstly, there is a lamentable degree of ignorance of the rights and duties of the public, which has led to widespread suspicion of the insurance companies and the unnecessary use of lawyers and expensive legal and quasi-legal processes.

Secondly, there is the delictual base of the law. A thorough-going revision of the law and removal of the economic inefficiency inherent in Third Party insurance can only be achieved by introducing a scheme in terms of which compensation is paid irrespective of fault.

As compensation is the clear intention of the law, all extraneous arguments should be dropped. Society must admit its collective responsibility to compensate motor accident victims. Such a plan would be called compensation insurance as against the present liability insurance ...

The proposal has been much debated in South Africa and has twice been put before Commissions of Enquiry into the workings of the Third Party Scheme. However, chiefly as a result of resistance by insurance companies, it has been neglected. But whereas the arguments in favour of such a scheme are strong, little that is cogent can be said against it" (3).

In 1968 Professor Harry Street (4) delivered an address at the University of the Witwatersrand, Johannesburg, in which he expressed his concern at the state of both the British and the South African laws governing the compensation of victims of traffic accidents. He pointed out that although social norms dictate that the person who caused the harm should accept responsibility and compensate the victim, in reality it is the insurance company and not the careless motorist who pays for the damages. In addition the insurer's administrative costs are greatly increased because of the need to investigate and assess the issue of fault, and concluded that:

" ... the present system based on fault has so many inherent defects that nothing less than its replacement by something completely new will bring about a fair and economical system for compensating traffic victims" (5).

As noted earlier, the 1970s saw a renewed interest in no-fault insurance in the Western world, with various no-fault plans being

adopted in America, Australia, Canada, New Zealand, etc., and with the appointment of the Pearson Commission in Great Britain. Here in South Africa, the Financial Mail regarded a completely new approach to motor vehicle insurance as vital. One of the alternatives it suggested was:

> " ... to recognise that MVA is an essential aspect of social welfare and to make cover automatic, on a graded compensation basis " (6)

However, the 1976 Wessels Commission of Inquiry adopted the position that the idea of no-fault insurance was at variance with the established principles of Roman-Dutch law on which the Act is based. They suggested that should the necessity arise in future of deliberating on the replacement of the present Act with no-fault insurance, such an inquiry should be assigned to a judicial commission (7). In 1979 the Secretary of Justice, Mr. J.P.J. Coetzer, indicated in his report that there were strong arguments in favour of a move towards no-fault motor vehicle insurance. In May 1980, the then Minister of Transport, Mr. Chris Heunis, recommended to the State President that a commission be appointed to investigate, inter alia, whether a system of no-fault insurance should be introduced. Such a commission was appointed on 8 May 1981, under the chairmanship of The Hon. Mr. Justice M.M. Grosskopf. The fact that such a judicial commission was appointed to investigate the desirability of insurance reform may be viewed as an indication of a willingness on the part of the authorities to at least consider a fundamental change in direction for South Africa's motor vehicle insurance legislation.

8.4 PROBLEMS ENCOUNTERED WITH THE PRESENT FAULT SYSTEM IN SOUTH AFRICA

Over the years a number of criticisms have been levelled against the use of the fault criterion in relation to motor vehicle insurance (9). The validity of these arguments has already been dealt with in relation to overseas systems. Here it is proposed

to examine the extent of these problems in the light of the South African motor vehicle insurance system. The results of a questionnaire, circulated mainly to attorneys practising in the country's major centres, will be used to illustrate this topic.

8.4.1 UNCOMPENSATED VICTIMS

One of the major criticisms levelled against the use of the fault criterion as a prerequisite for compensation is that its application results in many people being excluded from compensation. Even an entirely innocent victim may be excluded from compensation because of his inability to prove fault on the part of the other motorist. The survey taken indicates that more than two-thirds of the attorneys questioned had encountered cases where innocent victims had been denied compensation. Others remarked that they could well envisage such cases. The circumstances listed in illustration are too numerous and varied to be listed here in toto, but some of the most frequent situations which resulted in compensation being denied were: (i) where there were no witnesses to the accident; (ii) where mechanical failure, (e.g., brake failure) occurred; (iii) where there was no fault on the part of the other driver, e.g., the motor vehicle which caused the accident suffered a burst tyre (10), (iv) where the plaintiff suffered from amnesia as a result of the accident; (v) where evasive action was taken to avoid a collision, and thus no 'contact' between the vehicles could be proved in a hit-and-run case; (vi) where the claimant was a dependant of the negligent driver and was travelling with him in the insured vehicle.

Thus it would appear that in addition to those persons who cannot claim because they themselves solely were at fault, (or because they fell into that category of persons excluded from compensation in terms of Section 23 of the Act), a substantial number of people who were not at fault are also excluded from compensation due to the requirement that fault be proved.

8.4.2 OVER- AND UNDER - COMPENSATION

There is very little information available regarding the over- and under-compensation of victims in South Africa. Professor Botha cautiously states that:

> "Some accident claims in South Africa are settled without the direct intervention of the courts. It can be argued that as a result of the delay in disposing of claims victims could conceivably accept an unfavourable settlement" (13).

Insurance companies in South Africa have the advantage, as do all defendants, of using the "payment into court" procedure. Unlike other defendants, however, they have the benefit of the provisions of Section 21 (1B) of the Act, which has the effect of turning even the pre-litigation offer of settlement into the 'cost' equivalent of a payment into court. This may discourage a plaintiff - particularly a poorer plaintiff, from proceeding with the case. An attorney surveyed observed that "Third Party litigation is like poker, with the claimant at tremendous risk when the insurance company makes a payment into court". In addition, even if a claimant succeeds in a court action and is awarded party and party costs, he is still left to pay his attorney-client costs out of the lump sum he receives.

In relation to the issue of under-compensation, Section 22 of the present Act limits the liability of insurers towards various classes of passengers travelling in the insured vehicle. Although the question of fault does not play a direct role in relation to these limitations, it would appear that the imposition of limitations in these cases has something to do with 'morality' in so far as these passengers are to a greater or lesser extent 'punished' for the negligence of the driver of the vehicle they occupy. A large number of the people questioned felt strongly that unlimited cover should be extended to all passengers (86,3 per cent). A mere 7,2 per cent felt this to be an unnecessary measure. As far as the payment itself is

concerned, the call was for a more realistic quantum of compensation, especially for general damages. The view was expressed that in South Africa compensation is inadequate in most cases.

8.4.3 DELAY

A frequent criticism of the fault system is that the investigation into the question of fault required by third party liability insurance has the effect that many victims have to wait an inordinate amount of time before they are recompensed for their loss. The situation in South Africa would appear to confirm this pattern. The MVA Fund's Annual Report 1983/84 (14) indicates that the greatest amount of payments are made between 2-3 years after the accident (15). In addition, R26 665 501 was paid out during the 1983/84 insurance year in respect of claims made between 1965 and 1980.

When those surveyed were asked what, in their experience, the average time gap was between the injury and the compensation of the victim, the results were as follows: 7,6 per cent cited 4-12 months as average, 52,3 per cent considered 13-24 months normal, 32,5 per cent experienced 27-36 months as average, and 6,8 per cent cited an average time gap of over 3 years. It was generally felt that the act ought to be streamlined, and that there should be a simplification of the procedure of lodging claims. The need for a mechanism to obviate the delay in payment of compensation, especially in serious damage claims, was expressed. Three quarters (75,7 per cent) of those questioned were in favour of advance payment plans for a victim's out-of-pocket expenses in those cases where the insured driver is clearly liable. Interestingly, 45,2 per cent were of the opinion that the gap between losses incurred and compensation received was due to the fault requirement (40 per cent disagreed), although 60,6 per cent felt that a change to a system of no-fault insurance would have a significant beneficial effect on payment time periods (18,9 per cent disagreed and 20,5 per cent were uncertain).

8.4.3.1 DELAY IN RELATION TO EVIDENCE

Under the third party liability insurance system a plaintiff must be able to prove fault on the part of the driver who injured him. The evidential difficulties inherent in the fault system have already been examined (16), and the above-mentioned delay between the time of the accident and the court hearing has a further negative effect on the evidence requirement. Certain South African judges have acknowledged the deleterious effect of delay on evidence given in motor accident cases. Kotze J A in Union and South West Africa Insurance Co Ltd v Humphrey (17), stated that:

> "Experience has shown that the onus to be discharged by a plaintiff in a case of this nature is often an exacting one on account of the difficulty in recreating or of assessing the conditions which prevailed at the time of the event in question" (18).

Watermeyer J in Pasquallie N O v Shield Insurance Co Ltd (19), referring to the fact that the hearing had come to court three years and three months after the accident took place, expressed the opinion that after this time-lapse "memories are blurred and no longer accurate" (20).

8.4.3.2 DELAY IN RELATION TO COURT CONGESTION

There are no figures available as to the percentage of the court roll being taken up by motor vehicle accident cases in South Africa, although motor accident cases would appear to account for a considerable amount of litigation, both at the Magistrate's and Supreme Court levels. According to J.M. Burchell:

> "One merely has to look at the ratio of reported motor-accident cases to other delictual cases to see that motor-accident cases form the bulk of the reported material on

delict" (21).

It has been suggested in this regard that a special MVA court should be set up, with its own set of rules which would:

> "Accommodate the ideas of an early conference, availability of police dossiers in order to establish fault, interim payments and the relaxation of the present formalistic requirements concerning the exchange of unwieldly and often unnecessary pleadings. Actions not settled at the proposed early conference will not have to wait for twelve or even twenty-four months after closure of pleadings before trial dates are allocated" (22).

While this reform may be effective in speeding up the trial procedure, the necessary delay of an investigation into the issue of 'fault' still remains.

It should also be noted that the Wessels Commission considered the desirability of establishing a special court for MVA claims, but decided that such a move was not justified:

> " ... the Report records that of approximately 22 000 MVA claims disposed of annually only about 2% (440) had to be settled by a court, the remainder being settled mutually. (It is not clear whether the 440 includes matters settled after the trial had begun). This number compares strangely with the number of MVA matters on the court rolls for hearing, totalling, according to the Report (6.23.1.1) about 1 230 during the year. The implication appears to be that many matters are settled at the door of the court because the insurers have delayed their investigations or the plaintiffs have proceeded with hopeless claims or withheld medical or other information in expectation of a "nuisance value" settlement, or both parties have not exercised proper efforts towards settlement. Another, perhaps more likely, explanation is that claimants only realise, at the door of

the court, the high costs of the litigation involved and are more disposed to settle than they were originally"(23).

8.4.4 ADMINISTRATION OF THE SYSTEM: THE COST

According to the MVA Fund's Annual Report for 1983/84 (24), the average premium income per motor vehicle, as defined in the Act, for the period 1 May 1965-30 April 1984 amounted to R17,47 and was expended as follows (25):

Compensation	R10,39	Average premium income	R17,47
Medical costs	0,60	Interest earned on investments	5,36
Claimants' legal costs	1,14	Deficit	3,96
Insurers' legal costs	1,07		
Assessors' fees	0,17		
Provincial hospitals	0,21		
Other payments	0,04		
Estimate of claims outstanding	9,18		
Insurers' administration costs	3,06		
Agents' commission	0,82		
Reinsurance premiums	0,01		
Management costs (MVA Fund)	0,10		
	26,79		26,79

From the above, it can be established that the victim's compensation and medical costs (R10,99) amount to approximately 63 per cent of the total premium expenditure, the other 37 per cent being expended in other areas. From the figures given it would seem that administrative and legal costs (and agents' and assessors' fees) take up a substantial portion of the premium. A large amount of these costs are linked to the process of fault

determination. Provision is made for outstanding claims, and because motor vehicle insurance in South Africa lies in the hands of a group of private insurance companies, a certain amount of premium income is expended on investments and profit.

