A REPORT BY JUSTICE

No Fault on the Roads

CHAIRMAN OF COMMITTEE

PAUL SIEGHART

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PREFACE

THIS Report was first prepared as a Memorandum of Evidence to the Royal Commission on Civil Liability and Compensation for Personal Injuries, to whom it was submitted in July 1973. The Committee of JUSTICE which prepared it consisted of the following members:

Paul Sieghart (chairman),
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H. Travers-Smith and R. C. H. Briggs (secretary).
Philip Jeffrey, Q.C., of the Australian Bar was a corresponding member.

This Report has been endorsed and approved for publication by the Council of JUSTICE. It is, of course, the work of the entire Committee, but the Committee wishes to acknowledge its special indebtedness to Donald Harris, of the Centre for Socio-Legal Studies, Oxford, for his careful drafts of Chapters 2 and 3, to Tom Harper for the final editing, and to Ronald Briggs, the legal secretary of JUSTICE, without whose hard work and efficiency the surviving deficiencies of this Report would be far greater.

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[NOTE: In the interests of economy all footnotes, whether textual extensions or references, have been grouped together at the end of Chapters.]

COMPENSATION FOR VICTIMS OF ROAD TRAFFIC ACCIDENTS

INTRODUCTION

1. Every year, in Great Britain, over 7,000 men, women and children lose their lives on the roads, and a further 350,000 are injured, over a quarter of them so seriously that they have to be detained in hospital. While some of these victims obtain compensation for their injuries through the courts, others do not. To get compensation, the victim of a road accident has to show that his injuries were " caused " by the " fault " of someone else. If he cannot do this (and in paragraph 23 below we give some examples of the kinds of case in which it may be difficult or impossible) he will get nothing, however seriously he may have been injured—other, that is, than such sickness benefit as he may be entitled to under the Social Security system. Moreover, even if he can prove that someone else was " at fault," his compensation may be reduced if it is shown that he himself was also " at fault," in that his own conduct was a contributory " cause " of the incident that gave rise to his injuries. Although, in theory, the decision about each individual victim's entitlement to compensation ought to be predictable and certain, in practice much depends on matters of chance, which is why our compensation system has been called a " forensic lottery." [1]

2. Before any compensation can be obtained, there must therefore be a process of " fault investigation " and a process of " compensation assessment," initially carried out by the police, lawyers and insurance assessors. If they cannot agree on who was " at fault " or on the amount of compensation appropriate to the victim's injuries, these questions have to be decided by the civil courts. This whole process seldom takes less than several months, and in serious or difficult cases it may take some years to complete. Until it is completed, the victim may get nothing, even if he is crippled and has lost his livelihood, and he may have to survive as best he can on social security or on other people's charity, except in the rare case where he has ample means of his own. That will also be his position if, when the legal process has run its course, it is held that he is not entitled to any compensation for his injuries because no one was " at fault " in respect of them (or he is advised by those acting for him that that is the position). This situation, and the factors that may bring it about, are further considered in Chapter 2 of this Report.

3. In addition to being unpredictable and protracted, the process of " fault investigation " is also very expensive, since the business of collecting evidence, assessing its probative value, negotiating with the other side and finally presenting the case in court involves a great deal of work by many highly skilled people. In the U.S.A., it has been estimated that, under the " fault " system, nearly 60 per cent. of all the money collected for the compensation of accident victims is absorbed in paying the costs of the investigatory process, so that only a little over 40 per cent. is actually used to compensate

victims for their injuries. Such estimates as there are for the United Kingdom suggest that the position here is not very different.

4. For all these reasons, some have argued, both in this country and elsewhere, that it would be better for the victims of road traffic accidents (and, indeed, of other kinds of accident also) to be compensated for their injuries without the need for a full "fault investigation" in every case. Such a system of compensation—now generally known as a "no-fault" system—would, it is argued, have the merit of avoiding the delays, capriciousness and high cost of the "fault" system, without introducing any additional serious problems of its own. A number of other countries have been persuaded by the advocates of "no fault," and have adopted systems of that kind, sometimes to replace the existing "fault" system entirely and sometimes to run in parallel with it, either for road traffic accidents only, or for other kinds of accident also. The principal jurisdictions which have already adopted "no-fault" systems of one kind or another are referred to in Chapter 3 of this Report.

5. Dissatisfaction with the methods of compensating the victims of accidents in general has been increasing in recent years in Great Britain also. The thalidomide tragedy has helped to draw wider attention to some of the defects of our "fault" system, for even though it was a case which stood on its own and raised issues of exceptional complexity, it demonstrated a number of disadvantages of the system which are of general application.

6. In 1972 the Council of JUSTICE came to the conclusion that the problem merited investigation and set up our committee to study the broad question of "no-fault insurance." By coincidence, we met for the first time on the eve of the Prime Minister's announcement in the House of Commons that the Government had decided to set up a Royal Commission on Civil Liability and Compensation for Personal Injury. In that situation we decided, with the approval of the Council of JUSTICE, to continue with our work, but to cast our conclusions in the form of one or more Memoranda of Evidence for submission to the Royal Commission.

7. The field of inquiry is very wide, and we therefore decided at an early stage to deal with it piecemeal. There are many ways in which this could be done. For example, one way would be to classify accidents into those which are created by dangerous objects or processes put into circulation by the community, and those which are not. Another would be to distinguish between accidents which happen to people at work (or on the way to or from work) and those which occur in other situations.

8. We however decided to concentrate our attention in the first place on accidents resulting from the use of vehicles on roads. These provide a self-contained "parcel." They are tragically frequent in a country which has the largest density of motor vehicles per mile, and one of the highest proportions of urban to rural roads, in the world. The range of such accidents in terms of the degree of injury inflicted and the total cost of the compensation they call for is great. We seem, moreover, now to have tacitly accepted the annual toll of slaughter and maiming as the price we must pay for the advantages we obtain from the greater mobility of people and goods, and acceptance of this situation ought to be matched by correspondingly greater and more effective social concern for the needs of its victims. Any principles or reforms developed in the course of studying road accidents are likely to be particularly useful in informing future work in other areas

of personal injury; and it is in relation to road accidents more than in any other context that recent research and experience of reforms are available in other countries. But perhaps most important is the fact that the compensation of road accident victims still depends on "fault" to a far more significant extent than in any other accident context.[2]

9. There is, however, another and more practical reason why we think that this part of the subject merits attention before others. As will appear later, we have come to the conclusions—

(1) that our existing system for compensation, in so far as it is based on liability for "fault," contains a number of serious defects and too often inflicts grave injustices;
(2) that most if not all of these defects can be cured, and the consequential injustices avoided, by the adoption of a "no-fault" system in place of the system we have.

We have therefore devised an outline scheme for such a "no-fault" system which is described and discussed in Chapters 5 and 6 of this Report. Its adoption could, as we see it, eliminate the injustices and anomalies of the existing system in the context of road traffic accidents, without any adverse effects of such magnitude as would make its implementation inadvisable. That being so, society could safely begin now to move at a reasonably rapid pace towards the introduction of such a scheme, without having to wait until problems in other contexts can be resolved also.

10. For all these reasons, therefore, this Report is confined to compensation for personal injury suffered in road traffic accidents. We proceed first to consider accident compensation in general, and follow with a brief outline of our present system and its defects. We next examine some of the "no-fault" systems which have been advocated and adopted abroad, and the questions which arise in considering whether we in Great Britain should follow any of these precedents, in whole or in part. Finally, we set out our own proposals for reform, and examine the consequences which might be expected from them, and their relationship with the compensation of the victims of other kinds of accident.

REFERENCES

1. The title of a book by Professor T. G. Ison, which is one of the works listed in the selected bibliography which forms the Appendix to this Report.

2. According to one recent study, 58 per cent. of all compensation for road traffic accident injuries in 1970 was recovered in the form of damages for tort, while only about 12 per cent. of compensation for industrial injuries came from that source rather than from the Industrial Injuries Compensation Scheme (see Lees & Doherty, *Compensation for Personal Injury: The Economic Framework*: 1973).

CHAPTER 1

CALAMITIES AND COMPENSATION

11. Calamities of one kind or another are part of the human condition. One which is bound to overtake us all in the end is death. Others may or may not strike us, in varying degrees. Certainly most of us will fall ill at some time in our lives, and most of us will have at least some minor accident causing physical injury.

12. Each individual can to some extent influence the degree of his exposure to the risk of some of these calamities, but anyone who leads anything like a reasonably normal life in present-day conditions has to travel in motor vehicles and to cross main roads.

13. By our collective efforts, as a community, we can do much to limit the total number of calamities to individuals. Public health programmes have dramatically reduced the incidence of many infectious diseases. Stringent safety measures keep air accidents down to a very low level. So also, improved roads, safer cars, the breathalyser and other preventive and educative measures can have at least some impact on the incidence of road accidents.

14. Nonetheless, some calamities will always remain with us. It is doubtful whether medicine will ever be able to eradicate all disease, and however much the community as a whole, and each of its individual members, does to minimise risks, *some* people will fall seriously ill or be killed or injured in accidents of different kinds.

15. Some of these accidents will happen because the victim has not been quite careful enough for his own safety. Others will happen because someone else has not been quite careful enough for the safety of other people. Yet others will happen because someone has deliberately chosen to take an unwarranted risk. But many will happen despite the fact that everyone concerned has taken as much care as any reasonable person would, in the circumstances, have expected him to take. Not every accident is directly "caused" by someone's "fault" (see paragraph 21 below).

16. Whenever any man, woman or child suffers serious injury in an accident, the event is a calamity not only for the victim, but also for his family, and in decreasing degrees for his friends and acquaintances, and for the community at large in the form of "social cost." So long as the concept of "society" has existed, it has been taken for granted that the community has an obligation to help those who are incapacitated through bereavement, sickness or accidental injury. This obligation is looked upon as so axiomatic in all known human societies that its philosophical or psychological origins are immaterial. It may be regarded as an incident of humanity itself.

17. The obligation of mutual help in adversity is discharged in various ways from culture to culture. In modern Britain, it can take any or all of four forms:

(1) help through institutions provided by the state, such as the National Health Service and the Social Security system;

(2) help through private contractual schemes, such as personal accident insurance or company sickness schemes;

(3) help through the award of monetary compensation by the courts against someone else found to have "caused" the injury through his "fault";

(4) voluntary help from friends, neighbours, or charitable organisations.

18. The payment of money alone can never wholly compensate anyone for the calamity of a serious injury, but it can do a great deal to mitigate or assuage its consequences. In an ideal world, everyone who suffered injury would be compensated to the limit of what the community could afford, provided only that such compensation would not diminish the social deterrents against carelessness, recklessness or crime, or the sense of personal responsibility for the consequences of the individual's own acts.

19. The function of compensation for personal injury, therefore, is to make good to the victim, so far as is possible, what he has lost or suffered, by distributing his loss among those who are better able to bear it, because it is diluted by being widely spread. The test of the efficacy of such a system is the fairness, accuracy, certainty and speed with which it can achieve its object of helping individuals, balanced against the price which has to be paid for maximising each of these factors. That price is best expressed in terms of the proportion of the resources contributed towards compensation which actually reach the victims for whom they are intended, as opposed to being expended in administering the scheme under which compensation is distributed.

20. So far, we have only stated generalities which are probably not seriously disputed, but we have nevertheless spelled them out here because they ground much of our subsequent reasoning, and in particular because they provide a starting point for the next Chapter of this Report, in which we examine how the transfer and distribution of loss resulting from personal injury sustained in road traffic accidents is effected in Great Britain at the present time, and in what respects our system falls short of what it aims to achieve.

CHAPTER 2

OUR PRESENT SYSTEM AND ITS DEFECTS

No fault under the present system

21. Where there is no human fault, the law says that there is an "inevitable accident" for which no one is liable, so that no one can receive damages. The position here is to be clearly distinguished from another situation (discussed in a later section of this Chapter) where the victim of an accident is denied compensation, not because there is no fault to prove (as in the "inevitable accident" case) but because someone was at fault, and the victim is unable to secure any, or at any rate sufficient, evidence to prove it. "Inevitable accident," in which no one is "at fault" in respect of an accident which nevertheless gives rise to personal injury, is illustrated by the case of the man who is driving carefully along a city street when he suddenly drops dead at the wheel as the result of a heart attack and his car ploughs through a bus queue. Or again, there is the case where heavy traffic is passing along a narrow road during a hailstorm when a flash of lightning strikes a tall tree beside the road and it crashes onto a car; the car is severely damaged and the driver sustains serious injury. Similarly, there is usually no legal remedy where only one vehicle is involved in an accident. An illustration of this is the case of the country doctor who has been out on several emergency calls during successive nights, and as a result becomes desperately over-tired and falls asleep as he is driving home after attending a patient at 3 a.m.; his car strikes a tree and he is severely injured.

Negligence

22. In the United Kingdom, the civil wrong of "negligence" is the main basis for the award of "damages" as compensation for death or bodily injury suffered in road accidents. The essential structure of negligence in the legal sense is simple: a person (the plaintiff or claimant) who can prove that he suffered personal injury or other loss as the direct result of a lack of care on the part of another person (the defendant) may recover compensation ("damages") from the latter. The plaintiff must show that the defendant owed him a duty to be careful, and that his conduct fell below the standard of care which would have been shown by the "reasonable" or ordinary person in the same situation. Did the defendant do something which the ordinary person would not have done, or fail to do something which he would have done in order to avoid creating the risk of an accident? The standard of reasonable care is a flexible one and it gives the judges a limited discretion to decide whether or not to impose liability in borderline cases.

Proof

23. English law puts the burden of proving negligence on the plaintiff who will therefore fail in his claim for compensation if he cannot prove that the defendant was at fault and that his fault caused the accident that gave rise to the plaintiff's injuries. There are many situations where there is insufficient evidence to identify who was involved in an accident or who was to blame. Three illustrations will suffice.

(1) A careful motorist is rendered unconscious when a lorry, carelessly driven, collides with his car. When the motorist regains consciousness he cannot remember what happened. Apart from the lorry driver, who is saying nothing except what is intended to suggest that he was in no way responsible for what occurred, the only independent witness of the accident was an old age pensioner who could not, even immediately after the accident, give a very coherent account of the circumstances. Six months later, as a result of illness, the pensioner's memory fails altogether and he is unable to give any evidence at all about the accident.

(2) On a very dark night, in a country lane, two cars are approaching each other. Both have dipped headlights, but just before they pass. the driver of one car switches on his headlights to full beam, blinding the other who grazes the stone wall beside the road, loses control and crashes. The first motorist drives on without realising that he has caused an accident and cannot afterwards be traced.[1]

(3) An elderly woman is cycling along a quiet suburban road. Some children are kicking a football on the grass verge. The ball is deflected off the grass verge and hits the roadway just in front of her. She instinctively swerves to avoid it, loses her balance, falls from the bicycle onto her head and is severly injured. The children, frightened by what has happened, run away and are never traced.

Though these are fictitious cases, provided by way of illustration, they typify the real-life situations in which many victims of road traffic accidents find themselves. In a study of 90 serious[2] cases of bodily injury caused in traffic accidents in Oxford in 1965,[3] it was found that only 45 per cent. were successful in recovering any damages under the legal rules described above. Half of those who received nothing as damages put the blame for this result on the lack of evidence—either there were no independent witnesses of the accident at all, or the evidence that was available was inconclusive or unreliable.[4] Whether there were any reliable witnesses of an accident is usually a matter of chance, yet it can scarcely be suggested that the only victims who deserve to be compensated are those who were lucky enough to have spectators at the scene of their accident whom they can trace at a later date for the purpose of pursuing a claim. On the other hand, the seriously injured victim can hardly be expected to look for witnesses and take their names and addresses immediately after the accident, so that the success of his claim may depend on the further chance factor of there being someone available to do this service for him. Again, since road accidents occur in a split second, a witness cannot necessarily be expected to observe all the circumstances accurately. The attention of an independent witness is usually attracted only by the sound of a collision, or the crying out of a pedestrian struck by a passing vehicle, and the witness may derive his impressions of what happened, not from what he actually saw at the moment

of impact, but from his unconscious deductions drawn from what he saw immediately *after* the accident. A further difficulty on evidence arises from the delay of months and often years that intervenes between an accident and the hearing of the action arising from it; while memories are fading, clear recollections of the facts are diminishing and the opportunities for mental reconstruction of the event correspondingly increase.

There are moreover features of our fault investigation system—the demands it makes on a witness's time, the harrowing nature of the experience of going into the witness-box and being subjected to cross-examination, sincere doubts about the validity of his own impressions and recollections—which may well deter an independent witness from giving evidence at all, even where he has relevant evidence to give. These are some, but by no means all, of the factors which justify the description of the legal process in personal injury cases as a "forensic lottery."

The objective of the law—deterrence or compensation?

24. The advantage claimed for the negligence system is that it deters motorists from carelessness. But there are many factors which prevent deterrence from operating efficiently. First, a driver is compelled by law to be insured, so that he knows that he will not pay damages out of his own pocket if he carelessly causes an accident (although the risk of losing a no-claim bonus when he renews his insurance may perhaps provide a limited degree of deterrence). Secondly, the civil law of negligence comes into operation only if the motorist's carelessness actually causes injury to person or property, so that no matter how careless his driving, he will incur no liability for damages if no one is hurt and nothing is damaged, though he may of course run the risk of a *criminal* penalty if his conduct amounts to careless or dangerous driving which can be proved against him beyond reasonable doubt. Thirdly, even if there is some injury or damage, the "penalty" of damages is not necessarily proportionate to the driver's true blameworthiness. The amount of the damages a driver has to pay depends on the *extent* of the harm actually caused, and it is obvious that a trivial lack of care may cause extensive injuries and give rise to very substantial damages, whereas a flagrant act of recklessness may cause little or no damage. In our opinion, effective deterrence of careless driving is more likely to be achieved by using the criminal law, by a driver's fear for his own personal safety, and by a social conscience educated by publicity about accident prevention.

25. A further factor which in practice diminishes the potential deterrent effect of the law is that legal "fault" is a purely objective concept based on average standards in the community, and does not necessarily correspond to the personal sense of fault or moral blameworthiness in the individual. Moreover, the law takes no account of the mental and physical capabilities of the individual driver. Many accidents are caused by such factors as age, lack of experience, errors of judgement, unknown physical and in particular visual defects, below-average speeds of perception or reaction, or emotional tensions. We do not ignore these factors when deciding moral blame, but the law ignores them in attributing legal responsibility and liability to pay damages. In any event, we cannot hope to deter individuals from causing accidents by imposing on them standards which they are unable to achieve, at least within very extreme limits of incapacity or defect.

Fault of the injured person

26. If the injured person's loss or injury was caused partly by his own fault (that is, by his "contributory negligence") the court has a discretion to reduce the damages he would otherwise have received in proportion to the extent of the plaintiff's fault by comparison with the defendant's fault.[5] This means that the actual amount of the reduction in money terms depends largely on the extent of the injuries or loss suffered by the victim and not simply on the relative seriousness of his fault. A victim who is held to be only 10 per cent. at fault, but whose injuries merit an award of £20,000, will incur a ten times greater reduction in compensation than one who is held 80 per cent. at fault, but whose injuries are assessed at £1,000. This result might not be quite as open to criticism if the careless motorist paid the damages himself, but it is a fortuitous "penalty" when the damages are in fact paid by an insurance company, and thus ultimately by the motoring public. In this situation it would be better if the reduction were assessed as a fixed sum of money, like a fine, instead of a proportion of the individual's actual loss; it could then be made to depend on the various factors relevant to the assessment of a criminal fine, including the financial circumstances of the particular offender.

Assessment

27. Even after a court has found a defendant to be negligent, the victim of an accident faces many difficulties in the assessment of the amount of money he will receive as compensation for his injuries. The main objective of this process is said to be full compensation in each individual case—that is, that the victim should be placed in the same financial position as he would have been in if he had not been injured. The assessment is related to the particular circumstances of the individual plaintiff, and although no ceilings are laid down for the amounts which may be awarded as damages, there are many rules and practices followed by the judges which restrict the operation of the principle of full compensation. The vast majority of claims are however settled by negotiation between the parties, without the need for a judicial decision, and it is therefore solicitors, insurance assessors, trade union representatives and others who apply the rules of assessment in practice, while the judges remain in the background as the ultimate arbiters where a settlement cannot be reached between the parties. Items of loss, such as loss of earnings and expenses already incurred, which can be calculated exactly up to the time of the trial or settlement, are given in full. But all other items of loss are dealt with by the award of a single lump sum, described as "general damages," and intended to cover all the estimates which the judge makes in relation to items of loss the value of which cannot be exactly calculated.

Lump sums

28. Many of the problems which arise in assessing damages for personal injuries are caused because they are awarded as a single, lump sum. The judges have no power to order the payment of damages as regular, periodical sums. The successful plaintiff who can no longer work can replace his loss of a regular income by using the lump sum to purchase an annuity, or by himself investing it. But the lump sum approach means that compensation has to be finally assessed at the point in time when the court gives its decision,

or the parties agree upon a settlement. This once-and-for-all approach to compensating a person for all the consequences of his injury, even for those which may follow in an unforeseeable future, cannot avoid unfairness to one side or the other. Thus in a case where as a result of the victim's injuries, there is a 10 per cent. chance of a serious medical complication occurring in the future, the judge may notionally assess the victim's damages on the basis that the complication will ensue, and then reduce that sum by 90 per cent.; he will thus be able to award a definite sum immediately. If however the plaintiff does in fact later suffer the complication, he will be seriously under-compensated, whereas if he escapes it, he will be partly over-compensated.[6]

The once-and-for-all approach is also unfair in so far as it requires the period of a person's future working life, or his chance of future redundancy or unemployment, to be estimated in advance. If the judge takes account of these factors by reducing or increasing his award of damages, it is extremely unlikely that he will hit upon the solution which matches the individual's actual future experience, and the award will turn out to be either inadequate or over-generous by comparison with those made to other injured persons. Where the uncertainty relates to the degree of sight or hearing the plaintiff will retain in five years' time, it is a very remote chance that the judge will hit upon the figure he would have awarded had he known the future events. The advance assessment cannot be attempted with any pretensions to accuracy; if it proves to be accurate, that will be entirely fortuitous.

29. The whole approach of the courts to future contingencies ignores the insurance principle, embodied in life and personal accident insurance and in pension and social security schemes. The anomalies of the legal approach are partly masked by the Social Security system which, by spreading a net of benefits under everyone, catches those who are afflicted by a worsening of their condition which was not anticipated and adequately provided for at the time the lump sum damages were fixed by the court. Much of the guesswork involved could be avoided by periodical payments in the form of a pension which could be varied when any unforeseen contingency, favourable or adverse to the victim, occurred. This system is used in Germany, and is being tried in Western Australia, but there are many difficulties, as the Law Commission has found,[7] in devising a suitable system applicable to damages paid under the English system. The Law Commission is in favour of a provisional lump sum award being made by the courts in some circumstances (*e.g.* where the medical prognosis is uncertain) and for the plaintiff to be entitled to apply for an increased sum if his circumstances radically change.[8] But the legal system, as operated by lawyers and insurance companies, is out of step with the concept of periodical payments found in pension and sick pay schemes, the Social Security system and the few types of policy offered by private insurance companies for permanent sickness or disability.

Medical uncertainties

30. In awarding damages, the courts also take into account aspects of an injury which cannot easily be given a monetary value. "Pain and suffering," a regular item of damage, may cover mental suffering, such as neurosis caused by the injury, or the injured person's knowledge that his life has been shortened or that he is disabled or disfigured. "Loss of amenities"

covers loss of the capacity to enjoy life, and may include impairment of the plaintiff's health or energy, inability to have children, loss of marriage prospects, and anything which interferes with a normal life—for instance, if he can no longer play a sport or follow a leisure interest in which he previously took part.

31. In assessing damages for pain and suffering and loss of expectation of life or of amenities, the courts are very dependent on medical opinions. But the courts often expect the medical expert to pronounce upon a prognosis which is beset with uncertainties: uncertainty, for example, about whether the condition of the patient may worsen in the future (*e.g.* where a head injury may lead to epilepsy); and even when it is virtually certain that a particular condition will develop in the future (*e.g.* osteo-arthritis in a joint) there may be uncertainty as to the onset and severity of the condition. Medical men are compelled by the nature of the legal process to indulge in guesswork because the law insists on quantifying compensation once and for all, and in advance of the very developments it seeks to compensate. Only one action for damages can be brought, and if the plaintiff's injuries afterwards turn out to be more serious than his medical advisers expected at the time of the trial (or settlement) of his claim he cannot re-open it in order to recover more compensation.

Assessing non-economic loss

32. Even where the medical evidence can be relied on, lawyers find it difficult to agree upon a sum of money for losses of whose extent only a rough estimate is possible. The judges have developed over the years an unofficial "tariff" or scale of awards to lend a measure of consistency to cases where putting a monetary value on items such as pain and suffering or the loss of a limb is a matter of guesswork. Such awards are "fair" in the sense that they are in conformity with other awards in similar cases, but the judges make no attempt to see that their awards are adequate in fact. They have rejected the concept of putting a "price" on injury, in terms of what a man would pay to avoid the injury, or what an injured man would pay to get rid of the injury. There is no notion of a market, with its supply and demand, from which to fix a general value. The sums awarded by the courts are therefore arbitrary, even though they are relatively uniform as between persons with similar injuries.

33. The purpose of giving money as "compensation" can only be to enable the injured person to assuage his pain, or his loss of a limb, by providing something he could not otherwise have afforded—perhaps a better house, a new leisure activity, or more expensive holidays. But the legal solution of giving a disabled man a fund with which to provide his own facilities on an individual basis often does not solve all his problems, and he must still depend on governmental or community projects to provide him with specially adapted housing, or transport and parking, or recreational facilities.

Loss of earnings

34. The courts have encountered many problems in assessing damages for future loss of earnings. If, as a result of an accident, his life expectancy is shortened, an injured man's damages for loss of earnings will be related to the period of his shortened life. All that is awarded for the "lost years"

is a nominal sum of about £500. This involves the assumption by the judges that a surviving victim alone is to be compensated, and no account is therefore taken of the fact that many injured persons are supporting dependants whose own expectation of life will not have been shortened, but who will be adversely affected by the loss of the breadwinner's earnings during the "lost years." In cases of injury resulting in the disablement of a father or husband, the law does not think in terms of compensating the family unit as a whole, although this is the approach it adopts when a father or husband has been killed in an accident. Thus, in a "fatal accident" claim, damages are assessed so as to compensate the deceased's widow and children for the loss of the financial support they would have received during the years in which it could reasonably be expected that he would have gone on earning, had he not met his death in the accident. This difference in the way the law treats the family, depending on whether the breadwinner survives, though incapacitated, or is killed in the accident, is indefensible both logically and in social terms.[9]

In "fatal accident" cases, in assessing damages for loss of future earnings, the judges make a deduction for "contingencies of life." These relate to the risk that, apart from the fatal accident, the plaintiff might have become ill or been unemployed for various periods of his life, or even that he might have died prematurely or been killed in another accident. No account is however taken of the probable effect of inflation on future money values, and little account is taken of the expectation that wage and salary levels will rise in the future. The courts assume that prudent investment of the damages will nullify inflation.

A further anomaly in fatal accident cases that falls under the heading of "contingencies of life" relates to a widow's possible remarriage. By the Law Reform (Miscellaneous Provisions) Act 1971, the courts are required, when assessing damages, to ignore the prospects of a widow's remarriage (and even the fact that she has actually remarried).

Although this change in the law was made in order to dispense with the need to assess marriage prospects in individual cases—a process widely objected to as being distasteful to the trial judge and often distressing, and always embarrassing, for the plaintiff—the present rule, excluding such exercises in guesswork, is unsatisfactory on other grounds. It means, for example, that a childless young widow with excellent prospects of remarriage, who is in any event perfectly capable of earning her own living, and a middle-aged widow whose marriage prospects are almost nil and who has young children to support, may each receive awards that in no way reflect the very different extent to which they are likely to have to depend in future years on the damages they are awarded. Such anomalous results could only be avoided if once-for-all, lump sum compensation were replaced by periodical payments, adjusted as may be necessary to take account of the individual's changing circumstances—for better or for worse.

Other anomalies

35. There are other anomalies in the assessment of damages for personal injuries. The tax which would have been payable on the lost earnings is taken into account so as to reduce the amount of damages actually awarded; this can lead to a complicated tax enquiry but is based entirely on guesswork about future levels of taxation and allowances. There is also a deduction in respect of any sick pay, and part of any social security benefits, received by

the injured person. But no deduction is made in respect of benefits received under a disability pension arranged by the injured person's employer, or under a private insurance policy, or by way of grant from a charitable organisation. The result of these differences is that some injured persons may receive considerable sums without any deduction, while others, having different financial circumstances, will have to suffer substantial reductions in the compensation they receive. Others again, with no legal claim, are left with nothing but supplementary benefits to live on. There is an urgent need to integrate the different systems of compensation to avoid both unjustified overlapping and gaps. In particular, the different treatment of sick pay and disability pensions is formalistic and unreal and, while depriving some injured persons of part of their compensation, may allow others to recover double compensation from public sources, where, for example, both the damages and the disability pension are ultimately financed by the public, through compulsory insurance, taxation, or rates levied on property.

Delay

36. The problems involved in obtaining reliable evidence about the extent of an injured person's disablement and the uncertainties of medical prognoses inevitably cause delay in the settlement of claims. These multifarious sources of uncertainty and finality in the assessment of damages make it difficult for the claimant's solicitor and the defendant's insurance company to agree on the sum of money appropriate to the particular case. Insurance companies often make initial offers of relatively low sums, and much time is then spent in hard bargaining. In the Oxford survey,[10] only 45 per cent. of all those who were seriously injured received any damages at all. But this final total of 45 per cent. was achieved only gradually: during the first year after the accident, 12 per cent. received damages; during the second year, another 20 per cent.; during the third year, another 6 per cent., and during the fourth year, a final 6 per cent.[11] Delay results in financial hardship to victims, who have to use up savings, borrow money, or rely on their families to help. Moreover, during the period of the delay, the uncertainty whether a claim for damages will succeed or not can create serious anxiety, which may impede the victim's recovery. Delay is a direct consequence of the present system, since the uncertainty of many of the legal issues it raises encourages insurance companies to resist claims vigorously and to deny that negligence can be proved—or, even if negligence is conceded, to dispute the amount of damages claimed by the plaintiff.

Conclusions

37. In our opinion the main objective of the civil law should be to compensate injured persons for their injuries and losses.[12] In imposing on motorists a statutory obligation to take out liability insurance, Parliament's intention was to ensure that there would be money available to pay the damages awarded to injured persons, and not merely to protect careless motorists against the risk of bankruptcy or a crippling financial burden. However, the legal rules of negligence still treat the motorist as an individual who is liable to pay damages out of his own pocket, and since the law requires a good reason for making one man pay for another's loss, it still makes proof of a motorist's fault the sole ground for shifting onto him a road accident victim's loss. If however the compensation is in fact paid from insurance funds, why should proof of another person's fault be the only ground for

allowing an injured person access to those funds? The "other man's fault" approach discriminates between accident victims whose needs are similar, yet the ground of discrimination has nothing to do with the relative merits of different victims' claims. On the contrary, it may depend entirely on the chance availability of evidence of how an accident occurred. The substance of the matter is that a large number of people pay annual sums of money (insurance premiums) to compensate traffic victims, yet fewer than half the victims receive any of the money. The legal rules of liability for negligence take no account of the insurance principle whereby the burden of meeting the risk of accidents can be spread over a large section of society. They are thus out of line with the social philosophy underlying the modern welfare state, the Criminal Injuries Compensation Scheme, and the institution of sick pay and other privately-organised schemes for supporting individuals who suffer adversity.