8.4.5 LUMP SUMS AND REHABILITATION

The present motor vehicle insurance system tends to utilise the lump sum system of payment as a matter of course. This once-and-for-all type of payment may be used to cover such diverse heads of damages as:

(a) Medical and hospital expenses, present and future, including the cost of consulting a medical specialist;
(b) Pain, suffering and shock;
(c) Future pain and suffering;
(d) Permanent disability, loss of health and loss of amenities of life;
(e) Loss of expectation of life;
(f) Loss of earnings to date through absence from business, profession or employment (even where the employer has paid him his wages during such absence);
(g) Loss of earning capacity and of future earnings;
(h) Loss of benefits (e.g., board and lodging) incidental to employment;
(i) Disfigurement (26).

The difficulties inherent in assessing future medical expenses and future loss of earnings was recognised by the Wessels Commission of Inquiry (27), which recommended that such compensation be paid by way of periodic payments for the duration of a claimant's life. These recommendations resulted in the incorporation of S21 (1C) into the 1972 Act (28), which deals with the payment of costs of future medical expenses and future loss of income and support.

Section 21(1C)(b) now provides that:

" ... the authorised insurer concerned shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed him to furnish such undertaking, to pay the amount payable by him in respect of the said loss, by instalments as agreed upon or directed by the courts".

Thus, provision is made for the payment of loss by instalments under our law. However, in Marine and Trade Insurance Company Limited v Katz N O (29), Trollip J A in delivering the unanimous judgment of the Appellate Division, held that this provision was instituted mainly for the benefit of insurers. He also held that the sole right of electing to compensate by periodic payments lies with the insurers, and neither the third party involved nor the trial court is able to direct the insurers to adopt this form of compensation. Thus this provision does little, if anything, to provide more adequate compensation for a motor accident victim, as it will only be used in those circumstances where it suits the insurance company to utilise such payments.

Of the attorneys questioned, 51,4 per cent advocated a change to monthly payments of compensation, while 41,3 per cent favoured the retention of lump sum payments. Some people felt that there was a place for both options, using lump sums for general damages and monthly payments for ongoing treatments. A number of people expressed the view that a monthly system of compensation should only be utilised if no-fault insurance was introduced, as in the present system it would be impractical.

Turning briefly to the question of the rehabilitation of victims, the enormous amount of emphasis placed on the rehabilitation of motor accident victims by the no-fault plans presently operating in the USA and New Zealand has already been noted. However, here in South Africa little attention has been paid to this area of treatment. Mr. Harold Palmer, Director of the Cripple Care Association, has pointed out this country's great need for a

national rehabilitation policy, it being the only country in the Western world without such a policy. He has also called for the establishment of proper rehabilitation centres here (30).

8.4.6 TEMPTATION TO DISHONESTY

Only 34,8 per cent of those questioned felt that the present system exerts a strong temptation to dishonesty, while 45,2 per cent disagreed (20 per cent were uncertain).

8.5 THE VIEWS OF THE INSURER

To give effect to the principle of compulsory Third Party Insurance the Act has established a group, or consortium of authorised insurers, who are obliged to insure every applicant for insurance. This consortium is made up of private insurance companies, with the MVA Fund acting as a reinsurer of risks. At the moment, the position of these private companies is secure, as the State President entered into an agreement with the consortium, authorising them to insure all motor vehicles in terms of the Act for the period 1 May 1976-30 April 1986.

These private insurance companies have an interest in maintaining the present administrative system of third party insurance, under which they enjoy both exclusive rights in relation to the handling of motor vehicle insurance premiums and the protection of the MVA Fund, which acts as a 100 per cent reinsurer of risks. If a change to a no-fault insurance system were instituted, these companies would lose a certain amount of business - especially if it was decided to introduce a scheme run by a state corporation, as in New Zealand. However, although Section 24(1)(C) of the 1942 Act gave the State President the discretion to establish a corporation to insure motor vehicles, either in competition with registered companies or to the exclusion of all other companies:

"The 1972 Act did not give the State President this power

and it appeared from this omission that the question of absolute liability in respect of compulsory motor vehicle insurance had, at least for the time being, been shelved. Such a corporation could have provided the necessary machinery for the establishment of a system of absolute liability" (31).

It should be noted that although the establishment of such a corporation might be a useful reform, it is not vital to the introduction of a system of no-fault insurance, as has been demonstrated by the United States no-fault experience.

8.6 THE VIEWS OF THE LEGAL PROFESSION

The question remains: what is the attitude of the South African legal profession towards the institution of a no-fault motor vehicle insurance system?

The Financial Mail states its views vis-a-vis this group rather baldly:

> "The only groups which would suffer from introduction of a compensation scheme are those which earn a living as a result of the complexities and uncertainties of the present liability scheme, chiefly certain attorneys and other "Third Party specialists". But the scheme was not introduced for their benefit and their incomes are presently earned at the expense of the efficiency of the scheme, premiums paid by the motoring public and smaller awards received by Third Parties. Their loss is a small price for an economically more efficient, and socially more desirable scheme" (32).

However, it is unfair to assume that the legal profession is necessarily opposed to the introduction of no-fault insurance, simply on the grounds that they would lose some of their "bread-and-butter" cases if such a reform were to take place. While it cannot be denied that this does constitute a powerful incentive

to uphold the status quo one cannot blithely assume a lack of social conscience on the part of an entire profession (especially in the light of evidence to the contrary in respect of other areas of legal reform).

The response to the questionnaire, which dealt inter alia with the possible introduction of no-fault motor vehicle insurance, may be taken as an indication of attorneys' attitudes to this type of reform, and of their satisfaction with the third party fault system as it stands.

When asked to consider the 1972 Motor Vehicle Insurance Act and its stipulations, 40 per cent stated that change was urgently needed, while 39,3 per cent felt that change was needed at some stage. These figures would seem to indicate that more than three-quarters (79,3 per cent) of those questioned were not entirely happy with the Act as it stands (only 20,7 per cent stated that change was not necessary). Of those who considered change necessary, 53,2 per cent specifically recommended a change to no-fault insurance, 51,4 per cent advocated procedural changes, and 35,1 per cent endorsed changes to the provisions of cover under the Act (the overlap in percentages is due to the fact that some people detailed more than one type of reform).

Among the points enumerated in favour of a change to a no-fault system were suggestions that it would provide a speedier and more satisfactory basis of compensation, and that it would reduce legal costs and make a greater amount of finances available for compensation payments. Some attorneys emphasised the pressing need to introduce a no-fault scheme in order to obviate the well-known drawbacks inherent in the outmoded "laissez-faire" notion of fault. Even those attorneys not fully committed to a no-fault system felt that the question of no-fault insurance ought to be investigated more thoroughly.

The proposal of a partial abolition of the fault system using the concept of a "threshold" to eliminate delictual liability in less

serious accidents found favour with 42 per cent, although 44,7 per cent were against such a system (13,3 per cent were uncertain). However, this apparent rejection is tempered by the fact that several of those rejecting the use of a threshold, did so on the basis that there ought to be a total abolition of the fault concept, and that there was no reason whatsoever to institute the "half-way house" solution embodied by a threshold. Another view expressed was that a claimant should have the option of claiming a certain minimum under a no-fault system, or of electing to gamble on the present system, but that once they had chosen their means of compensation they should not be allowed to "switch midway". The majority of respondents felt that no-fault compensation should be restricted to claims under R5 000.

When questioned as to whether they considered that a change to no-fault insurance would have any effect on driver behaviour in relation to road safety and deterrence, more than two-thirds (69,1 per cent) of the replies indicated that such a change would have no effect whatsoever on driver behaviour. The main reason given for this view was that drivers do not actually pay compensation out of their own pockets under the present system - it is the insurance company which pays. A change to 'no-fault' would therefore not alter the present situation.

Views expressed in relation to the proposal of a change to a first-party system, (where one's claims are paid out by ones own insurance company), were fairly balanced: 32,8 per cent felt such a change was necessary, while 34,4 per cent felt it was unnecessary. However, if first-party coverage were introduced, 43,7 per cent felt that such cover should then also be extended to cover property damage. More than one-half of those questioned (60,6 per cent) agreed that a change to no-fault insurance would have a significant beneficial effect on payment time periods, and 62,6 per cent felt that no-fault motor vehicle insurance would be a socially more desirable scheme, although in some cases doubt was expressed whether such a scheme would be legally more desirable.

When asked whether, following the worldwide trend towards no-fault insurance, they would agree with the contention that it would only be a matter of time before such legislation was introduced in South Africa, 41 per cent replied in the affirmative, a further 41 per cent were uncertain, and only 18 per cent disagreed.

It must be acknowledged, however, that many attorneys were strongly in favour of the retention of the fault concept; 83,9 per cent felt that accidents result from the failure of drivers to use due care, while 49,3 per cent felt that it was just and fair to assign both moral and legal responsibility in each accident (36 per cent disagreed). Response to the statement that 'The concept of cause has little operational significance in the study of accidents, and traffic accidents can be most meaningfully viewed as failures of the system rather than failures of any single component' indicated that almost two-thirds (62,3 per cent) did not feel this to be accurate. Only 15,2 per cent upheld the statement.

Certain lawyers felt that the fault system was too basic to our legal system ever to be abolished, while others felt that any change from a capitalist free-enterprise system recognising delictual liability to a socialist approach to the problem of compensation was unacceptable.

When asked if they would rather see a national scheme run by a state agency or by a private agency, only 27,5 per cent opted for a state agency, while 64,1 per cent were in favour of a scheme run by private insurance agencies. Some expressed the opinion that the system should remain as it is at present, although there was apparently some confusion as to whether the present scheme was run by private agencies or a state agency. However, it was generally felt that the wider one extended no-fault compensation, the greater the need was for a single state agency. A Workmen's-Compensation type scheme was advocated by some, but an

overwhelming number of people were against such a scheme. In fact, one of the main reasons why many respondents objected to no-fault at all was the fear that MVA claims would be relegated to the same bureaucratic category as Workmen's Compensation claims. The fact that the Workmen's Compensation scheme is run by civil servants who "have no discretion" and who work on certain set formulas as to quantum, was generally criticised. Many respondents were of the opinion that state intervention is fatal to a fair system of compensation, and that an arbitrary impersonal approach to claimants would inevitably follow. Suggestions were accordingly made for the creation of a single body to deal with compensation, which would be manned by experts and not civil servants. A special 'motor court' was also proposed, in addition to the suggestion that all claims should be paid by the MVA Fund.

Some respondents even levelled criticisms at fellow members of the legal profession and at insurance companies. It was suggested that attorneys are often responsible for unnecessary delays to the claimant's detriment, and that extensive costs are frequently run up by attorneys acting on behalf of insurance companies before any serious attempt is made to settle. As far as insurance companies were concerned, it was alleged that it was often the case that insurers try to 'catch' the victims either by the citing of contradictory reports or by strict application of the relevant time limits (56,5 per cent of those questioned felt it necessary to extend the 2-year prescriptive period). The lack of incentive to settle claims speedily was also condemned.