The legal system whereby accident victims are compensated by an award of damages obviously has many advantages for those who are fortunate enough to be successful in satisfying the legal tests. Its aim is full compensation for each individual (where no contributory negligence is found). No ceilings are fixed and awards of damages are tailor-made to suit the needs of each individual. Many aspects of non-economic loss are covered. But the disadvantages of the system, as we see it, outweigh these advantages. It gives its benefits only to a proportion of all accident victims. It is very expensive to operate. Under it considerable delay occurs before any money reaches the accident victim, although his needs are immediate. The lump-sum approach calls for foresight of future contingencies which are not in fact foreseeable. The system gives insufficient attention to the collective needs of the family as a group. Finally, it allows some victims to enjoy a considerable "doubling up" of compensation, derived from different sources, in respect of the same accident.

38. In the Oxford survey already referred to,[13] only 45 per cent. of the seriously injured persons obtained any damages at all; about a quarter of these suffered a reduction on account of contributory negligence, which means that only one-third of the total were receiving (in theory at least) full common law damages. Of the 45 per cent. who obtained some damages, about one-fifth recovered less than their actual financial loss.[14] In the light of such evidence as this, the legal system of liability can scarcely be said to be functioning satisfactorily, or that under it all those who deserve, from a social point of view, to be compensated are compensated. Only because of the existence of various non-legal sources of compensation has the public failed to appreciate the glaring anomalies of the legal system of damages. In the Oxford survey, for instance, no less than 71 per cent. of the victims received some social security benefits (including 7 per cent. who received supplementary benefits); 77 per cent. of the victims were employed and 42 per cent. received some sick pay from employers; 73 per cent. received financial support during their disability from other members of their families. From such sources, some financial assistance is quickly provided for accident victims, so that none are left even temporarily destitute, but that happens in spite of the deficiencies of the legal system of damages.

REFERENCES

1. Every year many thousands of drivers fail to stop after accidents involving their vehicles—between 14,000 and 15,000 in each of the years

1965, 1966 and 1967, according to official statistics. Whether they failed to stop in order to escape liability, or because they were unaware that an accident had happened, the same difficulties ensue for the accident victims in terms of the burden of proof.

2. "Serious" cases were those where the injured person was away from work, or unable to carry on his normal daily life, for six weeks or longer after the accident.

3. A lengthy summary of the findings from this survey was published in the *New Law Journal* of May 22, 1969, p. 492.

4. Even in 13 per cent. of the successful claims for damages, the solicitors acting for the injured people said they had found difficulty in pressing the claim because of some lack of evidence.

5. In the Oxford survey (see paragraph 23 above) one quarter of those who obtained some damages received a sum which was reduced by reason of their contributory negligence.

6. The courts have not considered the insurance approach—what premium might be needed to insure the injured person in respect of the full notional sum against that contingency happening in the future. However, this type of risk is not one which the regular insurance companies are normally willing to accept.

7. Working Paper No. 41, "Personal Injury Litigation—Assessment of Damages" (paras. 222–252). On the day on which the final draft of our Report was completed, the Law Commission published their report (Law Com. No. 56) on the assessment of damages in personal injury cases, containing their definitive recommendations. No detailed account could therefore be taken here of the Commission's report and our comments relate to the earlier Working Paper. Compared with our Report, the Commission's report has a far more limited scope—being concerned only with the assessment of damages—and an entirely different objective in that it seeks to secure improvements in the operation of the existing "fault" system whereas our objective is to argue for the substitution of a fundamentally different, "no-fault" system. We are however glad to see that in so far as the Commission's report finds certain features of the existing system unsatisfactory and advocates their reform, it endorses criticisms of the existing system which we have ourselves emphasised in this Report.

8. *Ibid.*, paras. 253–256. See also note 7 above.

9. The Law Commission has criticised this rule and has considered alternative suggestions, *e.g.* that compensation for the loss of earnings in the lost years should be based on the expected amount of these earnings, less the sum which the plaintiff would have spent on himself (*e.g.* his own maintenance, holidays, pleasures, etc.); Working Paper No. 41, paras. 53–58 (see also para. 29, note 7 above).

10. See para. 23 above.

11. Since the date of the Oxford Survey, there may be less delay in settling claims, because of a change in the law which now requires interest to be paid on damages: *Jefford and Another* v. *Gee* [1970] 2 Q.B. 130.

12. This is the objective of the Criminal Injuries Compensation Scheme, financed directly by the taxpayer.

13. See para. 23 above.

14. This analysis takes no account of non-economic loss such as pain and suffering, disfigurement, loss of bodily function, etc. When the same analysis is made of all the victims, the result is that from all sources of compensation (including Social Security benefits) 12 per cent. of them received less than 20 per cent. of their financial losses and as many as 64 per cent. got less than the total amount of their financial losses.

CHAPTER 3

ALTERNATIVE SYSTEMS ABROAD

Strict liability without proof of fault [1]

39. Many countries throughout the world have found liability insurance to be the answer to the problems of compensating traffic accident victims, and have therefore imposed liability on owners or drivers of vehicles regardless of their fault. The person made liable is the one who is expected, or (in many countries) compelled, to take out insurance against this liability. This insurance approach is carried to its full extent in Norway and Finland, where the law simply specifies the person who is bound to insure a vehicle, and then gives the victim of an accident involving the vehicle a claim directly against the relevant insurance company. Not even nominally is the claim made against the owner or driver.

40. In many European countries, the owner or person in control of a motor vehicle is liable, irrespective of whether or not he was negligent in relation to an accident involving the vehicle. (A limited number of legal defences are available which he may raise,[2] but in practice he can seldom prove them.) For example, in West Germany, the Road Traffic Law of 1952 makes the person in possession of the vehicle strictly liable for damage caused by its operation. The driver may also be liable for such damage, unless he can prove that he was not negligent, but only rarely are drivers able to satisfy the stringent requirements of the law. Similarly, in Austria, France, the Netherlands and Switzerland, strict liability, irrespective of fault, is imposed variously on the owner, the possessor, the custodian or the guardian of a vehicle that causes injury or damage. In Italy, the driver of a vehicle is strictly liable, but its owner or hirer may also be liable in some circumstances. In Spain, the driver is liable, unless he can show that the damage was solely due to the fault of the injured person, or to *vis maior* (an overpowering force or uncontrollable event) external to the operation of the vehicle.

41. In some of the Scandinavian countries, the owner of, or person authorising the use of, a vehicle has for many years been liable for damage caused by its operation, unless he can show that neither he nor the driver of the vehicle was negligent. A Norwegian law of 1961 gives the victim a claim directly against the insurance company insuring the vehicle, irrespective of any proof that the driver was at fault. Similarly, a Finnish law of 1959 gives insurance protection to vehicle owners or drivers and their families, as well as to other injured persons.

42. In the Soviet Union, Czechoslovakia, Hungary, and Poland, strict liability is generally imposed on the person or organisation in possession of, or using, the vehicle which caused the damage.[3] Similarly, under a special Japanese law of 1955, strict liability is imposed on "the person who, for his own benefit, places an automobile in operational use." Under Venezuelan law, strict liability is imposed on both driver and owner.

Exemption from strict liability

43. Many of these legal systems imposing strict liability on owners or drivers contain a number of exceptions. For instance, if at the time of an accident the vehicle had been stolen from its " holder " or was being driven without his knowledge or consent, he was exempted from liability under a former German law, which has been copied by many other countries. Such an exemption from liability may lead to uncertainty in applying the law, and it seems unnecessary to introduce it when insurance is intended to provide funds with which to meet liability. For these reasons, the Scandinavian countries allow the victim to claim, even where the driver of the vehicle was not authorised to drive it. Another type of exemption is illustrated by Italian law, under which the driver is strictly liable " unless he can prove that he has done everything that was possible in order to avoid the damage." Again, under Swiss law the person in possession of the vehicle escapes liability if he can prove that it was an inevitable accident, or was caused by the gross negligence of the injured person or that of a third person.

Canada

44. Canada has produced some pioneering schemes in motor insurance. Several provinces have compelled motorists to pay for insurance benefits for anyone injured by their vehicles, whether or not fault can be proved, while others have permitted motorists, on a voluntary basis, to take out no-fault insurance of this kind. Some Canadian provinces have entrusted the schemes to government agencies, while others have allowed private insurance companies to run them. However, all these provinces have still allowed an injured person to sue for damages under the ordinary law of negligence, so that the new schemes merely supplement the long-established rules of legal liability. If the victim recovers damages he must deduct from the sum he claims any no-fault benefits which he has already received.

Saskatchewan

45. Sasketchewan was the first Canadian province in the field by many years. In 1946, it established a scheme [4] operated by a Government Insurance Office, under which everyone suffering bodily injury as the result of an accident involving a moving motor vehicle is entitled to limited benefits, without having to prove anyone else's fault. For instance, a person unable to work receives $25 a week for a maximum of 104 weeks, while a person partially disabled receives half this amount. In addition, lump sums are payable for loss of bodily function, up to a maximum of $4,000, under a schedule which fixes the amounts payable for different injuries. Where a person is killed, his primary dependant (usually the widow) may claim $5,000, plus $1,000 for each secondary dependant, up to a maximum of a further $5,000. The insurance premiums for this cover are paid by motorists. No benefits are payable if the injured person was driving without a licence, riding on the outside of the vehicle, or under the influence of alcohol.

The significance of the Saskatchewan scheme is that it was the first to use the concept of *loss* insurance, under which the victim of the loss simply claims directly from the Insurance Office. All previous systems depended on the concept of legal *liability* being imposed on another person, and the loss paid by *liability* insurance taken out by that person. However, in addition to this automatic, " no-fault," insurance cover, the Saskatchewan

scheme permits claims for damages to continue to be made in the courts by those who can prove negligence on the part of a motorist. For this reason, the scheme requires motorists to have compulsory liability insurance, up to a limit of $35,000, with optional insurance for higher amounts. It was felt to be necessary to allow legal claims to continue because the automatic benefits derived from the scheme were fixed at such low levels, and were not related to individual earnings.

Ontario

46. Since January 1, 1969, legislation in Ontario has permitted motorists voluntarily to take out " limited accident benefits " insurance to provide compensation, on a no-fault basis, for anyone injured in an accident arising out of the use of their vehicles. (Six other Canadian provinces have followed the lead of Ontario and passed similar legislation.) However, this coverage was made compulsory in Ontario as from January 1, 1972.[5] In addition to medical expenses (up to a limit of $5,000) an earnings-related weekly disability benefit is payable (normally for not more than 104 weeks [6]) to an employed person unable to work: the rate is 80 per cent. of gross weekly earnings, up to a maximum benefit of $70 a week. A housewife who is unable to do her work receives $35 a week, for a maximum of 12 weeks. In fatal accident cases, lump sum compensation is payable: $5,000, if the breadwinner in a family dies, plus $1,000 for each surviving dependant after the first; $500, if a child under five is killed, and $1,000 in respect of the death of a person aged between 5 and 21.

Private insurance companies provide the no-fault protection under the Ontario scheme. In 1972, the cost of the new benefits was $9 a year for each vehicle; this was in addition to the premium for the normal liability insurance required to meet the continuing risk of legal liability for negligence.

British Columbia

47. As the result of the reports of a Royal Commission and a special legislative committee, British Columbia introduced, on January 1, 1970, a modified version of the Saskatchewan plan.[7] The scheme is however run by the private insurance companies, who compensate, regardless of fault, anyone injured in an accident arising out of the use or operation of a motor vehicle. For a totally disabled person, there is a maximum weekly benefit of $50, limited to 80 per cent. of gross weekly earnings; in case of death, various amounts are payable, *e.g.* $5,000 for the death of a head of a household under 64 years of age, plus $1,000 for each dependant after the first, and $50 a week for 104 weeks (plus $10 for each dependant after the first). (Motorists have the choice of paying for additional no-fault benefits above these limits.) In addition, all motorists must be insured against their legal liability for negligence.

Manitoba

48. In 1970, Manitoba passed an Act to set up the Manitoba Public Insurance Corporation,[8] a goverment agency, to provide no-fault benefits for all victims of road accidents. The death benefits are similar to those in British Columbia; an employee who is totally disabled receives $50 a week during disablement, while a partially disabled person receives $25 a week for a maximum of 104 weeks. In addition, lump sum " impairment

benefits" are payable for specified disabilities, up to a maximum of $6,000 for total disability. Those who want "extension coverage" beyond these minimum amounts can buy it from the Insurance Corporation. Premiums to support the insurance fund come both from drivers (whose rating differs according to age and sex, and who may be surcharged if they have "demerit" points) and from the owners of vehicles. There is also compulsory liability insurance in respect of negligence claims.

Summary of Canadian developments

49. The limited benefits provided under these Canadian statutes will give reasonable compensation to the average earner, provided he is not off work for a long period. But in the case of a high earner, or serious, long-term or permanent disability, the Canadian schemes are inadequate: a maximum of 12 weeks' benefit for an injured housewife, or 104 weeks for an injured employee, may be enough in the majority of cases, but are too limited to provide reasonable help for the seriously-injured whose needs are greatest.

In none of the Canadian schemes does the accident victim lose his chance of establishing a legal claim to damages for negligence. But he must deduct from his claim for damages any no-fault benefits which he has received. The cost of insurance premiums to the Canadian motorist is still relatively high, since he must continue to take out liability insurance to protect himself against the risk of his legal liability under the old rules. The administrative cost of a liability insurance system is high, since much work is involved in investigating the question of fault in each accident, and in assessing in each case the amount of damages to be paid to the individual claimant. In British Columbia, a government study of liability insurance found that 37 per cent. of premiums received was spent on administration, so that only 63 per cent. actually reached accident victims. On the other hand, the administrative expenses of the Saskatchewan no-fault scheme in 1966 were found to be 12 per cent. of the premiums received. The preservation of legal claims in negligence is therefore wasteful in money terms, and maintains the discriminatory treatment of accident victims—those who can prove another's fault may receive much higher compensation than those who cannot.

The United States of America

50. In the United States of America there has been, during the past two decades, an extensive debate about alternative methods of compensating the victims of traffic accidents.[9] There have been major studies [10] of the financial losses suffered by injured persons, and of the extent to which they are met by financial support from various sources, and many proposals for reform. The culmination of this debate has been, since 1968, a sudden burst of legislation in various states.

The Keeton–O'Connell Scheme

51. The pattern of change in American thought began with the proposals of Professors Keeton and O'Connell in 1965.[11] They advocated a basic protection plan, under which anyone incurring economic loss (such as expenses and lost earnings) resulting from personal injury in a traffic accident would receive up to U.S. $10,000, regardless of anyone's fault. The injured motorist would claim directly against the insurer of his own vehicle, or of that in which he was travelling; only pedestrians and cyclists would claim

against the insurer of the vehicle which struck them. Benefits were to be paid on a monthly basis, up to a limit of $750 a month for loss of earnings, and would be calculated after taking account of any other support received by the claimant. People were to be encouraged to take out voluntary additional insurance cover beyond the ceilings provided by the basic protection plan. Claims for damages under the legal rules for liability were to be preserved only in cases of more severe injury, *e.g.* where the damages for pain and suffering would exceed $5.000.

This plan was extensively discussed in various journals and conferences, and was at first opposed by the insurance companies who feared the proposed changes, and perhaps even nationalisation, as well as by many lawyers whose practices would suffer. The controversy led to various inquiries at governmental level, the most important being that conducted by the United States (Federal) Department of Transportation in its mammoth Automobile Insurance and Compensation Study. This consists of many separate reports and runs to more than 20 volumes. The final report was published in 1971.