The questionnaire results clearly indicate that it is impossible to make a blanket assessment regarding the views of South African attorneys. Views supporting no-fault reform were expressed, as well as those supporting the retention of the fault liability system. However, it is also clear that there exists a depth of dissatisfaction with the present Act, even in relation to provisions unrelated to the question of fault. A telling point in this regard is that only 34,5 per cent of those questioned

were of the opinion that the present system is successful in its function of compensating personal injuries suffered in automobile accidents, while 47,4 per cent were of the view that it is unsuccessful.

All in all, the results of the survey taken, lead to the inevitable conclusion that the Motor Vehicle Insurance Act as it stands does not enjoy the united support of the South African legal profession as a whole.

8.7 AN EXAMINATION OF THE REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF COMPULSORY MOTOR VEHICLE INSURANCE

8.7.1 INTRODUCTION

A Commission of Inquiry was appointed in May 1981, under the chairmanship of Mr. Justice Grosskopf, to investigate certain aspects of compulsory motor vehicle insurance, in terms of the Compulsory Motor Vehicle Insurance Act, 1972, as amended. The terms of reference of this Commission authorised it to inquire into, report on and make recommendations in connection with, inter alia:

> "The desirability or otherwise of introducing no fault liability insurance and making it compulsory" (33).

After deliberating this, and other issues for some five years, the Grosskopf Commission reported its findings in 1985.

8.7.2 THE GENERAL APPROACH OF THE COMMISSION

In the chapter relating to the general approach of the Commission (34), an attempt is made to evaluate certain criticisms levelled against the third party fault liability insurance system.

The legal process is acknowledged as being not only time-consuming and expensive, but also uncertain (35). However, these

shortcomings are felt to be "often exaggerated" (36). Law reforms are said to have simplified procedures, improved rules of evidence, and created new procedures to simplify and expedite proceedings (37). The introduction of legal aid is said to have made the courts more accessible to the public. In relation to a claim arising from a delict, it is explained:

> "A claimant can succeed if he proves that the defendant acted negligently. Negligence is the failure to act as a reasonable person would have acted in the circumstances. The test sounds vague, but in most areas of life there is a generally accepted view in the community about what is expected from a reasonable person. This acceptance is often consolidated or created by decisions in court and by laws, but even without them most people in most circumstances would agree about what a reasonable person should do" (38).

It is submitted that the test does not merely sound vague, but is intrinsically flawed. The vagaries of the 'reasonable man' test have already been discussed in depth (39), and it can only be reiterated that enormous difficulties are encountered in attempting to establish what the hypothetical 'reasonable man' would do when he is a split-second away from a collision. The fact that liability is established on a case-by-case basis with new precedents continually being introduced, makes deciding how a 'reasonable man' would behave increasingly difficult for a judicial officer, to say nothing of the man in the street.

In relation to the cost-efficiency of the present system, the question has been posed whether the money obtained from the community is distributed in an equitable and efficient manner. The Commission answers this query by saying:

> "We feel that the answer to this question depends largely on one's point of view. If one regards third party insurance as a social service then the answer must be negative" (40).

The Commission makes the distinction that third party motor vehicle insurance is unacceptable as a social service because by its very nature its scope of compensation is limited to the compensation of a small percentage of people who suffer damage as a result of death or physical injury, i.e., to those people killed or injured in road accidents. In addition, compensation is restricted to those claimants who can prove negligence on the part of the other motorist. Thus it is argued that we cannot look upon third party insurance as a social service, because it only operates in relation to a small number of people. The Commission further illustrates it point by referring to figures taken from the Central Statistical Services, which indicate that whereas approximately 88 000 people were killed and injured in motor accidents in 1980, only 13 000 third party claims were paid or settled during the 1980/81 insurance year. Although these figures are approximate, they would tend to indicate that only 14,6 per cent of those suffering loss as a result of a motor accident eventually obtained compensation. The Commission acknowledged that the compensation paid in these cases had no connection with the need of the claimant - it is only related to the degree of fault apportioned to his actions. Payment will only be received once his claim has been recognised, settled, or decided by a court, no matter how great his need may be in the meantime. Finally, the Commission argued that third party insurance is described as unacceptable as a social service, due to its high administration costs, which are related to the determination of fault procedure.

> "To sum up: if one were planning a social welfare system for victims of accidents there would be no logical basis for distinguishing between the victims of traffic accidents and those of other accidents (or, for that matter, the victims of illness) and one would have to determine the benefits according to the victim's needs. This is, in essence, the approach of our present system of disability pensions. Our system of third party insurance is therefore difficult to defend if it is judged by the criteria used for welfare

service" (41).

On the other hand, the Commission argues that if third party insurance were judged simply as a form of insurance, one's approach would be different.

> "Then the system would have to be judged according to the benefit it offers the victim injured through the fault of the motorist and the motorist himself" (42).

If one chooses to judge the system according to the criteria given by the Commission one would discover that the latter receives unlimited cover against damage caused by him at a low-price premium, and the victim can recover his common law damages without fear of the wrongdoer's inability to pay. However, if third party insurance were judged simply as a form of insurance, it would probably be evaluated according to the benefits it affords the insured. Third party insurance offers no protection to the insured against bodily injury to himself or his family, and it compensates far fewer victims than would be the case under an alternative form of insurance, such as strict liability insurance, or no-fault insurance. The question that remains is whether third party liability insurance best fulfils the needs of accident victims and of motorists, (i.e., premium-payers), in the light of modern motor vehicle transportation, and its toll on life and limb.

The Commission then moves on to discuss certain criticisms levelled against the third party insurance system. The first criticism discussed is that third party insurance only helps a small percentage of all persons sustaining physical injuries. It has been suggested that the third party system be replaced by a general system of compensation for all who suffer injuries, regardless of cause, on the basis of absolute liability. (In other words, the implementation of the type of scheme presently operating in New Zealand). The Commission rejects this suggestion on the grounds that:

"Our terms of reference ... are not wide enough to include the abolition of third party system and the institution of a general accident scheme" (43).

The Commission continues by stating that:

"If such a scheme should be investigated one would have to give careful consideration to the financing and administration of such a scheme and also to the level at which benefits can be offered. Such an inquiry may indicate that the financial benefits which innocent victims of traffic accidents can reap at the moment would practically disappear if they were to be divided among all disabled people (or even all people whose disablement results from accidents). Be that as it may, we were not asked to institute such an inquiry and we did not do so" (43).

This statement tends to give credence to the view expressed earlier that the only reason third party insurance can ostensibly provide 'full' compensation - or even a high level of compensation for non-economic loss - is that a large number of people are left totally uncompensated. However, considering the extensive finances available to the MVA Fund, it is submitted that the financing of such a system should not be the main reason given for avoiding reform. It should be borne in mind that the large savings in administration and legal costs that would be achieved by instituting such a reform would create extra funds for the compensation of victims. The administrative costs of companies which undertake motor vehicle insurance was estimated at R131 380 975 for the year 1984 (44), and the total legal costs for the same year amounted to R52 130 430 (45).

The Commission then considered the alternative proposal of a compensation scheme exclusively for the victims of traffic accidents. The arguments for such a scheme include the assertion that such victims fall into a special category. This was the

view adopted by the Pearson Commission, as quoted by the Grosskopf Commission:

> "995 The Criticisms which may be levelled at the present system of tort compensation for road injuries - that too few victims are compensated; that the entitlement to compensation depends too much on chance; and that the system is unduly slow, and expensive to administer - may also be levelled, to a varying degree, at tort compensation for other types of injury. But there are in our view a number of considerations which justify singling out this system for reform.
>
> "996 First, motor vehicle injuries occur on a scale not matched by any other category of accidental injury within our terms of reference, except work injuries (which are already covered by a no-fault scheme). Secondly - and here they are to be distinguished from work injuries - they are not confined to any particular group of victims. Thirdly, they are particularly likely to be serious, so that they highlight the difficulties of compensating for prolonged incapacity. Fourthly, road transport, itself is an essential part of everyday life of fundamental importance to the economy as a whole and to the mobility of individuals" (46).

The Grosskopf Commission rejects this argument in its entirety. It upholds its former statement that those injured in motor accidents do not form a major portion of those injured in all types of accidents, by stating that the only reason that the Pearson Commission accorded so much weight to traffic injuries was that injuries sustained in the home were not included in that Commission's terms of reference. (One can argue that the Grosskopf Commission's terms of reference were similarly circumscribed (47)). It is further stated that:

> " ... we find it artificial, when one is dealing with social

services, to attach overriding importance to the commonness of the injuries. To a man who suffers a fracture of the skull when a robber hits him over the head it would be difficult to understand that compensation is withheld from him because relatively few people sustain injuries in that manner, but that he would have been compensated if he had fallen within the larger category of persons injured in traffic accidents, even if his injuries were the result of his own culpable actions" (48).

Here we see a new version of the 'bathtub' argument, referred to earlier (49). It seems that for some reason the Commission regards no-fault insurance as a form of social service, rather than a system of insurance. This is rather unusual, considering that under the type of no-fault insurance envisaged by the Pearson Commission, cover is still granted on the purchase of an insurance policy from an insurance company, although compensation is awarded on a first-party rather than a third-party basis.

The Commission also rejects the view of the Pearson report that motor accident injuries constitute a unique problem because injuries so suffered are likely to be serious, on the grounds that if the intention is to help the seriously injured, it should not matter how they sustained their injuries. The Commission further contends that:

"Because motor traffic is a necessary and integrated part of everyday life it does not follow that all persons injured by it must receive compensation. Indeed, the argument to the contrary appears stronger - motor vehicle traffic creates one of the normal risks of modern life so that there is no justification to single out victims of traffic accidents for compensation" (50).

This type of argument must be described as '<u>laissez-faire</u>' in the extreme. Originally such an argument was backed up by 'moral' principles, but there appears to be no such justification here,

probably because the institution of insurance has since come into existence. The fact that a motor accident is "one of the normal risks of modern life" does not preclude the insurance against such a risk on a first-party basis, as is the case with 'normal risks' such as theft of property. The casual attitude towards motor accidents and their victims exhibited by the Commission seems rather incongruous in the light of such statements as:

> "More human lives have been lost in traffic accidents in South Africa during the past three years than the 24 532 South Africans who perished during World Wars 1 and 2" (51).

It has also been estimated that:

> "purely in economic terms, without any allowances for social costs in terms of bereavement and pain, the cost of road traffic accidents to the nation was at least R2,5 billion (2 500 000 000) in the year 1984" (52).

The Commission further rejects the implementation of the general deterrence theory, that those engaging in and benefiting by an activity (such as motoring) should pay all damages caused by it.

> "Motor traffic is ... such an integral part of our community that a financial burden placed on the owners of motor vehicles, is in essence carried by the whole community and, in fact, the whole community benefits by motor vehicle traffic. Besides which, the authorities have placed many burdens on the owners and users of motor vehicles already in the form of direct and indirect taxation. The income derived from this will certainly be more than enough to compensate all damage caused by motor vehicles if the State should wish to use it for that purpose" (53).

The question arises: if the Commission believes that costs cannot be internalised, why does it endorse the purchasing of third party insurance by motor vehicle owners, rather than

recommend the use of general taxation? What is to be noted here is that there are apparently 'more than enough' funds available to compensate all damage done by motor vehicles, i.e., compensate all motor accident victims. The financing of a system of no-fault insurance can therefore not be held to be a bar to its introduction.

> "To sum up, it is true that the third party system provides aid to only a small percentage of people who suffer damage as a result of personal injuries. However, the third party system was never intended to be a system under which all people who suffer damage would be compensated, and it is not within our terms of reference to consider whether it should be replaced by a general system. When it comes to the narrower question of whether all persons should receive compensation for damage suffered as a result of injury or death resulting from motor vehicle traffic, we find it difficult to see why such people should be put at an advantage vis-a-vis people injured in other ways" (54).

The Commission thus strongly rejects the idea that any class of victim should be excluded from compensation, as they are all equally worthy of compensation. It therefore proceeds to shun any type of reform which does not encompass the idea of universal compensation, in the interests of equality. One wonders why workmen have been unfairly singled out for no-fault compensation for the last 25 years (55). Unlike the Woodhouse Commission in New Zealand which took full advantage of the item in its terms of reference which related to 'associated relevant matters,' the Grosskopf Commission evidently did not feel the necessity to venture beyond its immediate terms of reference, even though a similar provision is included in Item 1(b) of the terms of reference of the Grosskopf Commission, whereby it is authorised to inquire into, report on and make recommendations in connection with "any other matter relevant to this inquiry".

In relation to the criticism of the application of negligence as

a criterion for liability in relation to road traffic accidents, the Commission's response was to point out that there has been no pressure from the public to abolish such application. Its impression was "that the general public's sense of justice accepts negligence as a requirement for culpability" (56). However, such 'impressions' are, in the absence of evidence to the contrary, vague and unsubstantiated. It is difficult to prove, without research into this topic, just what the general public thinks about the negligence requirement in relation to motor accidents, and consequently such a response hardly constitutes a credible defence of the present fault system.

The criticisms of the evidence requirement and the difficulties of proof (due to the absence of witnesses, the time-lapse between accident and trial, etc.) under the present system are acknowledged to contain a measure of truth, but are generally felt by the Commission to be over-emphasised (57). It is believed that in most cases it is reasonably clear what the cause of the accident was, and whether anyone was negligent. This may be the case, but these factors will not necessarily facilitate a speedy settlement. A legal investigation into the apportionment of fault will still have to be carried out, which may not always be a clear-cut matter, especially where there is conflicting evidence on the part of the participants.

Finally, the criticism of the third party system's dependence on the legal process is evaluated. This criticism has two aspects: (i) that the third party system is slow and expensive because it involves the courts, and (ii) that the courts are overburdened because of the large number of third party cases it must hear. The Commission's response to this criticism is that if the third party system is a good one, it should not be discarded simply because it burdens the courts - one should rather adapt the judiciary so that it can carry the burden. Reference is made to Annexure K of the Report, which according to the Commission, makes it clear that in fact "third party cases occupy only a comparatively small part of the time of the Supreme Court" (58).

Annexure K contains a summary of statistics by the various divisions of the Supreme Court regarding the hearing of third party cases during the period 1 July 1981 to 30 June 1982. The figures given demonstrate that 820 such cases were heard in the Supreme Court during this period, with 454 court days being taken up with the hearing of these cases. Unfortunately, these figures are meaningless in themselves. An accurate assessment can only be made if these figures are expressed as a percentage of the total number of cases heard. It is suggested that the solution to the slow and expensive legal process lies either in making that process faster and less expensive, or to have the third party system administered by some other body. However, the Commission feels that the latter suggestion would only work if the system of compensation for road traffic accidents were greatly simplified. In any event, only a small proportion of claims reach the courts - the majority are settled by insurers or the MVA Fund. An analysis of a sample of 13 225 claims instituted up to and including 30 April 1981 referred to by the Commission (58) indicated that only 72 of these eventually reached the Court. Apparently 97,3 per cent of the 13 225 claimants received their compensation within 24 months after filing their claims. These figures may be impressive for a third party system, but they hardly compare with the average of 10 days achieved in New Zealand under a no-fault scheme.

8.7.3. THE COMMISSION'S FINDINGS AND RECOMMENDATIONS IN RELATION TO THE INTRODUCTION OF NO-FAULT INSURANCE (60)

The Commission begins by explaining that under a no-fault insurance system the moral culpability of the motorist or the victim will not be considered at all, even where there is intentional harm, or negligence. However, it is acknowledged that most systems of no-fault insurance do contain certain exceptions to this general rule. It goes on to state that it is against a system of no-fault insurance for death or injury caused through traffic accidents, as it sees no reason why traffic-accident victims should be especially favoured. On the other

hand, it adds that:

> "These theoretical arguments would not hold water if the administration of a system of no fault liability were to be so much cheaper than the present system that the total costs of such a system would not be more than the present system" (61).

The Commission continues:

> "In calculating the costs of a system of no-fault liability, however, we were confronted by insurmountable problems. We have already pointed out that 88 791 persons were injured and killed in motor car accidents during 1980, but that only approximately 13 000 third party claims amounting to R60 605 228 were paid during the 1980/81 insurance year. If one assumes that the damage suffered by each of the 13 000 claimants was approximately the same as that suffered by each of the 88 791 victims, the total compensation would rise by approximately 680 per cent. Unfortunately, this assumption has no scientific foundation. The 13 000 successful claimants did not recover all their damages. Some of them received a smaller amount because they contributed to the accident through their own fault. Others settled for a smaller amount because they were uncertain whether they could prove negligence on the part of the owner or driver of the insured vehicle, or for other reasons. Claimants from both these classes would have been able to claim the full amount of their damages under a system of no-fault liability. Under such a system the amount of R60 605 228 would have been significantly higher and the impact would have been even greater, of course, had it been multiplied by 6,8" (62).

In addition to the increased compensation costs, the Commission argues that under a no-fault system a claimant would still have to prove that he had suffered damage in a motor accident, and an

amount of compensation would still have to be determined. There would still be investigations and litigation, although to a lesser degree. Further litigation, it is argued, could arise from the exceptions. The Commission is sceptical that costs could be reduced in other ways, and the New Zealand system is taken as an example of this:

> "A victim's right to compensation can be limited, for example by entitling him only to his actual monetary loss (and not compensation for pain and suffering, loss of the amenities of life, etc.). If this limitation should be introduced one would have to consider whether these items of damage could still be recovered from a guilty owner or driver of the motor vehicle (either with or without compulsory insurance). If it could still be recovered, litigation would not be reduced very much by the system because practically all claimants who suffer monetary loss as a result of injuries also experience pain and suffering and forfeit enjoyment. If such damages could not be recovered, some people would regard this as unreasonable tampering with the present legal position. However, we do not need to take a stand in this regard because even with this limitation, compensation in accordance with a system of no fault liability would amount to a multiple of what is being paid at present" (63).

According to the Commission, costs could further be reduced by the use of a fixed tariff of compensation, and by allowing claims to be dealt with adminstratively. However, if such a system were accepted, the Commission feels that it would be "very unfair" to remove a victim's common law claim against the "unlawful perpetrator". The administrative handling of claims paid according to a tariff, although cheaper than the individualising of claims through negotiation or decisions of court would also involve costs. There could also be a duplication of procedures if compensation could be claimed according to a tariff and according to the common law.

The Commission concludes by saying that:

> "There are, of course, other possible variations but in almost all those we could think of, an equitable system of no fault liability would eventually be much more expensive than the present system" (64).

Therefore:

> " ... we recommend that a system of no fault liability insurance should not be introduced and made compulsory" (63).

The reasons ultimately given by the Commission for the rejection of the introduction of a no-fault system of motor vehicle insurance centre around the issue of cost. Keeping premiums low is obviously of primary importance to the Commission. However, while the amount of compensation awarded under a no-fault system would inevitably exceed the amount awarded under the present system (due to the increased number of claimants), the extent of this excess can only be guessed at and could, depending on the nature of the system to be instituted, be significantly lower than the amount suggested by the Commission.

Although the Commission is supposedly concerned only with the economics of a no-fault system, it reverts to 'moral' considerations in assessing the question of costs. The imposition of a limit to awards under various heads of damages is rejected as 'unfair' and 'unreasonable tampering', and thus the Commission avoids dealing with the very real cost-saving impact such limitations will have on the system. Furthermore, the erroneous impression is given that overseas systems, such as that of New Zealand, limit compensation to actual monetary loss and make no provision for the compensation of non-economic loss. However, the New Zealand scheme <u>does</u> provide for compensation in respect of pain and suffering, disfigurement, and loss of amenities and

enjoyment of life in certain cases. The Commission fails to pay sufficient attention to the very real savings which will flow from the reduction in litigation which a no-fault system will facilitate. It is implied that the introduction of a no-fault scheme would not substantially reduce the number of court cases. However, studies have shown that this number is drastically curtailed even under threshold no-fault systems, due to the fact that the court action is banned below the threshold, as are claims for non-economic loss, and that the majority of claims occur in respect of minor damages.

Finally, the Commission's concern with the costs of such a system is hardly in keeping with the statement made earlier in the Report that there are 'more than enough' funds available to compensate all motor vehicle-related damages. Internal contradictions such as this tend to undermine the credibility of the Commission's arguments in this regard.

8.7.4 CONCLUSION

The decision of the Commission in relation to the introduction of no-fault insurance indicates that it is dedicated to the perpetuation of the fault system, and that it is inherently opposed to the introduction of a 'social welfare' type of scheme. However, although it can be argued that no-fault insurance has certain 'social welfare' elements, it can be more realistically regarded as an alternative form of insurance offering first party rather than third party benefits. The Commission's dedication to the status quo is further demonstrated by the fact that the Commission also ruled against the introduction of compulsory balance of third party insurance, against the introduction of a levy on fuel (although a minority report supported such a levy), against the scrapping of the physical contact rule in hit-and-run accidents and against changing the prescription requirements of the Act.

The South African Commissions of Inquiry into motor vehicle

insurance seem to continually evade the question of the introduction of no-fault insurance. The Wessels Commission decided it was not qualified to look into the question of such a scheme, and the Grosskopf Commission decided that the only acceptable no-fault scheme was a national scheme covering all accident victims - which it was apparently not qualified to look into. Perhaps this attitude will herald the appointment in the future of a Commission with wider terms of reference. In any event, the fact that the report of the Grosskopf Commission is not the last word on reform is demonstrated by the announcement that a fuel levy will be introduced here next year (65).

NOTES TO CHAPTER EIGHT

1. Arthur Suzman 'Motor Vehicle Accidents: Proposals for a System of Collective Responsibility Irrespective of Fault' 1955 SALJ 374.

2. 1962 Annual Survey p.503

3. Merton Dagut 'Third Party Insurance: plan for reform' 1965 Financial Mail, p.133.

4. Harry Street op cit., 49

5. Ibid., p.63

6. "MVA: New Approach Needed" 1972 Financial Mail, May 19, p.528

7. RP 52 of 1976 2.8.1 and 6.10

8. Rand Daily Mail, May 29, quoted in "MVA 1980', 1980 SALJ G-15.

9. See Chapter 4.

10. See also Smit No v Standard General Versekeringsmaatskappy Bpk, 1979 (4) SA 624 (O), where the driver of the where vehicle that was on the wrong side of the road had suffered a heart attack just before the collision, and was therefore found to be not at fault.

11. See Regulation 6(a)(iv) of the Act.

12. See Section 23(ii) of the Act.

13. D.H. Botha op cit., p.166

14. RP 78 of 1984.

15. Ibid., p.18 para.3

16. See 4.3.7 'Evidence'

17. 1979 (3) SA 1 (A).

18. Ibid., at 12A

19. 1979 (2) SA 997(c).

20. Ibid., at 998C. The Wessels Commission of Inquiry also noted (6.14.1.9) that: "As (such) claims are lodged as much as two years after an accident, not only is it difficult to trace witnesses but the events have become blurred in people's memories and their statements about these events are inaccurate". "MVA Commission of Inquiry" 1977, SAILJ, G-21.