52. In 1968, Puerto Rico enacted a "Social Protection Plan" which gives automatic compensation to all accident victims with minor injuries. Negligence claims through the courts continue for larger losses, *e.g.* more than $1,000 for pain and suffering, or more than $2,000 for economic loss. By the end of 1972, this break-through had been followed by many other states: Connecticut, Delaware, Florida, Illinois (later held to be unconstitutional by the State Supreme Court), Massachusetts, Maryland, Michigan, Minnesota, New Jersey, Oregon and South Dakota. In 1973, they were joined by New York. Once this number of States has moved over to no-fault insurance, it is only a matter of time before most of the others follow.

53. There is a considerable variety of detail in the American no-fault systems. In all of them ceilings are fixed for the automatic benefits payable to accident victims. Sometimes the ceilings relate to medical expenses (up to $2,000 in some cases and $3,000 in others); sometimes to loss of earnings ($3;120 in two States, $5,000 and $6,000 in another two, but up to $36,000 in Michigan); but often the ceiling is an overall maximum covering both types of loss. Until recently, the overall maxima ranged from $2,000 to $10,000, but New York has greatly enlarged the scope of its no-fault scheme by fixing a maximum of $50,000.

54. In nine of the states the no-fault scheme is compulsory: either the owner of a vehicle can only register it after taking out no-fault insurance, or this cover must be part of any motor insurance policy taken out by a motorist. In two of the states, participation in the no-fault scheme is optional.

55. There are also variations in the rules on whether, in addition to his no-fault benefits, the accident victim retains the right to claim damages for negligence. In six states, if the vehicle-owner has taken out no-fault insurance, he is entitled to a limited exemption from civil liability in negligence. For instance, in Massachusetts, an injured person cannot sue for "general" damages (*e.g.* for items like pain and suffering) unless his medical expenses exceed $500, or in Florida $1,000. In Michigan, a claim for damages may be brought only in cases of death, or permanent disability, or where the injured person suffers substantial impairment of a bodily function. In five other states, there is no restriction on entitlement to receive damages [12]; but where the accident victim recovers damages, the amount of no-fault benefits received by him is deducted from the total sum assessed as damages.

56. The short experience of the working of the no-fault schemes in

America indicates that there are likely to be substantial savings in insurance premiums. Many injured persons are apparently satisfied with the prompt payment of the limited benefits under the schemes, and do not consider it worth the trouble of claiming damages in addition, or are unwilling to incur the risk of litigation. In Massachusetts, the average cost of a claim has gone down, and there has been almost no litigation on questions of entitlement under the scheme. A surprising aspect of the American experience is that over recent years a substantial proportion of the insurance companies has come to support no-fault schemes. Indeed, in some cases they have been urging more ambitious schemes than the state legislatures have accepted.

57. The recent American developments are experiments of great importance to the United Kingdom. They show that no-fault insurance for road accident victims can be handled by private insurance companies, if that is preferred to a national or governmental agency. They will also soon provide reliable evidence of the cost of no-fault insurance, so that actuaries in other countries will have information to guide them in costing proposals for similar schemes there. For instance, the experience in Massachusetts, since the no-fault scheme began, is that the frequency of insurance claims has not increased, but that, as expected, the average cost of a claim has gone down, so that substantial savings have been made, without any significant complaints of hardship. One authority has said that "the costs of compulsory bodily injury coverage to Massachusetts motorists in 1971 and 1972 were about half what they would have been if the law had not been changed." [13]

58. The weakest feature of the American solutions is the failure to provide substantial "no-fault" compensation for catastrophic losses, when a person is seriously and permanently disabled. Those with less serious injuries are reasonably compensated, but the greater the loss, the less truly compensatory are the no-fault benefits. It is in the serious and long-term instances that the needs of the injured person and his family present the strongest claim for assured assistance from the rest of society, and yet these are the very cases for whom the "forensic lottery" is preserved. Although a legislature must obviously try to keep control of the total cost of a no-fault scheme, it is our view that compensation for those with long-term disabilities should be as speedy and certain as for those with shorter-term disabilities. Indeed, if any group should be given preference, it should be the former. The much higher benefits provided in the more recent New York and Michigan statutes may reflect a growing appreciation of the fact that the savings achieved by eliminating the small claims based on negligence can be used to provide more substantial benefits for the seriously injured.

New Zealand

59. To date, New Zealand has produced the most comprehensive scheme for compensation in the English-speaking world.[14] Under the Accident Compensation Act 1972 (which is to be brought into operation on April 1, 1974) there is one scheme for earners, and another for traffic victims. The earner is given insurance cover for 24 hours of every day, no matter where or how an accident occurs. This "continuous cover" entitles him to rehabilitation assistance and compensation for personal injury in any accident, provided that he has been ordinarily resident in New Zealand for twelve months, and earns a living by his own personal efforts, either as an "employee" or as a "self-employed" person.

60. Under the New Zealand Motor Vehicle Accident Scheme everyone

is entitled to claim: "... all persons shall have cover ... in respect of personal injury by a motor vehicle accident in New Zealand and death resulting therefrom." This includes accidents where the vehicle should have been registered and licensed but was not, or accidents involving the vehicle of a visitor to New Zealand, a vehicle being towed, agricultural trailers and invalid carriages.

61. The new scheme is to be administered by the Accident Compensation Commission consisting of three members, one of whom must be an experienced lawyer. The same benefits are payable under both the earners' and the motor-vehicle accident schemes. The main benefit is compensation for loss of earning capacity. If the accident arose at work, the employer must pay his injured employee his full week's wages for the first week. If the accident did not occur in the course of employment but, for instance, at home or on the roads, the injured person must himself bear the first week's loss of earnings. After the first week, "loss of earning capacity" due to the injury is compensated by earnings-related payments of 80 per cent. of the lost earnings up to a maximum level of earnings that is fixed from time to time. The present figure is N.Z. $200 a week, so that the present ceiling for weekly compensation for loss of earning capacity is approximately £80 sterling a week (80 per cent. of $200). Special provision is made for the lower-paid; below a certain minimum rate of wages, a full-time earner is entitled to 90 per cent. of his relevant earnings.[15]

62. Benefits under the New Zealand scheme are paid periodically, at intervals not exceeding one month. The Commission has a discretion, "in very exceptional circumstances," to commute the periodic payments of compensation wholly or partly into a lump-sum payment, but this will not normally be done if as a result the injured person will need to be given additional support from state funds.

63. If a person is permanently disabled, his benefit of 80 per cent. continues for the rest of his working life. Once the rate of his permanent benefit has been finally assessed, it cannot be *reduced*, even if he unexpectedly improves in both health and ability to earn. But if his medical condition deteriorates, he may ask for a further assessment to increase his rate of benefit. Earnings-related compensation ceases when the injured person reaches the age of 65, for at that point age benefit and superannuation become payable under the ordinary Social Security scheme in New Zealand.

64. The New Zealand Act has gone well beyond the American no-fault schemes in another respect. It gives compensation for certain non-economic losses. Thus, a lump sum up to $5,000 (approximately £2,600) is payable where the injury involves the permanent loss or impairment of any bodily function, or the loss of any part of the body. A Schedule to the Act lists many common impairments, for which compensation is fixed as a percentage of $5,000 (*e.g.* for total loss of an arm or the greater part of an arm, 80 per cent.; for total loss of an index finger, 14 per cent.). The Commission is empowered, in the light of medical and other evidence, to fix the percentage, or lump sum, in cases not covered by the Schedule.

65. In addition to any other compensation under the Act, an injured person may claim a lump sum (not exceeding $7,500) in respect of his loss of "amenities or capacity for enjoying life, including loss from disfigurement"; and for his "pain and mental suffering, including nervous shock and neurosis." The Commission has a discretion to decide whether the "nature,

intensity, duration, and any other relevant circumstances " of the loss, pain or suffering are sufficient to justify payment under this heading. It must also take into account, when assessing compensation, the injured person's " knowledge and awareness of his injury and loss."

66. The Act also provides compensation for expenses, as distinct from loss of earnings. The Commission may pay " actual and reasonable expenses and proved losses necessarily and directly resulting from the injury and death," but it will not pay for " damage to property; or the loss of an opportunity to make a profit; or any loss arising from inability to perform a business contract." The injured person may also claim the reasonable cost of medical treatment, drugs and appliances, to the extent that the treatment is not already covered by the Social Security Act, under which the state meets the cost of most medical and hospital treatment.

Under the heading of expenses, the Act takes account of the injured person's family or household group. Thus, if an injured person needs " constant personal attention," the Commission has a discretion to pay for his " necessary care . . . in any place of abode or institution." And a person who helps the injured person may recover " any identifiable actual and reasonable expenses incurred."

67. When an earner [10] is killed in an accident, the widow or widower, children and other dependants are entitled to earnings-related compensation. If the widow was totally dependent on her deceased husband, the rate of her benefit is half the earnings-related compensation which would have been payable to her husband if he had survived and suffered a total loss of earning capacity. The widow's benefit ceases upon her remarriage, but a lump sum, equivalent to two years' benefit, is then payable to her as a " dowry," if she is under 63. A child totally dependent on the deceased person receives one-sixth of the rate of compensation which would have been payable to the deceased. For any other person dependent on the deceased the Commission has a discretion to fix a rate of compensation in the light of the degree of dependence and all other relevant circumstances.

68. In addition to the earnings-related payments, dependent survivors are entitled to various lump sums: thus, a widow or widower, or—in the discretion of the Commission—any person living with the deceased person as his or her spouse, receives $1,000 if totally dependent on the deceased. A child of the deceased, or a person whom the Commission decides to treat as a dependent child, receives $500 if totally dependent.

69. An injured person cannot claim under the New Zealand Act if he " wilfully " inflicted the injury on himself. Nor is there a legal entitlement to benefit following a death due to suicide. But in either situation, if the dependent spouse or child of the injured or deceased person " is in special need of assistance," the Commission has a discretion to pay compensation.

70. The scheme is supported financially from different sources. The aim seems to be to collect from motorists and employers much the same amounts as they paid in insurance premiums under the old system. The Earners' Compensation Fund is supported by levies on employers in respect of the earnings of employees, and by levies on self-employed persons. Differential rates may be fixed for various categories of earners, industries and occupations, and the Commission may fix a penalty rate for any employer or self-employed person " whose accident record is significantly worse than that normally set by others of the same class," or a rebated rate of levy for those whose accident rate is significantly better than the

norm. The Motor Vehicle Compensation Fund is supported by levies on every motor vehicle required to be licensed annually and by annual levies on all holders of drivers' licences (this driver's levy is initially to be $2). Penalty rates may be fixed for " drivers and classes of drivers whose driving or accident record is significantly worse than average."

71. A claimant who is dissatisfied with a decision of the Accident Compensation Commission may apply for a rehearing before a special Hearing Officer. From his decision, there is an appeal to an Appeal Authority, and finally to the ordinary courts. The discretionary powers of the Commission, especially on matters of non-economic loss, are likely to give rise to disputes, which will make the scheme more expensive than one which did not need individual assessments.

72. The administration of the scheme is in the hands of a special Commission appointed by the Government, but some of this work may be left to the private insurance companies, which can be appointed agents of the Commission to collect levies, handle claims and pay benefits.

73. Claims for damages for negligence are largely abolished under the scheme, since if an injured person has a claim for compensation under the Act, he cannot claim damages. However, there are some cases of personal injury not yet covered by the Act, *e.g.* where a non-earner is injured in an accident not on a road; in these cases the injured person will still be entitled to damages, if he can prove that his injuries were caused by someone else's fault. But the Labour Government elected in New Zealand at the end of 1972 has reaffirmed its pre-election pledge to extend the scope of the Act to non-earners such as housewives, pensioners and children, irrespective of the type of accident in which they are injured. This extension would make the scheme much simpler, since the difficult line of demarcation between earners and non-earners would disappear and claims in tort for damages for death and personal injury would disappear entirely.

74. The great advance made in New Zealand is that the concept of fault is no longer relevant to the entitlement of an injured person to compensation, although it may still be relevant to raising money for the scheme to the extent that employers or motorists may find themselves paying higher levies. But the scheme has not paid much attention to the different degrees of risk in the various situations in which accidents occur. For instance, airlines are not required to make any special contribution to the cost of accidents, despite the fact that " earners " killed or injured in aircraft accidents in New Zealand will be covered by the scheme. While therefore careful attention has been paid to the fairer distribution of compensation, the ways in which the cost of accidents might be allocated to different groups in society have not been as thoroughly considered.

Australia

75. The Federal Government in Australia has appointed a Committee of Inquiry into a National Rehabilitation and Compensation Scheme. Since its chairman is the Hon. Mr. Justice Woodhouse of New Zealand, who also chaired the Royal Commission whose report became the foundation of the New Zealand " no-fault " compensation system (described in paragraphs 59 *et seq.* above), it seems likely that the newly appointed committee will recommend a scheme for Australia on principles similar to those embodied in the New Zealand scheme.

REFERENCES

1. In this section of our Report we are heavily indebted to Professor André Tunc's contribution to the *International Encyclopedia of Comparative Law* (Vol. XI, Chapter 14). Here only a very broad outline of foreign legal systems is given, and it is obvious that in the absence of details, the generalisations cannot be completely accurate. It is also impossible to keep up to date with all current changes in the law throughout the world, and it may be that in some respects changes have occurred since the date of Professor Tunc's review (July 1970).

2. See para. 43 below.

3. The position is basically the same in some African countries. *e.g.* Ethiopia, Senegal and the Malagasy Republic.

4. Now contained in the Automobile Accident Insurance Act 1965, as amended by later legislation.

5. Insurance Amendment Act 1971, ss. 14 and 15.

6. Where a person is permanently and totally disabled, so that he cannot undertake any occupation for which he is reasonably suited, the weekly benefit may be continued beyond 104 weeks.

7. Insurance Act 1969, ss. 325 and 326, and Regulation 267/69 made thereunder.

8. Automobile Insurance Act 1970, followed by Regulation 48/71.

9. In 1932, there was the famous Columbia Plan: "The Report by a Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences."

10. *e.g.* Conard, Morgan and others: "Automobile Accidents Costs and Payments: Studies in the Economics of Injury Reparation" (1964) (known as the "Michigan Study"); The Federal Department of Transportation: "Report on the Automobile Insurance and Compensation Study" (1971).

11. "Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance" (1965).

12. In some of the states, the claimant is not allowed in his legal claim to plead or prove expenses paid by no-fault insurance. Normally. the amount of these expenses would be used to support a claim for damages for pain and suffering.

13. Professor Robert E. Keeton (1973) 121 *University of Pennsylvania Law Review* 590, 593 (Note 11). The change was made in Massachusetts on January 1, 1971. In 1970, the highest premium rate in the State for compulsory bodily injury coverage was $374 (for under-25 male car owners in Boston, without driver training); the corresponding rate in 1971 was $318 (including no-fault insurance to the limit of $2,000 per person) and in 1972, $237.

14. It is largely based on the report of the (New Zealand) Royal Commission for Personal Injury (1967), known as the "Woodhouse Report."

15. Special rules apply when the injured employee is under the age of 21; any permanent loss of earning capacity should take account of what, apart from the accident, he would have been earning after 21, or after he had obtained a qualification or completed an apprenticeship.

16. It seems that where a person who is not an "earner" is killed in a motor-vehicle accident, his dependants have no claim to benefits under the Act.