21. J.M. Burchell 'No fault compensation for motor-accident victims', 1982(11) Businessman's Law, 74 at 75.

22. D.P. Honey "Viewpoint" 1985 De Rebus Procuratoriis 439 at 440.

23. "MVA Commission of Inquiry" op cit., G-21.

24. RP 78 of 1984.

25. Ibid., p.20 para 8.

26. Lionel H. Hodes Suzman, Gordon and Hodes on the Law of Compulsory Motor Vehicle Insurance in South Africa 3rd ed 1982 pp.104-107.

27. RP 52 of 1976 2.8.12 and 6.21.

28. By s 8 of the Compulsory Motor Vehicle Amendment Act 69 of 1978, with effect from 1 September 1978.

29. 1979 (4) SA 961 AD.

30. Mr Harold Palmer spoke of these needs on the 8.00 p.m. news on SABC TV1, Saturday September 1, 1984.

31. Lionel H. Hodes op cit., p.46.

32. Merton Dagut op cit., p.134. The "Third Party Specialists' or claim consultants mentioned here have subsequently been excluded by the 1978 Amendment Act (69 of 1978) which provided that only the claimant himself, or a registered attorney, or a certain category of persons in the employ of, or representing the state or other state bodies may institute claim on behalf of the claimant (Section 23[d]).

33. Report of the Commission of Inquiry into Certain Aspects of Compulsory Motor Vehicle Insurance 1981, RP23/1985 (hereinafter referred to as the Grosskopf Report) terms of reference item (1)(a)(iii).

34. Ibid., Chapter 5.

35. Ibid.,5.5, 5.6

36. Ibid., 5.7

37. Ibid., 5.8

38. Ibid., 5.10

39. See 4.2 'Objectivity'.

40. Grosskopf Report 5.18.

41. Ibid., 5.19

42. Ibid., 5.20

43. Ibid., 5.23

44. C. Verburgh, H. Farquharson, and C.C. Hamilton, 'An estimate of the cost of road traffic accidents in South Africa, 1984' January 1985, Technical Report RT/1 NITRR, Table 21 p.28.

45. Ibid., Table 26 p.36

46. Grosskopf Report 5.24

47. Ibid., See terms of reference, p.1

48. Ibid., 5.24

49. See 4.3.1 'Uncompensated Victims'.

50. Grosskopf Report 5.24

51. 'Road accident toll increases' Daily News Wed. 10th April 1985.

52. Verburgh, Farquharson and Hamilton op cit., p (viii).

53. Grosskopf Report 5.24

54. Ibid., 5.25

55. Workmen's Compensation was first introduced by Act 30 of 1941.

56. Ibid., 5.26

57. Ibid., 5.27

58. Ibid., 5.28

59. Ibid., 5.29

60. Ibid., CHAPTER 7

61. Ibid., 7.3

62. Ibid., 7.4

63. Ibid., 7.7

64. Ibid., 7.9 and 7.10

65. 'Third party disc to be scrapped next year' Sunday Tribune, September 22, 1985.

9. PROPOSALS FOR THE IMPLEMENTATION OF A NO-FAULT SCHEME FOR SOUTH AFRICA

9.1 INTRODUCTION

The foregoing chapters have sought to emphasise the general defects of the fault liability system as applied to motor vehicle insurance, and in particular how various overseas plans have attempted to alleviate these problems by the introduction of a variety of no-fault motor vehicle insurance plans.

However, mere criticism of South Africa's present fault-based motor vehicle insurance scheme accomplishes little, and a viable alternative to the present system must at the same time be presented.

The plan which follows may admittedly appear idealistic, but there is no reason why one should not aim for the best possible solution to what is a social problem of some magnitude. It is hoped that the following proposals will provide some guidelines for the implementation of an effective and efficient no-fault plan for South Africa. Actuarial analysis will be necessary to flesh out the basic skeleton of the compensation system, and the writer has confined herself to setting out only the governing principles of the scheme.

The principles embodied in the plan are the result of the study and evaluation of a number of the statutory no-fault schemes currently in operation, but the largest debt is owed to the New Zealand Accident Compensation Act.

9.2 A NO-FAULT SCHEME FOR SOUTH AFRICA

9.2.1 RECIPIENTS UNDER THE SCHEME

It is envisaged that all motor accident victims be entitled to compensation under this scheme irrespective of the question of

fault, on the basis of their injuries. Compensation should no longer be dependent upon the determination of fault, but on whether a person has suffered bodily injury as a result of his or her involvement in a motor accident.

However, a small group of victims should be penalised by having their compensation restricted, or possibly even abolished. Such exclusions should be limited to those causing intentional harm (either to themselves or to another person), those using the vehicle in the commission of or in the furtherance of a crime, those participating in a motor race, and those driving while unlicensed, intoxicated, or under the influence of drugs. It should be noted that these exceptions all involve activities which may be guarded against, and that they consequently constitute an effective deterrent against such behaviour.

9.2.2 COMPENSATION TO BE PROVIDED UNDER THE SCHEME

This may be divided into economic and non-economic loss.

9.2.2.1 COMPENSATION FOR ECONOMIC LOSS

MEDICAL SCHEMES

The cost of all reasonable medical, surgical, nursing and ambulance services incurred in the treatment of a motor accident injury should be fully compensated under the scheme. A victim should possibly be compelled to pay a small sum, perhaps the first R25 or so, of his medical expenses, in order to discourage the administrative expense of frivolous 'nuisance' claims.

Compensation for damage to artificial limbs or aids, spectacles, contact lenses or dentures used or worn at the time of the accident should also be provided (as under S77 of the New Zealand Act).

WAGE LOSS AND REPLACEMENT SERVICES

Wage loss should be compensated by periodic payments, so as to cause the minimum amount of dislocation to accident victims. A monthly indemnity should be paid in order to alleviate the hardship caused by loss of income. However, no indemnity should be paid for the first two weeks following the accident, in order to discouratge frivolous claims. (Such loss is also usually compensated by an employer).

A victim should be entitled to receive 80 per cent of the wages he or she has lost due to the injuries received in an automobile accident. The aim is to provide adequate, but not full coverage in order to encourage the injured party to return to work as soon as is physically practicable. Compensation should be limited to a maximum amount per month. Ideally, this figure should provide fair compensation for loss of earnings for the majority of the population, and should be adjusted according to inflation at yearly intervals. If a person with a more substantial income desires greater compensation for wage loss, he should be able to purchase optional coverage for this purpose from an insurance company. Such coverage should be undertaken on a purely voluntary basis. To avoid double compensation, payment made pursuant to no-fault coverage should be reduced by the amount received from collateral statutory sources.

Earnings-related compensation should be paid for wage loss. It is submitted that the formula embodied in the New Zealand Act (S59[2])is the best. A person should be compensated for his or her loss of earning capacity, calculated by subtracting the earnings a person receives during the period of accident incapacity from his or her pre-accident earnings. Compensation to the level of 80 per cent of such loss of earning capacity should then be provided. In fixing the earnings of a self-employed person, reference should be made to his or her assessable income in the last financial year as declared and accepted by the Department of Inland Revenue.

The scheme is not to be a social security measure. Persons whose inability to resume employment is related to factors other than the accident injury should not be able to claim under the scheme. Once the injured person is ready for selected or alternative work, having received the full benefit of the rehabilitation and re-training resources provided under the scheme, he should be allowed a reasonable time period (e.g., 10 weeks) to seek employment. If he has not found work, his earnings-related compensation should be reduced. Earnings-related compensation should be reviewed from time to time, according to any improvement or deterioration in the condition of the injured person. Such compensation should continue, if necessary, until the death or retirement of the victim.

Compensation should also cover the expense of paying for those services which prior to the accident were performed free by the victim, but which he or she is subsequently prevented from performing as a result of the injury. Compensation paid should not exceed a set maximum sum per day, and should only be awarded for a limited period of time (e.g., 6 months).

FUNERAL EXPENSES

All reasonable funeral expenses (up to a stated maximum amount) should be paid by the scheme.

DEPENDENCY BENEFITS

A spouse and other dependants should be provided with earnings-related compensation in the event of the death of the victim. Division of such compensation between dependants should be related to the degree of dependency. Payments to children should cease on their attaining majority, or, in the case of students, on their becoming independent. Payments made to a spouse should cease on remarriage or retirement. On remarriage a spouse

should receive a lump sum equal to two years earnings-related benefits. The purpose of awarding such a sum is to encourage people to marry rather than cohabit in order to receive payments.

PROPERTY DAMAGE

Compensation for damage to property should not be provided under the Act. A vehicle owner should be responsible for damage to his own car, but should not be compelled to insure. Optional coverage along the lines of present "comprehensive" Motor Vehicle Insurance should be made available.

9.2.2.2 COMPENSATION FOR NON-ECONOMIC LOSS

PERMANENT DISABILITY

Compensation for non-economic loss (payable by lump sum awards) should only be made where the person does not completely recover from his accident injuries. Such disability should only be assessed once the injured person's medical condition has stabilised, and all practicable steps have been taken towards the victim's rehabilitation and re-training. A schedule should be drawn up specifying set amounts of compensation for permanent loss or impairment of bodily function. (A maximum total amount of compensation should be set). An assessment of the victim's disability should be made on the basis of specialist medical opinion. There should be a threshold of 5 per cent disability before any payment may be made for permanent disability.

LOSS OF AMENITIES AND PAIN AND SUFFERING

A lump sum not exceeding a set maximum amount (such as R20 000) should be awarded only in those cases where the victim has suffered a certain specified serious injury or disfigurement. Payment should be made as soon as the victim's medical condition has stabilised sufficiently for a medical assessment of such loss. Alternatively, pain and suffering awards should be

excluded from the scheme, and instead a person should be allowed to purchase optional coverage suited to his or her individual requirements from private insurance companies. Such cover should again be purchased on a purely voluntary basis.

9.2.3 THE METHOD OF COLLECTING COMPENSATION FUNDS

The scheme should be financed by a levy on petrol. This would have the effect of internalising costs, as such costs would be distributed among all drivers according to the amount of driving they do. Contributions to the scheme could also be collected easily and cheaply (by oil companies) if this method were instituted. Drivers of vehicles not driven by petrol (i.e., vehicles driven by diesel fuel or electricity) should pay a premium commensurate with the fuel levy. Such premiums should be collected by the Post Office.

The scheme should operate on a "pay as you go" rather than a fully-funded basis, as this will allow the scheme to operate more efficiently and economically (1). However, it is acknowledged that the full implementation of such a scheme may take a few years.

9.2.4 THE ADMINISTRATION OF THE SCHEME

The scheme should be administered by a central body, run on a non-profit basis. Such a scheme would have the advantage of avoiding the costs inherent in private enterprise, such as profit and advertising. The use of such a system would also make it easier to achieve economies of scale. There would also be no need to set up a whole new system, as the present MVA Fund could be modified in order to administer the new system. The Fund should be "insulated, to some degree, to insure that there is no partisan, government interference of any kind" (2).

In order to be compensated, a claimant should be required to lodge a claim form (which should be freely available from the

Post Office) with the MVA Fund. This form should be as simply-worded and straightforward as possible, in order that a claimant may complete it without professional assistance. The claim form should set out the necessary particulars of the motor accident and the resultant injury suffered by the claimant. Supporting medical certificates and receipts should be attached to the form, and where earnings-related compensation is claimed, an earnings certificate setting out the monthly wage received by the claimant should also be included. A claimant should also be required to report the accident to the police before he claims and quote the police reference on the form (in order to deter people from making fraudulent claims). In order to avoid delays, a prompt payment clause should form a part of the scheme. Where compensation has not been paid within 30 days of the receipt of the proof of injuries and of the amount of expenses incurred, a certain level of interest should be charged (1).