CHAPTER 4

CHOICES FOR GREAT BRITAIN

76. From what we have said in Chapter 2 of this Report, it seems to follow that a substantial degree of injustice will always, and necessarily, be inherent in a system under which the bulk of monetary compensation (other, that is, than the very low Social Security benefits which victims of road traffic accidents currently enjoy) is awarded by reference to "fault"; and since various no-fault systems have been adopted in other countries, including three important ones with an Anglo-Saxon common law tradition,[1] a study of these should help to clarify the choices which we would need to make, were we to decide to adopt a "no-fault" system in Great Britain. In this Chapter, we shall therefore attempt to list the matters on which choices need to be made in deciding whether or not to adopt a "no-fault" system here, before proceeding in the next two Chapters to a fuller discussion of the arguments for and against these choices, and the expression of our own conclusions on them.

"Fault" or "No Fault"

77. The first, and most obvious, question to decide is whether to make compensation for the victims of road traffic accidents dependent on any factor other than "fault." Before attempting any answer to that question, it seems to us important to draw attention to two considerations which have not always been made sufficiently clear:

(1) There tends to be a good deal of confusion between the fault of the victim and the fault of persons other than the victim.[2] These are in fact two quite different (and mutually independent) concepts of fault, from the retention or abandonment of which quite different consequences flow.

(2) Some of the compensation which is now given to accident victims in Great Britain is already given regardless of anyone's fault.

These points require some amplification, which we give in the following paragraphs.

78. Of all the injustices which the existing system inflicts, the greatest seems to us to be the necessity for the victim to prove someone else to have been at fault before he can receive any common law compensation at all, and it is largely from that factor that the other injustices of delay and expense directly follow. Any contribution which the victim's own fault made to the accident is secondary: that question can only arise once it is established that someone else was at fault. One of the main criticisms which opponents of "no-fault" systems raise is that it is morally wrong to compensate someone for injuries suffered in an accident which happened through his own fault, but that is by no means a necessary consequence of a "no-fault" system.

It would, for example, be perfectly possible to adopt a system under which any victim was entitled to compensation upon proof only that he suffered his injuries in a road accident (*i.e.* without having to prove that anyone else was at fault), but in which the amount of his compensation stood to be reduced in proportion to the degree of any fault which he himself bore in relation to the accident. At the other end of the scale, compensation could be wholly unaffected by the victim's own fault. A whole range of possibilities is available within " no-fault schemes," and the total exclusion of fault on the part of the victim is only one of them.

79. In considering, therefore, whether we should adopt any " no-fault " system of compensation in Great Britain, it will be necessary to make two separate and independent choices, namely—

(a) should compensation be granted without the victim having to prove any fault on the part of someone else?

(b) if so, should the victim's compensation be reduced (to nil, if need be) by reference to the extent to which his own fault is found to have caused, or contributed to, the accident?

80. As for the second of the points set out in paragraph 77, there is nothing particularly novel in the principle of " no-fault " compensation for personal injuries in Great Britain. Industrial injury benefits, for example, are already paid to victims of industrial accidents, and sickness benefits to victims of road traffic accidents, regardless of anyone's fault. (So, of course, are supplementary benefits, which are freely paid to the families of criminals serving prison sentences.) Again, it is possible to take out personal accident insurance, the benefits of which will be paid to the insured in the event of an accident regardless of who, if anyone, was at fault (provided the risk is not expressly excluded by the policy), and this is common practice today in many large commercial organisations.

81. Conceptually more important, perhaps, is the fact that every motorist holding comprehensive cover will be compensated by his insurance company for all damage to his vehicle occasioned by fire, theft, *or road traffic accidents* regardless (with few exceptions) of whether he or anyone else was at fault. All he does is to insure against a specified peril; if the peril occurs he is compensated automatically, and without any inquiry into who, if anyone, was at fault. The principal exception is the insured's own fraud or wilful act of destruction, but that is in reality only a quasi-exception, since in effect it negates the happening of the contemplated peril.

82. Finally, on this aspect of the matter, if the claim of a victim is seen, through the eyes of the owner or driver of a vehicle, as a peril which can be insured against, then it could be argued that everyone covered by a third party policy (that is, every motorist driving lawfully in this country) is now given compensation for damage arising to the victim as a result of the occurrence of that peril—*regardless of fault*. The accident may have been caused entirely by his own gross recklessness, yet (in the interests of the victims) the law will not leave him to bear the financial consequences himself, but insists that the whole of the burden falls on an approved insurance company. In this sense at least, therefore, the principle of " no-fault insurance " has been not only accepted, but enforced, in this country for more than half a century.

83. What is more, much of the damage suffered in accidents involving two or more insured drivers is in practice now compensated on a " no-fault "

basis, because under the almost universal " knock-for-knock " agreements, each insurance company compensates its own insured (unless he accepts a large " accidental damage excess ") regardless of the attribution of fault as between them.

84. From all this it seems to follow that the choice to be made is not so much whether or not we should have a " no-fault " system in Great Britain, but whether and to what extent the " no-fault " part of the system which we already have should be modified or extended to absorb part or all of the rest of the system, in which compensation still depends on " fault."

Beneficiaries of compensation

85. The next question for consideration is who should be compensated, and for what. In discussing this, we shall for the moment assume that there has been no relevant fault on the part of the victim: if there has, then whether the compensation otherwise payable should abate, and if so to what extent, is a question that has to be considered separately.

86. As to who should be compensated, the obvious answer must be " anyone who has suffered as the result of a personal injury incurred in the accident." That will be, in the first instance, the victim, but if he is seriously disabled or dead, an additional burden will fall on his dependants. One question to be resolved will therefore be whether, and if so in what circumstances and to what extent, they too should be included within the range of persons to be compensated.

Extent of compensation

87. The following list is, we think, exhaustive of the possible kinds of damage which a victim of a road traffic accident and his dependants can suffer as a result of the accident, and from which the choices about the extent of compensation will need to be made:

(a) *damage suffered in monetary form* (" *economic loss* ") [3]

(i) loss of earnings during total or partial incapacity from work [4];

(ii) loss of other monetary benefits during or as a result of incapacity (*e.g.* reduction in ultimate pension rights);

(iii) expenditure incurred by reason of the injury;

(iv) damage to, or destruction of, property;

(b) *damage suffered in other than monetary form* (" *non-economic loss* ")

(v) shock, pain, suffering, inconvenience and discomfort;

(vi) loss or impairment of function, including loss or reduction of use of an organ or faculty;

(vii) loss of amenity (almost invariably as a consequence of loss of function), including disfigurement and loss of enjoyment of life;

(viii) abbreviation of life.

88. The choices which will have to be made in this connection appear to us to be these (though there may well be others):

(a) Should loss of earnings be compensated in full, or at an earnings-related rate, or at a flat rate which is equal for all?

(b) Should non-economic damage be compensated *ad hoc*, as at present (which would mean at least occasional recourse to some superior tribunal for guidance as to quantum) or according to a fixed schedule —so much for the loss of an eye, so much for so much loss of articulation in a limb, etc.?

Form of compensation

89. Traditionally, there are two forms in which monetary compensation can be paid: either as a lump sum once and for all, or as regular periodic payments. Their respective advantages and disadvantages have been frequently debated in the context of our existing system. Some (but not all) of the arguments previously rehearsed on this issue would still be valid under any new system, and there may be others which would be relevant under a new system but are not relevant to the existing system, or are of greater or lesser weight.

90. One of the important points to be borne in mind throughout any discussion on this subject is the importance of rehabilitation. In both human and economic terms, the aim should be to enable the victim of an accident to return to a life of useful and enriching work and leisure, rather than to remain for the rest of his days as an embittered pensioner. Compensation should therefore be designed, as far as possible, so as to encourage and promote rehabilitation of the victims.

Limits of compensation

91. Under the system which we now have, there are in theory no lower or upper limits for the damages recoverable at common law on a basis of full liability. In practice, there is a comparatively high " floor " below which it is simply not worth the trouble and (for all but the very poorest who would be entitled to legal aid without any contribution) the expense of suing. We think that this " floor " may be of the order of £75–£100, but it is of course to some extent mitigated by the entitlement to sickness benefit, at all events for those who have been employed (but not, it must be remembered, for most housewives, most students and all children). Again, there is an effective " ceiling " for the victim who substantially outlives his statistical expectation of life on which his damages were assessed, especially if his investment policy fails to allow adequately for inflation.

92. In considering any " no-fault " system, the presence or absence of " floors " and " ceilings " may have a substantial effect, in the first case on the cost of administration, and in both cases on the total cost of the scheme. The introduction of a " floor " would eliminate many very small claims and could as a result substantially reduce the total cost of the scheme, as well as the proportion of the cost attributable to administration, while the imposition of a " ceiling," especially for non-economic loss, might make it easier to calculate the actuarial cost of total benefits, and so make any scheme less " open-ended," especially in its early stages when the claims experience is still incomplete.

93. It is a piece of trite wisdom that quality costs money, and that perfection is unattainable. A consideration which, we suspect, will ultimately prove crucial in weighing the merits of any proposed " no-fault " scheme against another is that, in the last analysis, one has to decide how many blemishes one is willing to accept in return for substantial savings—or, conversely, how much one is willing to pay for each successively smaller advance towards perfection.

94. In the field which we are considering, the aspects of perfection towards which society strives seem to be these, in order of relative importance:

(1) *justice*, in the sense that no one who is entitled to compensation should be denied it;

(2) *certainty*, in the sense that as soon as anyone has suffered injury, he should know whether or not he will be compensated;
(3) *speed*, in the sense that everyone who is entitled to compensation should have it as soon as he needs it;
(4) *accuracy*, in the sense that everyone who receives compensation should obtain it in the measure appropriate to his case—no more, no less;
(5) *justice* once more, in the sense that no one should receive compensation who is not entitled to it.

95. These are, of course, impossible demands to make on any system devised and administered by fallible human beings for other fallible human beings. But the list is useful in positing a scale of priority against which it is possible to measure cost. It is bound to cost money even to approach any of these ideals, and as one approaches them more closely the cost will tend to rise exponentially. What has therefore to be considered is how much the contributors to, or the recipients of, the benefits of compensation are willing to pay to approach each of these ideals by each successive stage of improvement.

96. In placing justice (in one of its aspects) at the head of our list, we are conscious that we are making a specific choice between two tenable positions. For it might be argued that, if our concern were only for those who go begging for lack of compensation at law, the answer is to be found more readily in improving social security for the poor than in a reform of the system of compensation in its entirety. But, in the view that we take of justice, it would be just as wrong to discriminate against the rich man who is reduced to a subsistence level, as it would be to discriminate against the poor man who is reduced below it. To give the latter certain and speedy relief is wholly laudable, but to deny it to the former appears to us arbitrary and inequitable.

Source of compensation fund

97. From the point of view of the community as a whole, who pays the compensation is as important as who receives it. We have left this question to the end of our list of choices only because, at least to some extent, its resolution depends on the answers to earlier ones.

98. A fund designed to be used exclusively to compensate the victims of road traffic accidents can, in all common sense, only come from two possible sources:

(1) the community as a whole, as the common beneficiaries of our system of road transport, on the ground that those who reap the benefit must pay the price;
(2) that section of the community who, collectively, " cause " the victims' damage, on the ground that it is that section who put potentially dangerous vehicles on our roads.

We do not therefore subscribe to the view that those who expose themselves to a risk should bear its burden. If that were right, then whenever a pedestrian who had been so incautious or impoverished as not to take out personal accident insurance was crippled in a road traffic accident, we should be entitled to turn our backs on his personal calamity on the ground that he had only himself to blame.

99. If the choice of bearer of the burden were to fall on the community as a whole, the fund would simply be provided out of general taxation, and it would be irrelevant which source of taxation was in fact burdened with it. That position would be no different from that of, say, national defence or the National Health Service.

100. If the choice were to fall on what is called "the motoring community," a sub-group of choices arises, namely:

(1) whether the burden should be borne by owners, drivers or users; and in each case

(2) whether it should be borne in proportion to the use made of vehicles, or to the danger which they create.

These are not, of course, mutually exclusive alternatives: many permutations and combinations are possible.

Administration of compensation fund

101. On this issue, the form at least of the choice is simple: should the fund be administered by the state, or by the private sector, or by both? To some extent, this choice may involve issues of party-political dogma with which, as an all-party organisation, JUSTICE is not concerned. But there are also genuine considerations of efficiency, economy, incentives, and available manpower and expertise involved, which may well make it essential to make a choice.

Prevention and rehabilitation

102. We have already mentioned rehabilitation, but we think it is so important that it is worth raising it again. To use a medical metaphor, the avoidance of accidents is prevention, the rehabilitation of the victims is the cure, and compensation can never be more than a palliative. Prevention is notoriously better than cure, but cure is in its turn better than any mere palliative. We therefore regard it as a matter of the first importance that any system of road traffic accident compensation which we choose, as a society, to substitute for that which we now have should encourage far more to be done than is now done to reduce the number of such accidents and to rehabilitate their victims, and to provide the means for making this possible. In saying this, we do not wish to be thought to devalue what is already being done in these fields at the present time, but we share the view of many who are involved in this kind of work, that substantial returns could be expected from an increase in the investment in it and that such an increase is well within our collective means.

REFERENCES

1. United States of America, Canada and New Zealand; see Chapter 3 of this Report.

2. See, for example, the Society of Conservative Lawyers' report, "Compensation for the Injured" (1970).

3. We prefer the expression "economic loss" to others (not always synonymous) such as "pecuniary loss" or "special damage," and will use it in the rest of this Report.

4. It will be noted that we do not here draw the usual distinction between loss of *past* earnings, and loss of *future* earning *capacity*. The distinction depends on an arbitrary date (*i.e.*, under our present system, that of the trial) and for the moment we prefer to include both under the one head of earnings actually lost throughout the period of incapacity.

CHAPTER 5

NO-FAULT INSURANCE: BENEFITS

103. Having described the field of choice, we must now attempt to set out the arguments for and against each of the alternatives involved. We have given some thought to the question of whether we should stop at that point, and leave the conclusions to be drawn by others; but we have decided that, having gone so far, it would be pusillanimous for us not to attempt to make a choice for ourselves. Our choice cannot, after all, commit anyone else, but the result of making it is a specific scheme which can provide a focus for criticism, discussion and debate.

104. We have, however, found it easier to make up our minds about some of the alternatives than about others. Where the answer seems to us to be clear, we have said so, but where we think that it may depend on the ascertainment of more facts than we have at our disposal, or where the choice has seemed to be evenly balanced, we have said that too.

We have divided the presentation of our proposals into two chapters, this one dealing with benefits and the next with costs. There is no special logic in this: it is merely a matter of convenience of presentation.

Fault of persons other than the victim

105. We have already said that it is our clear conclusion that any system of compensation designed to avoid the injustices of the one we now have must be a system in which compensation is awarded regardless of whether any person other than the victim is considered to have been at fault. We hope that what we have said in Chapter 2 of this Report will suffice to ground this conclusion, and that we need not therefore repeat it here.

But we should perhaps deal at this point with two objections which have in the past been raised against the "no-fault" principle as such, and this we do in the next two paragraphs.

106. *"It would remove or diminish an important deterrent against carelessness on the roads."* This objection to a new system would certainly have force if the present system contained such a deterrent. We do not however believe that it does, for the following reasons:

(1) In so far as the threat of civil litigation against a negligent driver could be a deterrent, it has not been a real threat in Great Britain for more than 50 years: that is, since third party insurance became compulsory. Every driver who is lawfully on our roads now knows that if he negligently kills or maims someone else, his insurance company will take care of his civil liability.

(2) We believe that the threat of criminal prosecution is potentially a far more powerful deterrent. This will remain unaffected by any change to a "no-fault" system of civil compensation. We should moreover like to see the criminal law in this field enforced much more stringently than it is now.

(3) Another substantial deterrent, for those who have to pay it themselves, is the annual cost of insurance. Insurance companies already load their premiums against drivers whom they regard as creating greater risks on the ground of their lack of experience, their need to drive in areas of high traffic density, or their accident record. There is no reason why such loadings should not be applied to a "no-fault" system: indeed, in paragraph 167 below we suggest some ways in which they could be made more sophisticated.

(4) From our collective experience, we are convinced that the most important deterrent is the individual's fear of personal injury to himself. That fear far exceeds any fear of not being compensated, and we will have occasion to refer to it again in paragraph 110 below.

(5) Most road traffic accidents are caused, not because the driver has recognised a situation of danger and failed to take the appropriate precautions, but because he has not recognised the situation as a dangerous one until it is too late. To that extent, most accidents are unique.[1] Although the law of tort may regard it as "negligent," such conduct cannot of its nature be improved by introducing greater deterrents, but only by ensuring that dangerous situations are recognised more often, by providing more and better road signs, by road safety campaigns, and by raising the standards of drivers' skill and responsibility on lines such as those which the Institute of Advanced Motorists has pioneered with such success for a number of years. Responsibility for bringing about such improvements is currently divided among a number of bodies who all have to compete for funds, and it would be an excellent thing if one authority, like the body which would have to be created to administer or supervise any national compensation fund, were also to be charged with overall responsibility for supervising accident prevention, while at the same time having available to it the means and the expertise to discharge that function.

107. *"It would greatly increase the total cost of compensation and so of premiums."* We shall have to return to this objection in greater detail in Chapter 6 of this Memorandum, where we deal with the cost of our proposals. At this point, we would merely repeat that cost is a corollary of the extent to which any compensation scheme seeks perfection, a point which we have already made in paragraphs 93, 94 and 95 above. The imperfections of our present system are such, despite what some may regard as its inordinately high cost, that it seems virtually certain that a closer approach to perfection can be bought for no greater price.

The victim's own fault

108. Quite separate considerations apply when one turns to consider the question whether the victim's own fault should affect his recovery of compensation. In the paragraphs which follow, we set out the arguments which appear to us to be material to this issue.

109. If *any* degree of fault on the part of the victim were to affect his

compensation, a conscientious administrator of the compensation fund would need to investigate each claim to see whether it was, prima facie, a case of "victim's fault" and, in the event of dispute, submit it to adjudication. In that situation, none or virtually none of the present heavy costs of "fault investigation" would be saved. That consideration alone appears to us to be conclusive against taking into account the victim's fault where this consists in mere carelessness, of the kind which our civil law calls "negligence" and our criminal law calls "driving without due care and attention" or "without due consideration for other road users," or some of the conduct which may give rise to a charge of driving "at a speed or in a manner dangerous to the public." A further argument for the exclusion of "victim's carelessness" as a factor governing recovery is the fact that its present inclusion as such a factor creates, as we have shown in Chapter 2 above, substantial injustices which call for reform.

110. Here again, it may be objected that the removal of this factor may exclude an existing deterrent against carelessness. But here again, we do not believe that such a deterrent operates in practice. We doubt whether anyone drives more carefully for fear that, if injured, he will not be compensated; the principal deterrent, surely, is fear of injury—not fear of injury without compensation. No one would view the prospect of a lifetime of paraplegia with equanimity, even if he knew for certain that he would have £50,000 or more in his bank account, or continue to be paid his wages as long as he lived. Again, we think the sanctions of the criminal law operate as a far greater deterrent than those of the civil law, especially if they were known to be enforced with the utmost rigour, as we believe they should be.

111. Lastly, it appears to us lacking in both charity and compassion to say to someone who has been injured: "Because you did not take enough care for your own safety, we deny you the help in your adversity which we would otherwise feel impelled to give you." And such an attitude is even less defensible when expressed to the victim's dependants, who are wholly innocent of any "fault." No private accident insurance or life assurance undertaking adopts this attitude; nor is it adopted by the National Health Service or the Social Security system.

112. There is, however, a limited number of cases where we would think it right to reduce or even deny compensation to a victim on the grounds of his "fault." These are the cases where the fault is so grave that most people would positively revolt against the notion of giving the victim full compensation. One obvious case is where the injury is wilfully self-inflicted. Another is that of the criminal who is injured while using a vehicle in the course or furtherance of a crime of violence to which he is a party, or while escaping apprehension after its commission. It does not appear to us to be fruitful to pursue the question whether such a "common-sense" reaction is wholly rational; the fact is, we believe, that the contrary proposition would not be acceptable to responsible public opinion.

113. Between "carelessness" and "outrageous conduct" there is an area on which views legitimately differ. These cover such activities as driving while drunk, disqualified or uninsured, taking and driving away someone else's car without his consent, or wilfully engaging in some exceptionally hazardous exercise such as racing on the highway. There is a case for saying that persons injured while driving in such circumstances should not be compensated at all. There is a better case for saying that they should be compensated, but to a lesser extent than wholly innocent victims. There is

also some case for saying that they should be punished for their crimes, and compensated for their injuries when they have paid their debt to society. Although any final decision on this question will probably excite strong feelings whichever way it goes, we do not regard it as being of an importance comparable with that of many of the other issues on which a choice between alternative courses will have to be made. Were the question left to us, we would recommend that compensation should be reduced whenever gross or wilful misconduct is established against the victim in the course of a criminal prosecution.

114. In those cases where it is finally decided that there should be a reduction or denial of compensation by reference to the victim's own fault, there are, as it seems to us, three methods by which this can be achieved:

(1) By analogy with the Criminal Injuries Compensation Board's practice, adopting the concept of the "undeserving victim" in the sense that "having regard to his conduct before and after the events giving rise to the claim, and to his character and way of life, it is inappropriate that he should be granted a full award or any award at all."[2]

(2) By adopting the concept of what is sometimes conveniently, if inelegantly, called a "tort fine," whereby the victim is effectively fined for his "fault" by having deducted from his compensation a predetermined sum representing the penalty he must pay for his wrongdoing. If compensation is paid as a lump sum, the whole fine is deducted at once; if it is paid periodically, the fine is deducted in instalments until all of it has been recovered by the compensation fund.

(3) By denying compensation altogether in extreme cases of fault such as those which we have mentioned in paragraph 112 above (that is to say, where the victim wilfully inflicted the injuries upon himself, or suffered them as a result of his own criminal activities) but giving full compensation in all other cases.

Either of the first two of these methods leaves the administrator of the fund with a considerable discretion, and may be objected to on that ground. In this respect, the second method is preferable to the first. In either case, an appeal procedure should go far towards eliminating any risk of arbitrariness. This ground of objection is of course avoided by the third method.

Beneficiaries of compensation

115. The class of persons eligible for compensation under the scheme which we propose should, in our view, be all those who have suffered the direct consequences of personal injury resulting from any accident involving the use of any vehicle on any road. In particular:

(1) We do not think that any distinction should be made between those who were, at the time of the accident, in gainful employment and those who were not. Their suffering is the same, and so, in our view, should be their right to be compensated. The distinction drawn in New Zealand between "earners" and "non-earners," apparently based on some notion of enlightened self-interest on the part of the community, does not commend itself to us. We see no reason in principle why housewives, students, and children should not be compensated in the same way as those earning a living. The right

criterion in cases such as these appears to us to be one of need rather than of past contribution. A victim should be compensated for whatever he has lost.

(2) In many cases, some or even most of the burden of the consequences of the victim's injuries will fall on his family. Any such scheme as we propose must therefore allow for compensation to be paid over to them in appropriate cases. The most obvious of these is the case where the victim himself has died from his injuries or is unable to manage his affairs, but there may well be others. And by " family " in this context we mean those who were at the time of the accident actual dependants, regardless of their legal relationship to the victim. Proof of dependancy should be enough to ground entitlement, without the additional obligation of proving legitimacy of marriage or descent.

(3) We can think of no valid reason why " vehicles " should be confined to those equipped with engines. To a man whose hip is broken as the result of being run down by a bicycle, it is immaterial that the vehicle which collided with him had no motor.

(4) Nor do we know of any valid reason why compensation should be confined to injury suffered on the public highway—as, in practice, it now is by virtue of sections 143 and 196 of the Road Traffic Act 1972, adopting a definition which has been applied for many years. It is not vehicles on roads that cause injuries, but vehicles wherever they are, and the injuries are the same whether they are sustained on a public highway, a private drive, or a beach, or in a house or shop into which a vehicle happens to career. (Different considerations may however apply where the accident occurs on, say, a motor racing circuit.)

Extent of compensation

116. In principle, we think that all the heads of damage which we have listed in paragraph 87 above should be compensated, on the principle which is followed by the common law courts under the present system, namely that the claimant should be given such sums of money as will make good to him the loss which he has suffered, in so far as it is possible to do so by monetary relief (which in the case of non-economic losses it is not).[8] All the heads of damage which we have listed are heads of which anyone who has suffered them would be acutely aware: none of them is in any sense fanciful or too insignificant to merit consideration,[4] and in a perfect world all of them would be compensated as far as possible.

117. But this is a far from perfect world, and there may well be limits not so much on what the community can afford, but on what it is willing to pay. We revert to those limits in Chapter 6 of this Report.

Form of compensation

118. Before considering the quantum of compensation, it is convenient to consider the form in which it should be paid. The principal difference between the administration of a " no-fault " system such as we propose and the administration of our present system in this country is that, under the former, there need be no " fault investigation " in any but the tiny minority of cases where there is reason to suspect that the injury may have been

self-inflicted, or incurred in the course of an activity so anti-social as to justify denial or reduction of compensation (see paragraphs 112 and 113 above). Adjudications can therefore be completed very much more quickly: indeed, benefits can begin to be paid as soon as there is, say, a police report on the accident naming the claimant as a victim, and a medical certificate certifying that he was injured and is not fit for work. At that point, it would be quite impossible even to guess, in any case where the injuries are more than trivial, what the victim's ultimate need of compensation will be. That consideration alone appears to us to be conclusive of the proposition that at all events economic loss should under our scheme be paid periodically, and not in the form of a lump sum. We would in any event have inclined to this recommendation, since there are a number of problems traditionally associated with lump sum awards which are not attracted by periodic payments (see paragraph 28 above).

119. There may, however, be certain exceptional cases where it may be desirable, in the victim's own interests, to commute for a lump sum some or all of the future periodic payments for economic loss. It could be, for example, that his best hope for rehabilitation to some kind of happy and useful life is to take up farming, or to acquire or start up a business. Again, a case of " compensation neurosis " may recover quickly on payment of a final lump sum. We recommend therefore that the administrators of the fund should have power, in their discretion and only if they are satisfied that in the exceptional circumstances of the case it would serve the victim's best interests, to commute to a lump sum all or part of his remaining entitlement to periodic payments for economic loss. The lump sum should be computed on actuarial principles. The interests of the fund should never be a ground for such commutation, and before periodic payments are commuted, even at the express request of the victim, he should be given the fullest actuarial information, clearly and simply presented, to enable him to understand the financial consequences of such a course.

120. In the case of non-economic loss, the position is not quite the same. On the one hand, this too is suffered day by day, week by week, and month by month, and only comes to an end when there is a substantial change in the victim's condition, either because he recovers, or because he dies. In the case of non-economic loss also, therefore, there is a case for periodic rather than lump sum payments. On the other hand, it is possible to imagine a number of circumstances where payment of a lump sum could provide more effective relief for non-economic loss than periodic payments. We have in mind the acquisition of a motor car, or a move to a different and more suitable house, or the acquisition of alternative means of enjoyment or entertainment such as a television set, or books, or the capital equipment for a hobby or leisure activity, or in some cases the cost of remedial training or educational courses. There is also the powerful effect of a " sweetener " at the beginning of the period of disability. We would therefore recommend that the administrators of the fund should have a discretion to pay compensation for non-economic loss either periodically, or in one or more lump sums, or partly as one and partly as the other.

121. All periodical payments should of course be payable only so long as the appropriate head of damage lasts, and should be subject to review at any time in the light of changes in the victim's condition, or in the value of money. In the case of economic loss they should, on principle, be payable only until normal retirement date, if the victim is then still disabled, since

otherwise road traffic accident victims would be singled out for preferential treatment as against other old age pensioners.[5] In the case of widow's benefits, it will be necessary to make some provision for cesser or reduction on remarriage—perhaps, as in New Zealand, with a dowry. Benefits paid to a victim's children should normally come to an end at the age of majority, or the completion of full-time education, whichever is the later.

122. There should be no serious difficulty in assessing, year by year, the actuarial value of continuing claims on the fund.

123. In the case of compensation for property damage (see paragraph 136 below) we recommend that it should be paid in full, once and for all, on an indemnity basis, upon simple proof of the loss.

Extent of compensation

(a) *Economic loss*

124. In the case of economic loss, there are three practical possibilities. First, payments could be at a flat rate for everyone regardless of earnings lost; secondly, they could be fully earnings-related, and so replace all lost earnings; and, thirdly, they could be partly earnings-related, in the sense of being computed as a fraction of the earnings lost, that fraction being the same for everyone.

125. Of these, we see no merit in a flat rate. Such payments are already provided by Social Security in the form of sickness benefit and are therefore designed to ensure that at least the basic necessities of life are within the reach of even the most severely disabled.[6] We take the view that under any scheme of compensation such as the one we recommend these benefits should continue unaltered. Once that is done, there is no case for additional flat-rate compensation, bearing no relation to earnings lost. Indeed, compensation of that kind would penalise those who have lost more, and be over-generous (at the expense of other claimants on the fund) to those who have lost less. In any case, if compensation were to be awarded on such a basis, it would be essential to retain the tort liability system, with all its disadvantages, for those who have lost much more than the flat rate of compensation would cover.

126. We are therefore in favour of earnings-related compensation. It is arguable that this should equal 100 per cent. of the earnings in fact lost, but we think that there is a stronger case for making it a little less, such as 85 per cent. or 90 per cent. Such a reduction might operate as some deterrent against fraud, self-inflicted injury, and malingering, and at the same time provide an incentive for rehabilitation, but would not be so great as to inflict real hardship on victims. Significantly, a reduction of this order has been adopted in both New Zealand and the U.S.A., although the "no-fault" schemes in those two countries differ considerably from each other in many other respects.

127. Whatever proportion of earnings is chosen, it should of course only be a proportion of earnings *actually* lost. If, therefore, any partly disabled victim is able to earn a lower wage or salary in a different occupation, his compensation should be based on the difference between his earnings before and after the accident.

128. For this purpose, it may be convenient to adopt something akin to the criterion of a "percentage of disablement" used in industrial injury cases. We believe that this has worked well, and the system of medical

assessment associated with it has ample safeguards in the form of tribunals and appeals.

129. The only substantial difficulties which we foresee will arise in the case of those who were earning nothing immediately before the accident, such as housewives, students, children and the unemployed. The last of these classes is the easiest to deal with, since compensation can be assessed on the basis of the victim's earnings when he was last at work. In the case of children and students, we think that the administrators of the fund should not find it too difficult to assess the future earning capacity which the victim would have had if he had not been injured in the accident, and to compensate him accordingly if his disability persists into that period. The common law judges, after all, constantly have to make this kind of assessment.

130. Compensation for the incapacitated housewife should, in our view, be assessed by reference to the value of the contribution which she is no longer able to make to the family. Though this may vary as between one housewife and another, it should be capable of assessment. It is here perhaps that there is a case of sorts for flat-rate compensation.

131. Where there is proof of economic loss other than loss of earnings (such as, *e.g.*, loss of the perquisites of an office or employment, or expenditure directly caused by the accident, such as the cost of special food, etc.) this too should in our view be compensated.

132. In computing the quantum of compensation for economic loss under our proposals, we think it right that the victim should bring into account all Social Security benefits which he receives as the result of his injury, in full and throughout the period of his compensation (rather than, as is now the case, giving credit for only half, and that only for five years). We revert to this recommendation in paragraph 159 below.