9.2.5 REHABILITATION OF VICTIMS

The rehabilitation of victims should be a primary aim of the scheme. The promotion of rehabilitation procedures is advantageous both in relation to injured individuals and to the economic savings realised by enabling motor victims to become self-supporting again.

The scheme should fully finance the cost of services and supplies required for the rehabilitation of the victim, such as: wheel chairs, prosthetic devices, refitting automobiles for operation by paraplegics, guide dogs, the construction of wheelchair ramps in houses, lessons in braille and job re-training.

The scheme should (through the central body) promote a national rehabilitation policy and sponsor the opening of new rehabilitation centres.

As in New Zealand, the central administrative body should be required to "take all practicable steps to promote a well co-

ordinated and vigorous programme for the medical and vocational rehabilitation of injured persons" (3).

The rehabilitation programmes promoted should have the objectives set out in S36(2) of the New Zealand Accident Compensation Act, namely:

(a) The restoration of the injured persons as speedily as possible to the fullest physical, mental and social fitness of which they are capable, having regard to their incapacity;

(b) Their restoration to the fullest vocational and economic usefulness of which they are capable, where applicable; and

(c) Their reinstatement or placement in employment where applicable.

9.2.6 ACCIDENT PREVENTION AND DRIVER EDUCATION

High priority should be given under the scheme to accident prevention measures. The need to direct attention towards accident prevention is especially pressing in South Africa, a country noted for having one of the highest motor vehicle accident rates in the world (4).

Full consideration should be given by the scheme to promoting better design and maintenance of roads so as to facilitate as far as possible the elimination of roadside hazards, as it has been demonstrated that "road improvements can save more than 20 per cent of accident costs" (5).

Attention should also be directed towards the problem of alcohol abuse and driving. One estimate puts the value figure of alcohol-abuse related motor accidents in South Africa during 1983 at R530 million (6),

The necessity for a clamp-down on drunken drivers has been realised in Britain, where there is currently talk of fining drivers with any alcohol in their blood up to £2000 (7). Perhaps

a similar response should be considered here.

A full programme of driver education should be conducted through the mass media and a driver education course should be a prerequisite for the issuance of a licence. Driver education should be seen as fulfilling an important function in relation to the saving of lives and the reduction of injuries on our roads. This is especially so in the light of evidence in Canada and the United States that young people who are trained in comprehensive courses of instruction in theory and in practice have significantly fewer accidents and traffic violations (8).

9.3 ANTICIPATED ARGUMENTS AGAINST THE PROPOSED SCHEME

In recommending a system of no-fault compensation for South Africa, it may be relevant to examine some of the criticisms levelled at such a scheme. Many arguments against the no-fault system have already been examined in Chapter 4. However, it may be of value to look at certain criticisms made especially in relation to the introduction of no-fault in South Africa.

9.3.1 THE CRITICISM OF "SOCIALISM"

One of the charges most often levelled at proposals for the introduction of no-fault motor vehicle insurance is that they represent a move away from the free enterprise capitalistic system presently operating in South Africa towards a "socialist" approach to the problem of compensation. Such charges are not only highly emotive in light of the present South African political landscape, but also do an injury to the actual dictionary definition of the term: "socialist". In addition, claims that South Africa is "capitalistic" obviously do not take into account what might be described as the "socialistic" nature of the South African economy in so far as the extensive nationalisation of industry (SAA, ISCOR, SAR, to name a few) is concerned, nor do they take into account the fact that there is no such thing as a purely "capitalistic" system in operation

anywhere in the world. Even the so-called bastion of capitalism, the United States, can be accused of "socialism" by opponents of no-fault insurance, because of its numerous no-fault plans. In any event, many forms of "first party no fault" insurance, such as fire and theft insurance, are in fact operative in South Africa already, and these do not appear to have plunged our society into "socialism".

When the implementation of a no-fault scheme similar to that which presently operates in New Zealand is suggested, much is made of the fact that South Africa is not a social welfare state. However, New Zealand had a relatively low level of general social security payments before the Accident Compensation Act was introduced in 1972 (9). On the other hand:

> "New Zealand has a far more developed social security system than we do, which lowers the cost of their scheme, since the cost of hospital treatment, for example, is borne by the state. The egalitarian nature of New Zealand society is another important difference, but it should not be over-emphasised. The uneven distribution of wealth in South Africa would not necessarily result in high earners subsidising low earners under a comprehensive scheme, since compensation for lost earning capacity would be paid on an earnings-related rather than a flat-rate basis, as is the case in New Zealand" (10).

9.3.2 CRITICISM OF THE TYPE OF COMPENSATION TO BE PROVIDED UNDER THE PROPOSED SCHEME.

COMPENSATION FOR NON-ECONOMIC LOSS

PERMANENT DISABILITY.

The scheme's utilisation of a fixed schedule of damages for specified permanent disabilities may be criticised on the grounds that the same injury will affect different victims in different

ways. For example, a violinist with a broken or crippled hand suffers infinitely more than a bank manager with the same injury. This is readily conceded. However, the scheme is intended to offer an adequate level of benefits to all people, and accordingly persons with special skills, such as the violinist, should have the responsibility of taking out personal insurance to guard themselves against such loss. This would arguably be the most sensible solution for all concerned, as the violinist may just as easily injure his hand under other circumstances.

LOSS OF AMENITIES AND PAIN AND SUFFERING

The stipulation under this head of damages of a set maximum amount of compensation at a lower level than amounts which may be obtained under the present system may also give rise to criticism, especially since such general damages tend to form the bulk of compensation awarded under the present system. The case of Marine and Trade Insurance Company vs Katz No (11) is referred to in the Memorandum on behalf of the Association of Law Societies of South Africa:

> "In that case, Mrs Ingrid Simmons, who was then about 32 years old, was injured in a motor accident, as a result of which she was almost completely quadraplegic and would have to spend the rest of her life as a bedridden patient in a nursing home for chronically ill patients; during that time she would require constant treatment, attention, medication and careful nursing. The Appellate Division confirmed an award of R90,000-00 for general damages ... It would have to be a society without humanity which would deprive Mrs. Simmons of at least the comforts which her R90,000-00 would bring her. The sense of equity of a society which would do so in order to compensate the person who injured her would be dubious" (12).

This criticism has been concisely dealt with in an address delivered by Mr. J L Fahy, the Managing Director of the New

Zealand Accident Compensation Corporation:

> "Sometimes the comparison is made between a quadriplegic who, at common law can recover an enormous lump sum and a quadriplegic in New Zealand whose main entitlements are rehabilitation assistance and permanent periodic compensation related to loss of earning capacity.
>
> There are however three factors:
>
> First, at common law it is useless for a seriously injured person to think of a large lump-sum award unless his injury can be proved to have been caused by someone else's fault, so a significant number of seriously injured people are excluded altogether .
>
> Second, periodic compensation and rehabilitation are designed to meet the injured person's continuing needs, both present and future, while some of the very large lump sums awarded at common law seem to be more appropriate to the foundation of a dynasty.
>
> Third, the common law lump-sum award is a "once-off" award; it cannot be revised upwards if the injured person's circumstances change for the worse" (13).

In addition, critics of the relatively small amount of damages awarded under no-fault schemes often overlook the fact that although a smaller amount of compensation for non-economic loss is available under such a scheme, a victim may ultimately receive more overall compensation under the no-fault system, as he will be compensated on an inflation-proofed periodic basis for future wage loss, and such compensation may last until he is 65, or possibly even until his death.

As far as the "dubious equity" of the no-fault system is concerned, the charge is made that:

" ... such a system would necessarily penalise the Claimant who can at present establish fault and recover full compensation, in order to provide compensation for the person who cannot, and who will in many instances himself have been the cause of his own damage. In other words, the paraplegic will subside (sic) the drunken driver who ran him down. The equity of such a system is difficult to grasp" (14).

It is significant that the Association resorts to the emotive concept of a drunken driver being compensated at the expense of his unfortunate paraplegic victim, which is so frequently cited by critics of the no-fault system. However, this particular concept would appear to have no foundation in any no-fault scheme presently in operation, as the drunken driver falls into that category of persons excluded from compensation under such schemes. In any event, it would be equally simple to make an emotional appeal on the basis of inequities resulting from the application of the fault criterion.

Inherent in the argument of dubious equity is the tendency to label all drivers as either "innocent" and therefore deserving of compensation, or "guilty" and therefore undeserving of compensation. However, this loses sight of the fact that a motor accident is in the vast majority of cases the result of "negligence", and not the result of a deliberate action on the part of the driver or drivers concerned.

9.3.3 THE ISSUE OF PERSONAL INSURANCE

The suggestion that motorists be allowed to take out optional extra coverage for wage loss, and optional coverage for non-economic loss has met with the criticism that:

"We have difficulty in understanding the logic of an argument that the present insurance scheme should be replaced by a scheme which, if voluntary would oblige every

prudent motorist to take out additional insurance not only for himself but for all members of his family; if such additional insurance were to be compulsory .... this would amount simply to two different insurance schemes, the total cost of which to the motorist would be vastly increased, and which would provide the person who is at present entitled to compensation under the MVA Act with no greater cover than he presently enjoys" (15).

As far as wage loss is concerned, it must be pointed out that the proposed scheme aims to provide adequate but not total compensation for wage losses, with the maximum amount available large enough to adequately compensate the majority of the population. It is deemed more equitable to adequately compensate substantially all victims, rather than to totally compensate a handful of victims. Although the above passage would seem to imply that a victim is entitled to total cover under the present Act, it should be noted that the Memorandum acknowledges that "approximately 25 per cent of all injured persons have received compensation prior to the amendment of April, 1980" (16) and goes on to make calculations as to the cost of a no-fault system on the assumption that

" ... the present premium structure has been tailored to provide full common law compensation for 25 per cent of all persons injured in road accidents" (17).

If one takes this figure to be the norm, then it would appear that at present no cover at all is provided for 75 per cent of motor accident victims.

In the light of the escalating number of road deaths and injuries in a country noted for having one of the highest motor accident rates in the world, it is submitted that prudent people under the present system will be forced to take out optional insurance cover to cover <u>all</u> their damages in the event of a motor accident, as the odds are against their receiving compensation

under the present system.

As far as cover for non-economic loss is concerned, it is submitted that it may be wiser to incorporate compensation for these damages into the scheme, as it is doubtful whether claimants will be sufficiently concerned about this type of loss to take out such insurance (18). This issue could possibly be put to the public by way of a referendum, the results of which may surprise critics of the no-fault system:

> "Surveys in the USA indicate that the general public prefers insurance which offers the certainty of payment of actual loss suffered as opposed to the uncertainty of recovery of actual loss suffered plus pain and suffering, dependent on whether or not fault can be proved" (19).