133. On the other hand, we think on balance that there should be no need to bring into account benefits received from private insurance schemes, for which the victim or his employers have themselves paid.[7] We are conscious that the difference between these and Social Security benefits is not great, and accordingly the distinction in regard to their treatment is not one we would wish to press too far. But in so far as we contribute to Social Security benefits (as opposed to supplementary benefits) under legal compulsion, whereas private insurance is voluntary, that difference seems to us to be just enough to justify their being dealt with differently.

134. All medical and hospital treatment is now freely available to everyone under the National Health Service. Accordingly, there appears to us to be no further need for compensation under that head. Moreover, there are a number of insurance schemes which will provide the necessary money for private treatment, and it is open to anyone who wishes to have these benefits to take out the appropriate policy.

135. Where home nursing or attention is required, it should in our view be reimbursed at cost, as in effect it is at present. If the attention happens to be that of the victim's wife or husband, we see no reason why that should not be reimbursed precisely as if it had been obtained and paid for outside the family.[8] Equally, if and so long as home nursing is provided at public expense, there is no direct cost to the victim and no case for compensation.

136. The final head of economic loss is damage to property. Here we think that there is a special case for not giving compensation, except in a very limited number of situations. Any substantial loss of property presupposes that the owner was sufficiently well off to have acquired the object

concerned, and to that extent it is likely that his need will be less than that of others who are less fortunate in not having substantial property to lose. More important, damage to property can be easily and cheaply insured against, whereas it is difficult, and in this country still very expensive, to insure against loss of earnings. Also, damage to property in general brings with it far less privation than personal injury. Lastly, the incentive for fraud (both as to valuation and as to the infliction of damage) is far greater in the case of property.

137. There is, however, one exception, and that is in respect of items of property, such as glasses, false teeth and artificial limbs, which are essential to those who need to have them, and effectively form spare parts for their bodies. In so far as damage to these is not already covered by the National Health Service, we recommend that the cost of repair or replacement should be included in compensation for economic loss under the scheme which we propose.

(b) *Non-economic loss*

138. The quantification of economic loss stands on a totally different footing from that of non-economic loss. In the former case, money replaces money; in the latter, money is put in the place of things which no money can buy, and whose value cannot be expressed in terms of money. As the judges have frequently said, they do the best they can, but they know only too well that even the best they do can only assuage the loss, and can never compensate it in any true sense.

139. The first question which arises here is whether, under a " no-fault " scheme, payments for non-economic loss should continue to be made on more or less the same scale of values as that adopted by the common law judges under the present system. In answering this question, the prime consideration will undoubtedly be cost, and we therefore postpone what we have to say about it until Chapter 6 of this Report.

140. Whatever over-all scale of values is to be adopted, however, it will still be necessary to distinguish between different victims by reference to the relative seriousness of the consequences of their injuries. Here there is a subsidiary question to be answered: should there, as in New Zealand, be a fixed scale of benefits, or should each case be judged on its own merits? The fixed scale has the advantages of simplicity, certainty and low cost of administration. On the other hand, it is a form of " palm-tree justice ": the loss of a finger is a disaster incomparably greater for a pianist—even an amateur one—than it is for a solicitor, and it is the roughest justice to compensate both with the same standard sum. We are therefore inclined to favour *ad hoc* adjudication in each case, in the light of all its circumstances, although we are conscious of the inevitable increase in administrative costs which this would bring in its train for, at all events, some proportion of claims. On the other hand, it should not be too difficult to streamline the administration to a substantial extent, and we revert to this subject in paragraph 145 below.

141. We have one other comment which is relevant at this point, and that is in relation to the increasing number of victims whom medical technology is now able to keep alive in a state of permanent unconsciousness —the so-called " living vegetable " cases. Whatever may be said about the medical or social ethics of performing these technological miracles, it does not appear to us to be right to award victims in that situation any substantial

compensation for loss of function or loss of amenity. Until a few years ago, they would have died and received virtually nothing under this head; their compensation would have been limited to the heads of pain and suffering (if they did not die very quickly) and abbreviation of life. They, *ex hypothesi*, know nothing of their own condition or of the fact that by virtue of technological advance they are theoretically still " alive " when they would otherwise have been dead. Again, when we compensate someone for non-economic loss, we are essentially seeking to relieve his suffering, and suffering is by its nature an experience subjective to the victim. For all these reasons, we would recommend that in any scheme such as ours there should be no compensation for loss of function or amenity in cases of this kind.

142. By the same reasoning, we are in favour of abolishing altogether the head of " abbreviation of life " for those who have died of their injuries. Death comes to us all in the end, and once it has overtaken us, there is nothing to compensate us for.

143. In our view, compensation in the case of a victim who dies of his injuries should therefore fall only under the following heads:

(1) loss of earnings, payable to the victim until death and to his dependants during dependency thereafter;
(2) shock, pain and suffering (to the extent that the victim has suffered any);
(3) reasonable funeral expenses, perhaps at a fixed sum which takes into account the death grant payable under the Social Security scheme.

Assessment of compensation

144. In the case of both economic and non-economic loss, it will be necessary for quantum to be assessed. Though the cost of " fault investigation " will be avoided under a " no-fault " scheme, the cost of " compensation assessment " cannot be eliminated entirely. But it can, in our opinion, be substantially reduced by a change in attitudes and procedures. At the present time we have an adversary process, requiring detailed preparation, forensic argument, and finally adjudication by a High Court or county court judge. In our view, this procedure can safely be replaced by one in which there are no adversaries and in which everyone is equally concerned to find the best answer to the problem.

145. Such a procedure already exists, and works well, in many administrative tribunals, and especially those which have accumulated a wealth of experience in the assessment of benefits payable under the National Insurance schemes. We see no reason why such a procedure should not also be adopted for the assessment of compensation under a " no-fault " scheme for the victims of road traffic accidents such as we recommend. The victim would furnish evidence of his previous earnings and the findings of his own doctor, and a single official of the body responsible for administering the fund would make a provisional assessment of both economic and non-economic losses. Payments to the victim could begin at once, and the principal duty of the administrator would be to provide the victim with all the resources of rehabilitation and compensation available under the scheme. If the victim was dissatisfied with the assessment, he could appeal to a tribunal, which could have him examined by one or more doctors drawn from its own panels. Naturally, he should be given an opportunity of

presenting his case and, if necessary, would be legally represented and legally aided.

146. From that tribunal, there should be an appeal on a point of law to the courts—or it may be thought wise (as in New Zealand) to insert a further stage of adjudication on the facts before allowing recourse to the courts. The possibility of an appeal to the courts has the advantage of combating arbitrariness, and developing general guide-lines in the assessment of non-economic loss, if there is to be no fixed scale of payments under this head (see paragraph 140 above).

147. Such a system should in our view have all the advantages of speed, informality and humanity, as well as being far cheaper to administer than the one we have at present.

148. Lest we have not already made it sufficiently clear, we would emphasise that the scheme which we propose would take the place of the present action in tort, which would accordingly cease to be available for all those heads of claim for which a claimant receives compensation under the "no-fault" system. Only if it were thought right to exclude any of the existing heads of claim altogether from the operation of the "no-fault" system would we recommend the retention of the action in tort for that head. Thus if our recommendations in paragraphs 136 and 137 were accepted, the tort action would be retained only for cases of damage to property other than the very limited category for which our scheme would itself provide compensation.

REFERENCES

1. Professor Tunc (*op. cit.*) has estimated that, in France, only 5 per cent. of all road traffic accidents are the consequence of "real" fault, *i.e.* behaviour which was clearly unreasonable in the circumstances as they presented themselves to the drivers of the vehicles concerned.

2. Criminal Injuries Compensation Scheme (1969 Revision), para. 17.

3. See *Admiralty Commissioners* v. *S.S. Susquehanna* [1926] A.C. 655.

4. For a survey of American public opinion on this subject, see O'Connell, *op. cit.*

5. Unless, that is, the accident has resulted in the loss of a pension which the victim would otherwise have received, in which case this should be paid to him as part of his compensation.

6. When we refer here and elsewhere in this Report to benefits under the Social Security scheme, we have in mind the contributory benefits of the National Insurance scheme and not the non-contributory benefits of the Supplementary Benefits scheme.

7. See *Parry* v. *Cleaver* [1970] A.C. 1.

8. In *Cunningham* v. *Harrison*, *The Times*, May 18, 1973, the Court of Appeal came to much the same conclusion under the principles applicable to the existing system of compensation.

CHAPTER 6

NO-FAULT INSURANCE: COSTS

149. Had the Royal Commission not been appointed, we would have found it necessary to conduct a substantial inquiry into the costs of the present system of compensation, and to obtain reliable evidence of the effect which "no-fault" systems of different kinds could be expected to have on the total cost and on the proportion of the fund available for the payment of benefits to victims. We are very conscious of the difficulty of obtaining accurate information on this subject and the appointment of the Royal Commission fortunately relieves us of this task, which it is far better equipped to carry out than we are. In this Chapter, we therefore confine ourselves to general considerations on the subject of cost, and the marshalling of what seem to us to be at least the most important of the relevant arguments.

150. First, we should like to repeat what we have already said in paragraph 95 above, namely, that cost is exponentially related to the extent to which we attempt to approach perfection. If, for instance, we could have a substantially better system than our present one at no greater cost, the case for reform would be unanswerable. If, on the other hand, substantial improvements would be bound to cost more, Parliament would ultimately have to decide whether the improvement was worth the extra burden.

151. It should not, however, be forgotten that any additional burden can be arranged to fall on two quite different classes of people: those who contribute to the compensation fund, and those who benefit from it. At first sight, the former of these classes seems the obvious candidate for any extra burden, but it may well be the case that potential victims would also be quite willing to make a contribution by accepting some reduction in benefits in return for the very substantial advantages offered by a "no-fault" scheme in the form of certainty and speed of recovery, as against the present "forensic lottery." We are not suggesting here that any "no-fault" system would be defensible if it deprived victims who now succeed in obtaining compensation of substantial benefits, in return for giving other advantages to those who now fail, for that would merely be substituting one injustice for another. But it may be that small contributions towards costs from the many who are now successful would be an acceptable price for the substantial benefits which would accrue to those who now fail altogether.

152. Accordingly, we shall consider the question of cost in two parts:

(1) First, we shall discuss whether the introduction of a "no-fault" system, with benefits no less than those now given to successful claimants, is likely to prove more expensive than the system we have at present;

(2) Secondly, we shall consider the arguments for and against various means by which benefits under a "no-fault" system could be reduced, without causing hardship or injustice, in the event that

it is thought likely that a "no-fault" system with full benefits would cost prohibitively more than the present "fault" system.

Effect of a "no-fault" system on costs

153. It is certainly true that under a "no-fault" system, where the victim is entitled to recover without having to prove that someone else was at fault, there are potentially more claimants and, other things being equal, more benefits to be paid out. On the other hand, the experience of "no-fault" systems in other countries, described in Chapter 3 of this Memorandum, suggests that savings can be quite dramatic, since the entire cost of "fault investigation" is saved overnight. In paragraph 57 above, we cited the finding of Professor Robert Keeton that in Massachusetts the costs to motorists under the "no-fault" system in 1971 and 1972 were "about half what they would have been if the law had not been changed." The only comparable figure we have for Great Britain is that of an estimate [1] of administrative costs (including agency commission and other selling costs) as 74 per cent. of compensation payments in the case of road traffic accident compensation under the law of tort, as compared with 15 per cent. in the case of industrial injury and disablement. Converting these figures to percentages of total premium income gives 42·5 per cent. as the administrative cost of tort compensation for victims of road accidents, and 13 per cent. as the administrative cost of the Industrial Injuries scheme. Road accident victims therefore now receive only 57·5 per cent. of the gross premium income. By contrast, 87 per cent. of income is distributed to the victims of industrial injury and disablement, and this latter scheme is very closely analogous to the kind of "no-fault" scheme which we recommend, since in it the only inquiry which needs to be undertaken is whether and to what extent the victim was injured, and whether the injury arose "out of or in the course of" his employment. But even if the difference between these figures is thought to be overestimated (and there is no reason to believe that it is), and if only an additional 25 per cent. of total premium income could be made available for victims of road traffic accidents by the introduction of a "no-fault" scheme, the results could well be as dramatic here as they appear to have been in the U.S.A. The British Insurance Association, whose members handle about 82 per cent. of all U.K. motor insurance, records a premium income for its members of £M384 in 1972. The total United Kingdom motor insurance premium income for 1972, therefore, was about £M470. The BIA points out that less than 20 per cent. of the total claims costs relate to claims by third parties for bodily injury. Since the insurance companies generally contend that they make no profit out of this class of business, the cost of such claims could not be less than about £M90. On these figures alone, the introduction of a "no-fault" scheme could make available—at no extra cost—additional sums of more than £M20 in benefits for those whose claims at present, in our view quite unjustly, remain unsatisfied because they cannot prove that someone else was at fault.

154. It is difficult to assess the effect on the total cost of compensation of paying benefits to some of those who are now unable to recover, in whole or in part, because their own fault caused or contributed to their injury. We know of no published figures from which it would be possible to estimate how much they would recover if they could. But we have reason to believe that the additional cost in these cases would not be as great as

might be feared, and two considerations in particular are relevant in this connection:

(1) the class of those who are now denied full recovery, because they were themselves at fault, overlaps to some extent with the class who cannot recover at all because they cannot prove that someone else was also at fault. We have already explained why we are convinced that, in any new scheme, the second of these classes should be fully compensated: the addition of the first class should not therefore be thought of as leading to yet another substantial increase.

(2) the exclusion of the first class would, as we have already pointed out (see paragraph 109 above), necessarily result in the retention of "fault investigation" in all cases, and would thus make impossible the dramatic savings which have been shown to result from its abolition in other countries, and from which many who are now denied compensation could be paid the benefits which in common justice they should receive.

155. It will be remembered that we have also recommended (see paragraph 115 (3) above) that victims should be compensated regardless of whether the vehicle concerned was or was not equipped with an engine. Fortunately, the damage inflicted by vehicles without engines is diminutive by comparison with that inflicted by those which have them, and it therefore seems probable that no appreciable increase in cost would result from giving those injured by the former the same compensation as other victims of road traffic accidents.

156. We would also expect substantial savings from the system of "compensation assessment" which we recommend (see paragraph 145 above), and these too would go to swell the fund available for compensation.

157. All things considered, therefore, we think it probable that the savings to be expected from a "no-fault" system such as we recommend would suffice to compensate, on the same scale as that which obtains at present, the additional victims who now recover nothing, or only a part of their full entitlement. However, we are aware that this judgment is not made on anything like full information, and we therefore pass on to the next section on the hypothesis that it is unreliable and that we should therefore consider means of reducing the total cost of a "no-fault" scheme beyond the savings which are already inherent in it.

Limits of compensation

158. Unlike the present system, which imposes its own lower limit on claims through the trouble and expense involved in pursuing them, claims under our scheme would cost nothing to make. If in the result there were a huge rise in very small claims, the cost of the scheme, and of its administration, might increase greatly and make severe inroads into the savings which we expect from the abandonment of the process of "fault investigation" and the streamlining of "compensation assessment." There is therefore a strong case for setting a "floor" to all claims. In New Zealand, no claim can be made for the loss of the first week's earnings, which are made payable by the victim's employer if he was an "earner" and by himself if he was not. We assume that there are good actuarial reasons for this, since it is

notorious that a large number of small claims cost an insurance fund far more than a small number of large ones.

159. A similar " floor " should, in our view, certainly form part of any scheme which is adopted in this country. This can be provided automatically by requiring claimants to give credit for *all* social security benefits which they receive, rather than for only half of them, limited to five years, as is the case at present. We have already discussed this matter in paragraph 132 above.