9.3.4 CRITICISM OF THE METHOD OF COLLECTING COMPENSATION FUNDS

The imposition of the levy on fuel in place of compulsory insurance of vehicles has been rejected by the Grosskopf Commission (20). Although the Commission acknowledged the advantages such a system would have (such as increased cost-efficiency), it felt that a system financed by a levy on fuel would have to overcome certain basic problems:

> "(a) Fuel which is used for internal combustion engines is also used for other purposes which have no connection with traffic on public roads. This is especially so in the case of diesel which is used on a large scale for the running of stationary engines, tractors, etc. If fuel were to be sometimes taxed and sometimes not there would be too many opportunities for evasion and mistakes in administration.
>
> (b) If a fund were to be established through a levy on fuel there would be no third party insurer to handle claims as under the present system. A new system for handling

claims will thus have to be established.
Added to these two basic problems there is another less important one, namely -

(c) many vehicles which are at present covered by the Act, such as trailers and vehicles driven by electricity do not use liquid fuel and would thus not make a direct contribution to the fund". (21)

In order to surmount these problems the MVA fund submitted a proposal containing the following suggestions:

"(a) That a fund be created and financed by -
(i) a levy on petrol, and
(ii) the payment of a premium for vehicles not driven by petrol.

(b) That the administration of the proposed scheme be handled as follows:
(i) The levy to be recovered by oil companies;
(ii) the premium for vehicles not driven by petrol to be paid at a Post Office;
(iii) claims to be administered by a State Corporation created for this purpose" (22).

The Commission then attempted to compare this proposed system with the present system in relation to costs, service rendered to the public, and the general effectiveness of the scheme.

In the course of examining the question of costs, the Commission discovered that the oil companies were in principle prepared to collect the levy free of charge or at a small charge provided it could be included in levies already collected by them. The Department of Posts and Telecommunications had not, at that stage, agreed to collect premiums or indicated how much it would charge for this service, but the Commission accepted that the total costs of collection would probably be lower than at

present, as 80 per cent of vehicles are driven by petrol at the moment. However, it was felt that the number of diesel-driven vehicles might well rise drastically in the future, resulting in the necessity of insuring more and more vehicles individually.

The Commission felt that the cost of administering the claims was difficult to predict, and was not persuaded that there would be any substantial saving achieved by the proposed system. It was also not convinced that the proposed scheme would be an improvement in relation to service rendered to the public, or in relation to general effectiveness. The Commission expressed the opinion that the proposed State corporation would not be cheaper or more effective in the long run than the present system. In this connection it argued that:

> " ... it must be borne in mind that the members of the Consortium already have an existing widely spread network of branch offices in 43 centres throughout the country to satisfy the needs of the public and that a State corporation would suffer a loss in effectiveness without a similar infrastructure" (23).

It was generally felt that there was a lack of information regarding the imposition of a fuel levy, and therefore no concrete evidence that it would prove to be a better system. Consequently the majority of the commission recommended that a change from the present system of compulsory insurance of vehicles to a levy on fuel should not be made.

However, a minority report (24) presented by J. Keyser supported a change to a levy on fuel, and gave extensive reasons for its introduction. These arguments given in support of a fuel levy effectively counter many of the reservations held by the majority of the Commission and merit closer examination.

Mr. Keyser commences his report by stating:

"I feel that, in their approach to the problem, some of the other members of the Commission placed too high a premium on the importance and effectiveness of the free market system, which, as far as third party insurance is concerned, is at present represented by the service insurers and their agents render on an agency basis, as against the interests of the owners of about 4 million motor vehicles who are compelled to take out third party insurance annually in terms of the amended Compulsory Motor Vehicle Insurance Act, 1972 (Act 56 of 1972)" (25).

Keyser then commences to review the system of third party insurance in relation to the question of State interference in a free market system. He relates how under the provisions of the 1942 Motor Vehicle Insurance Act insurance companies were allowed to carry on third party insurance for their own gain or loss, with the State's function being merely to see to it that all motor vehicle owners satisfied the requirements laid down in the Act, and to determine tariffs for the insurance of motor vehicles from time to time at the request of insurance companies.

The prescribed insurance tariffs increased gradually from R3,00 in 1946/47 to R17,00 in 1961/62. In 1964 the insurance companies requested the Minister of Transport to increase the applicable tariffs by 20 per cent. When this request was refused some companies practically refused to issue third party insurance, and a chaotic situation developed. Thus the State intervened and created the Motor Vehicle Assurance Fund (MVA Fund) which acted as a 100 per cent reinsurer of all the risks of insurance companies. Keyser points out that it was only this governmental intervention that has kept the tariff of premiums as low as it is:

"The refusal of the Minister of Transport to agree to a 20% increase in the premium tariffs at that time and the resultant further intervention of the State in the free market system had the result that motorists were saved at

least R150 million in premiums up to and including the 1983/84 insurance year. The amount of R150 million does not include any premium increases resulting from inflation, which insurers would certainly have insisted upon if they had still been carrying on the relevant insurance for their own gain" (26).

Keyser proceeds to demonstrate how between 1 May 1965 and 30 April 1983, 62,5 per cent of funds were used in compensating claimants and paying their medical expenses, 37,5 per cent of funds being used to pay the legal costs of insurers, the legal costs of claimants, the assessors' fees, sundry expenses, commission paid to insurers and their agents for collection of premiums and handling of claims, and the operating costs of the MVA fund (27). Keyser thus submits that 37,5 per cent of the funds are not used for the purpose for which they were collected and that consequently more cost-effective systems must be investigated.

Keyser also comments that:

> "It is not good financial practice for the State to impose a financial obligation on its citizens and then to leave it to the private sector to spend the funds collected without the sector's running any danger of suffering a loss as the result of inefficiency and poor judgement" (28).

In relation to the problem of vehicles not driven by petrol, Keyser's solution is to abolish insurance for the approximately 340 208 vehicles which are not self-driven. These vehicles amount to approximately 44 per cent of the 20 per cent of vehicles not driven by petrol. He argues that:

> "The driver of a haulage unit or towing vehicle must necessarily drive that vehicle negligently to cause an accident with the towed vehicle. Even where a trailer, for example, is left on a road or highway in a negligent manner

and an accident results from this the driver of the haulage unit who left the trailer there was being negligent and he will be liable for the damage caused through his negligence...

If the owners of towing vehicles were released from the obligation of taking out third party insurance there would be only about 431 000 vehicles not driven by petrol that would have to be insured annually, and this would certainly not be so formidable a task for the Department of Posts and Telecommunications or any other body" (29).

In relation to the problem of diesel-driven vehicles, Keyser states:

"Because of the imbalance between petrol and diesel in the manufacturing process it must be accepted that the Government would discourage rather than encourage the manufacture of diesel-driven vehicles and the number of vehicles of this type will, in my opinion, not increase so much that their insurance will create any problems" (29).

Finally, the supposed advantage of the Consortium's network of branch offices is challenged:

"Concerning the handling of claims, the insurers at present have offices in some 43 centres in the country where claims can be handed in. In most cases, however, the claims are actually dealt with at the head offices of the Insurers on a centralised basis and negotiations between a claimant and an insurer can necessarily only take place in that centre where the claims are being handled. In the case of the MVA fund, all claims are at present filed at the MVA Fund office in Pretoria and to help claimants the date on which the claim was posted is regarded as the date of service of such claim on the MVA Fund. Officials of the MVA Fund also visit the larger centres in the country regularly to conduct negotiations for settlement with claimants and their legal

representatives. There is no reason why the present procedure could not be continued under the proposed system" (30).

Keyser ends his minority report by recommending that

"(a) a levy be imposed on petrol

(b) an insurance premium be imposed on all vehicles not driven by petrol

(c) all vehicles not self-propelled be exempted from compulsory motor vehicle insurance, and

(d) the collection of funds and the handling of claims be assigned to the Motor Vehicle Assurance Fund" (31).

Although these arguments and recommendations are made with regard to the imposition of a petrol levy within a third party system, they are equally apposite to the imposition of such a system within a first-party no-fault framework. In any event, it would appear that a levy on fuel will be imposed in South Africa as from April 1986, thus providing an opportunity to observe the functioning of this alternative form of third party insurance at first hand.

9.3.5 THE ISSUE OF COST

It is often alleged that the cost of instituting a no-fault system will be very high, making it a completely impractical type of reform. There seems to be an overwhelming concern with keeping the price of premiums (or levies) low. However, costs "should not be seen as an insurmountable obstacle in view of the fact that the cost to the community of retaining the fault system is astronomically high" (32). Even if a no-fault system would cost more, the benefits to society as a whole would far outweigh the extra expense. As an attorney replying to the questionnaire pointed out, the present premium amounts to about one-half of the cost of filling a petrol tank. He further suggested that premiums should be increased to R100-R150. Those who argue that such a move would prejudice poorer people presuppose that people

who can afford to purchase a motor vehicle - an expensive item - cannot afford to pay for motor vehicle insurance, which is a relatively small item. In any event, the high-benefit medical and rehabilitation coverage offered by the proposed no-fault scheme could mean the difference between full rehabilitation or a life of disability for a poor person.

A change to a system of no-fault insurance does, however, not necessarily mean an increase in costs. In examining the New Zealand scheme, on which the proposed plan is to a large extent based, one discovers that:

> "the overall cost of the new system is much the same as the previous one, despite the generosity of benefits and the vastly enhanced entitlement to compensation" (33).

This factor is due not only to the considerable saving in administrative costs brought about by the utilisation of an efficient state-backed insurance scheme but also to the use of the "pay-as-you-go" method of financing the scheme.

> "Private insurers operate on the principle of full funding: in any one year the revenues raised must on investment be sufficient to meet the current and all future costs of accidents occurring in that year. Thus considerable capital reserves must be built up to meet the run-off costs of present claims and they must, of course, cater for future inflation. A government backed scheme, on the other hand, can operate on a "pay-as-you-go" basis, which means that the revenues raised in any one year need only be sufficient to meet the current costs of benefits provided in that year, including, of course, benefits currently payable in respect of past accidents. Consequently, there is no need to establish huge reserves, or to predict the future, if inflation, for example, drives up the cost of the system, the government (unlike private insurers) can increase levies or reduce the benefits payable under the system. This

flexibility reduces the overall costs of the system enormously" (34).

NOTES TO CHAPTER NINE

1. See Chapter 7, note 39 for an explanation and evaluation of the "pay-as-you-go" system.

2. 1973 Nova Scotia Report p.164.

3. Fahy, op cit., p.96.

4. F.C.L. Loots "Introduction: accident rates and causes in South Africa" quoted in "The economics of traffic accident evaluation and prevention: Proceedings of the seminar held at the Council for Scientific and Industrial Research, Pretoria, on 10 August 1984" Seminar S.377 NITRR p.2.

5. Romano F. Del Mistro "How effective are physical improvements in reducing urban road accidents" ibid., p.7.

6. F.C.L. Loots, ibid., p.5.

7. Reported on The News SABC TV 1, 7 p.m. Friday, 3 January 1986.

8. 1973 Nova Scotia Report, p.273.

9. Jon Holyoak "Accident Compensation in New Zealand Today" in Accident Compensation After Pearson p.181.

10. D.B. Hutchinson op cit., p.42.

11. 1979 (4) SA 961 (AD).

12. "Commission of Enquiry into No-fault Insurance in respect of MVA Claims and other aspects under the Compulsory Motor Vehicle Insurance Act No. 56 of 1972, Memorandum on behalf of The Association of Law Societies of South Africa p.23-25 (Hereinafter referred to as the Law Societies Memorandum.

13. The New Zealand Accident Compensation System - a brief description. From an address by Mr. J.L. Fahy, Managing Director, Accident Compensation Corporation, to the 1984 Conference on Workers' Compensation, Adelaide, South Australia p.4-5.