160. More difficult problems arise on the question of whether there should be any, and if so what, " ceilings " for claims. In the case of economic loss, it seems to us to be wrong in principle to distinguish adversely, in either direction, between the rich and the poor. The loss of wages suffered by a badly-paid working man can be disastrous, but so can the loss of salary of a company chairman, especially if it continues for any length of time, since it may force his family to adopt a completely different form of life, sell their house, change their children's education, and so on. We do not therefore think that there should be any " ceiling " as such for economic loss. On the other hand, it would be manifestly unjust for anyone to receive more by way of compensation for loss of earnings than he would have received if he had remained fit to earn his living, and we therefore recommend that all compensation for loss of earnings should be paid after deduction of notional tax at the rate to which the recipient would be subject if he had earned them. This seems to us to be fair in all respects, both as between different claimants, and as between claimants on the one hand and the rest of the community on the other.

161. We think, however, that there is a good case for the compensation fund not to be obliged to account to the Exchequer for the tax so deducted, but to be allowed to retain it. In this way, the state could be said to be making a contribution to the fund, even though it is not from moneys which the state has actually received. Such a notional contribution would, in our view, reflect no more than the state's interest in compensating those who have suffered injury through the implementation of a national policy—in this case road transport—which exacts a social cost in life and limb. It may or may not be desirable to place upon the administrators of the fund an obligation to spend the tax so retained, in whole or in part, on safety and rehabilitation programmes, on the lines of the responsibility in this respect which is imposed on the Accident Compensation Commission in New Zealand. We have already expressed the view that a good deal more money, from one source or another, could usefully be spent in this way (paragraph 102).

162. The most difficult question which arises on this aspect of our scheme is whether there should be any " ceiling " on payments for non-economic loss. As a matter of principle, there clearly should not, for it is precisely those who have suffered the most serious injuries who are in the greatest need, and the courts have often pointed out that even the largest sums of money can never fully compensate them for what they have lost. Besides, a criticism which has often been made of " no-fault " schemes [2] is that they might compensate those who were themselves " at fault " at the expense of those who have suffered most without any blame attaching to them. We think that any " no-fault " system which is open to that criticism is to that extent defective, even though it might still, on balance, be an improvement on the existing system.

163. The " no-fault " schemes which have recently been adopted in the

United States compromise on this issue by excluding non-economic loss altogether from the scheme, and allowing claimants to sue for it in tort, above a (usually low) " floor," as before the adoption of the " no-fault " scheme. Such a compromise is less open to the criticism we mentioned in paragraph 162, since it at least leaves the badly injured no worse off than they were before. On the other hand, the result of such a compromise is to preserve the " forensic lottery " exclusively for those who have suffered most, and the justice of such a result is, to say the least, questionable. In our view, therefore, the most serious consideration should be given to finding means whereby those most badly injured can also enjoy the advantages of certainty and speed which are the greatest merits of a " no-fault " scheme.

164. We know of no reliable information on the extent to which the total cost of compensation under a " no-fault " scheme where there is no ceiling on compensation for non-economic loss would exceed the cost if there were some such ceiling, which on any view would have to be reasonably high (in New Zealand it has been fixed at $12,500). We would ourselves imagine that this excess cost cannot in fact be very great; the number of *very* seriously injured victims is always only a tiny proportion of all victims, and the excess of their recovery over any reasonably generous " ceiling " seems unlikely to raise the total cost of compensation to any significant extent. Besides, we think it likely that the proportion of very serious cases which receive compensation under the present system is already greater than the proportion of less serious ones. However, we have no reliable evidence on this and such soundings as we have made indicate that there is a good deal of uncertainty on the question.

165. In our view, therefore, there should be no " ceiling " on non-economic loss *unless* there were found to be compelling evidence that the absence of such a ceiling would have such a dramatic effect on the total cost of compensation as to put a " no-fault " scheme such as we recommend economically out of court. Only in that event would there be any case for retaining the present tort system to provide compensation above the " ceiling."

166. The single exception to this conclusion is the special category of " living vegetable " cases (already discussed in paragraph 141 above). There, we recommend, compensation for non-economic loss should be very substantially reduced.

Sources of compensation fund

167. The conclusions which we have reached on this aspect of the matter are these:

(1) Both the community at large, and the " motoring community " in particular, should, it can be persuasively argued, bear the moral responsibility for compensating the victims of road traffic accidents.

(2) We have already recommended that the state should " contribute " to the fund (at no real cost to itself) by not collecting the " tax " notionally deducted from periodic payments for loss of earnings. There is a case for proposing that the state should in addition make a real cash contribution to the fund, and it is this: the compensation which victims receive will be proportional to their earnings, but the contributions they pay into the fund will not. If the state were to allocate to the fund a small part of its revenue from taxes on income, the effect would be that those who pay these taxes at the higher rates

(because they earn more) would be making a greater contribution to the fund from which, if injured, they will draw earnings-related compensation.

(3) The balance should be found by the " motoring community," roughly in proportion both to the risk which its members create and to the benefits which they receive from the use of their vehicles.

(4) The motoring community's contributions to the fund should therefore come from all the following sources:

(a) A contribution paid by *owners* or *operators* of vehicles, graduated (as the road fund licence fee already is) by reference to size of vehicle, and subject to loading (or, it may be, rebate) for bad (or good) accident records. This contribution could be cheaply and efficiently collected together with the road fund licence fee, as it is for example in Puerto Rico.

(b) A contribution paid by *users* of vehicles, graduated by reference to the mileage run by each vehicle. This contribution could be cheaply and efficiently collected together with the motor fuel tax.

(c) A contribution paid by *drivers* of vehicles, which could be cheaply and efficiently collected together with the fee payable on the grant or renewal of driving licences. Here too there is scope for graduating the contribution by reference both to experience and to the accident record, at all events to the extent to which the latter is reflected by endorsements of the licence.

We think that these conclusions speak for themselves and require no further supporting arguments here, beyond saying that the graduating of contributions according to individual drivers' motoring records would act to some degree as a deterrent against bad driving, and an incentive to good driving.

Administration of compensation fund

168. In New Zealand, the fund is a state fund, but its administration is delegated to the insurance industry as the state's agents. This would appear to have a number of merits, including the availability to the fund of the expertise of those working in that industry, who are already fully familiar with the problems of accident compensation and their solutions, and would not need to find alternative employment if they could continue in their existing occupations. Such an arrangement would also save the substantial cost of competitive advertising for motor insurance, and possibly some or all commissions. Again, it may be that the insurance industry would, as in New Zealand, welcome the opportunity of using its expertise in administering such a scheme without having to bear any risk, and so not having to make reserves for losses which might otherwise increase the cost of the scheme, especially in its first few years.

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1. See Lees and Doherty, *Compensation for Personal Injury: The Economic Framework* (1973).

2. As, for example, by the Society of Conservative Lawyers: *Compensation for the Injured* (1970).

CHAPTER 7

EFFECT OF NO-FAULT INSURANCE IN OTHER FIELDS

169. It remains only to discuss briefly the relevance of the considerations which we have set out in the preceding chapters of this Report to accidents other than those resulting from the use of vehicles on roads.

170. First, it may be objected that, in recommending a scheme such as we propose, we are singling out road traffic accident victims for special privileges. To that we would answer as follows:

(1) There is clear evidence from a number of jurisdictions abroad that the adoption of a " no-fault " system for road accident victims has provided them with significant remedies for the real injustices which they still suffer here, at no greater (and in many cases at substantially lower) cost to the community. On that basis, we in the United Kingdom ought in all conscience to follow suit as quickly as we reasonably can, without waiting to resolve less tractable problems in adjacent fields.

(2) The three classes of accident which claim the largest number of victims each year are those on the roads, at work, and in the home. Accidents at work are already compensated largely on an earnings-related " no-fault " basis. Whatever criticisms may be levelled at that system, it inflicts none of the injustices inherent in the " fault " system. Almost without exception, accidents in the home are at present compensated (if at all) by sickness benefit alone, and to give full compensation to their victims would plainly cost very large additional sums of money. It is only in the case of road traffic accidents, therefore, that substantial new benefits can quickly be obtained at little cost.

(3) It is no answer to a proposal to put right a serious injustice that there are other injustices which should also be remedied, and that the proposed reform should not be implemented because it will not mitigate those other injustices also. Were that objection valid, no reform could ever be undertaken unless it reformed everything that needed reforming at one stroke. Partial reform is better than no reform at all.

171. However, even the earnings-related compensation awarded for accidents at work under the National Insurance Scheme is felt by many to be inadequate, and we hope to consider these criticisms in more detail in our next Memorandum to the Royal Commission. For the moment, we would only say that there seems to us to be no reason in principle why the scheme which we here propose for road traffic accidents could not be extended quite

simply to industrial accidents also. Indeed, in devising our scheme we have borne in mind the possibility of such an extension at a later stage.

172. Apart from accidents, on the roads and in all other contexts, other calamities occur, such as illness and congenital defects, whose effects are just as tragic, and yet at the present time their victims are compensated, if at all, only by sickness benefit. There is clearly a very strong case for improving the lot of these victims, if the community as a whole can afford it. We hope that what we have said in this Report may help to stimulate a more positive interest in devising improved methods of compensating the victims of such other calamities also.

173. One final point should not go unmentioned, and the mention of it will make a fitting end for this Report, submitted as it is by an organisation of lawyers. The most articulate and persistent (but in recent years increasingly uninfluential) opposition to " no-fault " schemes in the United States has come from the trial lawyers in that country. Were a " no-fault " scheme, such as the one we have proposed, to be implemented in this country, it would be bound to result, at least at first, in a substantial reduction in the collective earnings of the two branches of our profession, and the loss of much work that is today an important source of income for many individual practitioners. Being lawyers ourselves, we are of course very conscious of this problem, but precisely because we *are* lawyers, we have thought it better not to take its direct implications into account in assessing the pros and cons of " no-fault " systems, lest we should be suspected, on the one hand, of doing so merely in order to protect our own professional interests, or, on the other hand, of going to the opposite extreme of under-rating these consequences, merely in order to avoid being suspected of self-interest. Our profession is well provided with representative bodies who can speak for it, and it would seem more appropriate for them, rather than JUSTICE, to argue the merits of the profession's case.

174. However, we are convinced that there is plenty of other work for lawyers to do which would compensate for the loss of work in the personal injuries field; and not the least factor to be borne in mind in this connection is that the profession is, and has been for many years, suffering from a serious manpower shortage. In any event, the legal system is moving in new directions, and there are many opportunities for the use of ingenuity and initiative in new fields. In particular, we are confident that even if the advent of a " no-fault " system of compensation for personal injuries removes one area in which lawyers have in the past acted in the defence of the weak against the strong, our society is at a stage in its evolution when there will be no lack of other opportunities for them to perform that very important task.

175. Nonetheless, if it is thought likely that the removal of road accident compensation from the grip of the " forensic lottery " may cause transitional problems, economic or other, for legal practitioners (as indeed it may do also for insurance companies), then that is a matter to which serious consideration should be given at an early stage. For if it appeared that the possibility was a real and substantial one, society and the legal profession itself should take steps to ensure that provision is made to mitigate or obviate it. It will probably be only one of a number of " teething troubles " which should be cured without delay, so that the new system may function the more efficiently and to the greater benefit of society as a whole.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. This Report is confined to the consideration of compensation for damage suffered in accidents resulting from the use of vehicles on roads (para. 8).

2. The compensation of road traffic victims in the United Kingdom still depends on " fault " to a far more significant extent than compensation for any other kind of accident (para. 8).

3. The giving of mutual help in adversity is axiomatic in all human societies. The function of compensation for personal injury is to make good to the victim, so far as is possible, what he has lost or suffered, by distributing his loss among those who are better able to bear it because it is diluted by being widely spread (paras. 16–19).

4. Any system of compensation designed to avoid the injustices of the present one should allow for the award of compensation regardless of whether any person other than the victim is considered to have been at fault (paras. 21–38 and 105).

5. A no-fault system of compensation would avoid the delays, anomalies, capriciousness and high cost that too often produce injustice under the existing system, but would not introduce any additional problems of its own (paras. 4, 21, 23, 26, and 28–38).

6. The most effective deterrent to carelessness is the individual's fear of personal injury to himself. The threat of criminal proceedings and the cost of insurance are further deterrents (para. 106).

7. Only if the victim's own fault amounts to gross or wilful misconduct, established in the course of a criminal prosecution, should his compensation be reduced (paras. 106–114).

8. Subject to that, all those who have suffered the direct consequences of a personal injury resulting from any accident involving the use of any vehicle on any road should be eligible for compensation: this includes the actual dependants of victims (para. 115).

9. In principle, the victim of an accident should be compensated in accordance with the existing common law basis of awarding damages, *i.e.* loss of earnings and other monetary benefits as a result of incapacity; expenditure incurred by reason of the injury; shock, pain, suffering, inconvenience and discomfort; loss of function and amenity and abbreviation of life (paras. 87 and 116).

10. Compensation for economic loss should be paid periodically so long as the loss continues, and subject to review in the light of the victim's condition and changes in the value of money. Lump-sum payments should only be made exceptionally, and only if desirable in the interests of the victim. In the case of non-economic loss, the fund should have discretion to pay compensation either periodically or in the one or more lump sums (paras. 119–21).

11. Compensation should be earnings-related, and equivalent to 85–90 per cent. of actual earnings (paras. 126–7).

12. Economic loss other than loss of earnings should be compensated (para. 131).

13. All Social Security benefits received as a consequence of the injury should be deducted from the global figure for compensation (paras. 132 and 158), but benefits from private insurance schemes should not be taken into account (para. 133).

14. Compensation for non-economic loss presents much greater difficulties. We favour *ad hoc* adjudication in each case (paras. 140 and 143).

15. In the case of those kept alive in a state of permanent unconsciousness there should be no compensation for loss of function or amenity. Nor should compensation be given for "abbreviation of life" where a victim has died of injuries (para. 141).

16. The assessment of compensation should be entrusted to a tribunal from which there would be an appeal to the courts on a point of law (paras. 145–147).

17. The no-fault scheme would replace the present action in tort save to the extent that any heads of claim were excluded from the scheme (para. 148).

18. Under the no-fault system there are potentially more claims than under the existing system; but the experience of other countries suggests that dramatic savings can be achieved by the adoption of no-fault schemes (paras. 39–75 and para. 153).

19. We recommend "floors" for all claims; this could be achieved automatically by the victim giving credit for the full amount of Social Security benefits he receives as a result of the injury. All compensation for loss of earnings should be paid after deduction of notional tax at the rate appropriate to the victim's notional earnings. The fund should not be obliged to account to the Exchequer for the tax so deducted (paras. 159 and 160–1).

20. The imposition of a "ceiling" on claims raises difficult questions. There should be no ceiling on non-economic loss unless compelling evidence be found that its absence would render a no-fault scheme wholly uneconomic (para. 165).

21. Both the state and the motoring community should contribute to the compensation fund. The contribution of the latter should come from:

(a) vehicle owners and operators (collected with the road fund licence fee),
(b) vehicle users (collected with the motor fuel tax) and
(c) drivers (collected with driving licence fees) (para. 167).

22. There appear to be merits in the method adopted in New Zealand, where the no-fault compensation scheme is administered by the insurance industry as agent of the state (para. 169).

23. It is desirable that the body created to administer or supervise the national compensation fund should also have overall responsibility for supervising accident prevention and rehabilitation schemes for victims (para. 106).

24. The justification for introducing a scheme now to compensate victims of road traffic accidents and not victims of other accidents is that:

(a) the adoption of the scheme should produce significant remedies at no greater cost to the community than the existing system;
(b) of the three classes of accident that claim the largest number of victims annually, only in the case of road traffic accidents can substantial new benefits be obtained quickly at little cost;
(c) partial reform is better than no reform at all.

We hope that the introduction of a no-fault insurance system of compensating road accident victims will stimulate a more positive interest in devising improved methods of compensating victims of other calamities (paras. 170–172).

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