14. Law Societies Memorandum p.22.

15. Ibid., p.27.

16. Ibid., p.19.

17. Ibid., p.19.

18. Barry W. McCormick and Lynn Franklin Taylor II, op cit., p.169.

19. D.H. Botha, op cit., p.166.

20. Grosskopf Report, Chapter 9.

21. Ibid., 9.4.

22. Ibid., 9.5.1.

23. Ibid., 9.5.6.2.

24. Ibid., Annexure A, p.25.

25. Ibid., Annexure A, 3.1.

26. Ibid., Annexure A, 3.2.5.

27. Ibid., Annexure A, 3.2.8.

28. Ibid., Annexure A, 3.3.1.

29. Ibid., Annexure A, 3.6.1.

30. Ibid., Annexure A, 3.6.3.

31. Ibid., Annexure A, 3.8.

32. R.P. Schaffer, op cit., p.210.

33. D.B. Hutchinson, op cit., p.40.

34. Ibid.

10. CONCLUSION

In the foregoing chapters the various forms of motor vehicle insurance available today have been reviewed and the philosophy behind the present fault system has been briefly examined. A study has been made of the arguments both for and against the present fault system and the implementation of no-fault motor vehicle insurance in United States and New Zealand has been examined. Finally, attention has been directed towards the motor vehicle insurance system in South Africa and the possibility of the reform of this system.

In closing, a brief reiteration of some of the reasons for the necessity of reform may be helpful.

As noted earlier, there has, in recent years, been a shift in the purpose of motor vehicle insurance from the indemnification of drivers to the protection of victims. Compulsory motor vehicle insurance plans are enacted for the benefit of those injured in motor vehicle accidents, in order to ensure that there is a solvent defendant in every case. At the same time, Western society has demonstrated an increasing concern for the victim, whether or not he is negligent, and the idea that society has a moral duty to protect the public from the ravages of automobile transportation has gained widespread acceptance.

There has been a recognition even among supporters of the fault system, that the deterrent value of basing liability on fault has been more or less eradicated by the provision of compulsory insurance for all motor vehicle owners, and thus one of the main tenets of using the fault system has crumbled. No-fault plans have been enacted in various overseas systems without any increase in irresponsible driving, thus confirming the suspicion that driver behaviour is not influenced by the amount of cover provided.

With the great increase in the number of vehicles on the road,

accidents have become more frequent and on today's roads a split-second's loss of attention may result in a serious accident. Even good drivers make mistakes and in many cases it is simply a matter of chance whether or not an accident will occur.

The fault system has been seen to make an arbitrary selection as to who shall be compensated under the system. Factors such as the absence of witnesses, the mechanical failure of the insured vehicle and an inability to establish fault on anyone's part, as well as factors such as the negligence of the victim have been allowed to determine the exclusion of a large percentage of motor accident victims from compensation. As a result, thousands of injured victims and dependants of those victims who have been killed on the road are left without compensation, and often without any means of support.

In addition, the delays and administrative expense inherent in the present fault-adversary system as well as the over-compensation of minor injuries and the under-compensation of serious injuries resulting from this approach, mean that even where the victim can prove fault, the process of compensation is still not entirely satisfactory.

In short, the fault system in its application to motor vehicle accident compensation is inefficient and dilatory, and is therefore not a suitable system in relation to this particular field. What is needed is a system that will offer adequate compensation to all motor accident victims. It must be economical, well-administered and efficient. It should offer prompt payments in order to alleviate, as far as possible, the economic and social hardships resulting from a motor accident, and the largest part of the insurance premium or levy collected should be allocated to the compensation of victims.

It is contended here after careful consideration that a no-fault system would fulfil these requirements. The advantages of such a system have been highlighted earlier, and an investigation into

overseas no-fault systems presently in operation has demonstrated that in practice these systems enjoy a great deal of success.

Prompt compensation of all victims on the basis of the injuries they have sustained as a result of the motor accident, regardless of the question of fault, would result in a more equitable system. The resulting reduction in administrative costs and legal fees would also provide more funds for the compensation of victims.

In South Africa calls for reform have led to the appointment of a Commission of Inquiry to investigate the question of a change to a system of no-fault motor vehicle insurance. Academics have voiced their concern as to the deficiencies of the fault system and although the legal profession would appear to be divided over the issue of no-fault reform, there is no doubt that many have encountered injustices in the present system.

The time is ripe for South Africa to take a bold and visionary step into the forefront of Western insurance thinking. Although the introduction of a no-fault scheme for motor accident injuries would involve breaking new ground for South Africa, there is no excuse for clinging to the present system simply to avoid a leap into the unknown. This is especially the case in the light of the proven success of 'no fault' in overseas systems. As Lord Denning has said in another context:

> "If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on : and that will be bad for both" (1).

NOTE TO CHAPTER 10

1. Packer v Packer (1954) P15 (A) at 22. quoted by J.M. Burchell op cit., p.110.

APPENDIX A

In May 1983 a questionnaire on motor vehicle insurance was sent out to all attorneys in the cities of Durban, Pietermaritzburg, Bloemfontein, Cape Town, East London, Johannesburg and Pretoria. It was also sent to the Law Departments of all the South African Universities, and to all the insurance companies in the consortium at the time. In all, 150 completed questionnaires were received from 144 attorneys, 4 academics and 2 insurance companies. The results of this questionnaire therefore express, to a large extent, the opinions of attorneys. While it is acknowledged that the response was small it may still be useful to record the findings of this survey.

SECTION A

QUESTION ONE

Consider the Motor Vehicle Insurance Act, 1972, and its stipulations.

Is change in the Act:

(a)	Urgently needed	-	40 per cent
(b)	Needed at some stage	-	39,3 per cent
(c)	Not necessary	-	20,7 per cent

QUESTION TWO

If the answer to the above is (a) or (b), what changes do you envisage?

Change to a no-fault system	-	53,2 per cent
Procedural changes	-	51,4 per cent
Changes in the provisions of cover under the Act	-	35,1 per cent

QUESTION THREE

Would you rather see a national scheme run by:

(a)	A State agency	-	27,5 per cent
(b)	A private agency/ agencies	-	64,1 per cent

In addition, 0,8 per cent felt an independent body should be utilised, 3,1 per cent felt neither a state agency nor a private agency should be utilised, 0,8 per cent felt that both should be employed, and 3,8 per cent responded that the situation should 'remain as is'.

QUESTION FOUR

Should insurance companies pay on a monthly basis, as doctor's bills, hospital bills, lost wages etc., occur, or wait until the injured person and the insurance company agree on a lump sum after a trial?

(a)	monthly sum best	-	51,4 per cent
(b)	lump sum best	-	41,3 per cent

In addition, 5,1 per cent felt both options should apply, 0,7 per cent were uncertain, and 1,4 per cent felt that neither option should be used.

QUESTION FIVE

(i). Are you in favour of a partial abolition of the fault system using the concept of a "threshold' to eliminate delictual liability in less serious accidents?

(a)	Yes	-	42 per cent
(b)	Uncertain	-	13,3 per cent

(c) No - 44,7 per cent

(ii) If yes, at what level would you place such a threshold?

Under R5000	-	43,2 per cent
R5000 - R10 000	-	28,2 per cent
R10 000+	-	7,0 per cent

8,5 per cent were uncertain, and 14,1 per cent felt there should be no limit.

QUESTION SIX

What effect, if any, do you think a change to no-fault insurance would have on the behaviour of drivers regarding road safety and deterrence?

(a) adverse effect	-	25,5 per cent
(b) no effect	-	69,1 per cent
(c) beneficial effect	-	5,4 per cent

QUESTION SEVEN

What, in your experience, is the average/normal time gap between the injury and the compensation of the victim?

4-12 months	-	7.6 per cent
12-24 months	-	52,3 per cent
24-36 months	-	32,5 per cent
36-48 months	-	6,1 per cent
Over 48 months	-	0,7 per cent

QUESTION EIGHT

(i) Have you encountered cases where innocent victims have been denied compensation due to the absence of fault?

(a) Yes - 69,4 per cent
(b) No - 30,6 per cent

(ii) If yes, give an example of the circumstances. Numerous varied examples were given, the most common of which were: there were no witnesses to the accident, (ii) where mechanical failure (e.g. brake failure) occurred, (iii) where there was no fault on the part of the driver (e.g., where the motor vehicle which caused the accident suffered a burst tyre, or where the driver of the vehicle which caused the accident suffered a heart attack), (iv) where the plaintiff suffered from amnesia as a result of the accident, (v) where evasive action was taken to avoid a collision, and thus no 'contact' between the vehicles could be proved in a hit-and-run case, (vi) where the claimant was a dependant of the negligent driver and was travelling with him in the insured vehicle.

SECTION B

QUESTION ONE

Unlimited cover for all passengers

Necessary	-	86,3 per cent
Uncertain	-	6,5 per cent
Unnecessary	-	7,2 per cent

QUESTION TWO

Advance payment plans for victim's out-of-pocket expenses if the insured driver is clearly liable.

Necessary	-	75,7 per cent
Uncertain	-	11,0 per cent
Unnecessary	-	13,2 per cent

QUESTION THREE

Claims paid by claimant's own insurance company

Necessary	-	32,8 per cent
Uncertain	-	32,8 per cent
Unnecessary	-	34,4 per cent

QUESTION FOUR

Lengthening of 2-year prescriptive period

Necessary	-	56,5 per cent
Uncertain	-	8,0 per cent
Unnecessary	-	35,5 per cent

QUESTION FIVE

Liability insurance sold to cover individual people instead of car owners

Necessary	-	21,5 per cent
Uncertain	-	22,2 per cent
Unnecessary	-	56,3 per cent

SECTION C

QUESTION ONE

Accidents result from the failure of drivers to use due care

Agree	-	83,9 per cent
Uncertain	-	9,5 per cent
Disagree	-	6,6 per cent

QUESTION TWO

It is just and fair to assign both moral and legal responsibility in each accident

Agree	-	49,3 per cent
Uncertain	-	14,7 per cent
Disagree	-	36 per cent

QUESTION THREE

The concept of cause has little operational significance in the study of accidents, and traffic accidents can be most meaningfully viewed as failures of the system rather than failures of any single component

Agree	-	15,2 per cent
Uncertain	-	22,5 per cent
Disagree	-	62,3 per cent

QUESTION FOUR

The present system is a success as regards its function of compensating for personal injuries suffered in automobile accidents

Agree	-	34,3 per cent
Uncertain	-	18,2 per cent
Disagree	-	47,4 per cent

QUESTION FIVE

The gap between loss and compensation is primarily due to the role of fault in the system

Agree	-	45,2 per cent
Uncertain	-	14,8 per cent

Disagree	-	40,0 per cent

QUESTION SIX

The present system exerts a strong temptation to dishonesty, in that pressure is felt to improve one's case or defence, even by outright invention or perjury

Agree	-	34,8 per cent
Uncertain	-	20,0 per cent
Disagree	-	45,2 per cent

QUESTION SEVEN

If first party coverage was introduced, then such insurance should be extended to cover property damage

Agree	-	43,7 per cent
Uncertain	-	19,3 per cent
Disagree	-	37,0 per cent

QUESTION EIGHT

If change to a system of 'no-fault' insurance would have a significant beneficial effect on payment time periods and extraneous costs.

Agree	-	60,6 per cent
Uncertain	-	20,5 per cent
Disagree	-	18,9 per cent

QUESTION NINE

The introduction of a no-fault motor vehicle insurance system would be a socially more desirable scheme

Agree	-	62,6 per cent

Uncertain	-	12,1 per cent
Disagree	-	25,2 per cent

QUESTION TEN

Following a worldwide trend towards no-fault insurance, it will only be a matter of time before such legislation is introduced in South Africa

Agree	-	41 per cent
Uncertain	-	41 per cent
Disagree	-	18 per cent

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