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22.M.
COMPENSATION FOR PERSONAL INJURY:

THE CASE FOR REFORM

A DISSERTATION PRESENTED BY

JAMES CAMPBELL STEVENSON, LL.B

FOR THE DEGREE OF MASTER OF LAWS IN

THE UNIVERSITY OF GLASGOW IN APRIL 1976

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SUMMARY

SUMMARY

The advantages traditionally claimed for the fault system do not stand up to close scrutiny in the socio-legal climate of the second half of the twentieth century. An injured person recovers damages not according to his needs, but according to whether he is able to prove that his injury was caused by the "fault" of another. In many cases whether such proof is available is a matter of chance. Over thirty years ago Sir William Beveridge concluded that with the inevitable uncertainties of legal proceedings, suits for damages could not escape having something of the character of a lottery. The system of recovering damages for personal injury is in practice expensive to operate, involves considerable delays before payment of compensation is made, and compensates future lost income by lump sums which are not calculated with sufficient precision or with proper regard to important factors such as inflation. There are no proper rules for deciding whether and to what extent benefits provided by the state should be deducted from awards of damages, and the present rules, which depend on nebulous distinctions between different kinds of benefit, are entirely unsatisfactory.

The social security system deals with large numbers of claims by an efficient administrative process and compensates as a general rule by periodic payments. It is now of much greater significance, in terms of the amount of benefit provided, than recovery of damages. There are problems, particularly with regard to the preferential treatment of accidents arising out of and in course of employment. The position of those incapacitated for long periods should be improved. In addition there is the problem of abuse, which is always likely to be present in any system designed to deal speedily with large numbers of claims.

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The Criminal Injuries Compensation Scheme is relatively unimportant in terms of the amount of compensation it provides. It is difficult to justify the existence of this scheme on rational grounds.

Reforms are necessary. They could be undertaken within the existing system. So far as awards of damages are concerned, procedure could be improved, legal aid could be made more widely available, and more accurate assessment of damages is possible. Anomalies within the social security system could be removed, and proper rules could be developed dealing with the deduction of state benefits from awards of damages. Such changes would not, however, meet the criticisms of the system as it operates in practice.

The field of road accidents is one where there is dissatisfaction with the present system and special rules could be introduced for road accident victims. The problem is that it is difficult to justify preferential treatment of certain classes of victims, and ultimately only a system along the lines of the system recently adopted by New Zealand is able to deal with all accident victims in a humane and equitable way.

INTRODUCTION

INTRODUCTION

On 19 December 1972, the Prime Minister announced in the House of Commons, that a Royal Commission (the Pearson Commission) was to be established with the following terms of reference:-

"To consider to what extent, in what circumstances and by what means, compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person -

- (a) in the course of employment;
- (b) through the use of a motor vehicle or other means of transport;
- (c) through the manufacture; supply or use of goods or services;
- (d) on premises belonging to or occupied by another; or
- (e) otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability,

having regard to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise".

It is unfortunate that, wide though the terms of reference of the Pearson Commission are, the majority of accidents in the home are effectively excluded.

The purpose of this paper is to consider what changes are necessary in what Mr. Justice McKenna recently called our "ancient" laws for compensating the victims of accidents.

At the present time, an injured person may be compensated in two principal ways - he may recover damages and/or may be entitled to compensation in a variety of forms from the state.

Part One examines the operation in practice of the laws of reparation governing recovery of damages for personal injury; part Two examines briefly the principal types of compensation now provided by the state, and part Three examines possible future reforms.

PART ONE
AWARDS OF DAMAGES

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PART ONE

AWARDS OF DAMAGES

I IS FAULT APPROPRIATE AS A CRITERION FOR LIABILITY?

1. Advantages Claimed for the Fault System

- (a) Deterrence
- (b) Morality
- (c) Balancing of interests
- (d) Flexibility
- (e) Avoidance of categories

2. Criticisms Advanced of the Fault System

- (a) Criticisms of the fault principle itself
- (b) Difficulties of proof
- (c) Delay
- (d) Cost

3. Conclusion

II FINANCE - WHO PAYS FOR THE PRESENT SYSTEM?

III CALCULATION OF THE AMOUNT OF DAMAGES

1. Solatium

2. Patrimonial loss

Problems associated with calculation of the lump sum

- (a) Taxation
- (b) Inflation
- (c) Expert evidence

An alternative approach

Lump sum awards or periodic payments?

3. Outlays and Expenses
4. Deductions to be made from awards of damages
 - (a) General considerations
 - (b) State benefits
 - (i) Industrial Injuries Benefits
 - (ii) National Insurance Benefits
 - (iii) Supplementary Benefits
 - (iv) Family Income Supplement
 - (v) State benefits in kind
 - (vi) Local authority benefits in kind
 - (c) Conclusions

I IS FAULT APPROPRIATE AS A CRITERION FOR LIABILITY?

It has often been plainly stated in the case law that the basic principle of the Scots Law of delict is rooted firmly in the concept of fault or culpa. For example, Lord Guthrie has stated that "the fundamental principle of the Scots Law of reparation is that liability depends on culpa",¹ and Lord Cooper that "culpa is the very basis of the Scots Law of delict"².

An examination of the case law does not, however, reveal any attempt to justify these bold assertions or any proper consideration of whether fault is today an appropriate criterion for liability.

I. Advantages claimed for the fault system

A recent attempt has been made to set out the advantages of fault,³ and these advantages are said to be:-

- (a) Deterrence
- (b) Morality
- (c) Balancing of Interests
- (d) Flexibility
- (e) Avoidance of Categories

(a) Deterrence

There is surely little if any deterrent value in imposing liability for fault; this is generally accepted even by staunch supporters of the present system.⁴

To suggest that the fear of a damages award is a deterrent, and that the higher a probable damages award the greater the deterrent effect, seems absurd. Take for example, motor vehicle accidents. If "the risk of injury to oneself, the inconvenience of accidents, the risk of damage to one's own car, and the risk

of a fine, imprisonment or the suspension of the driving licence are not effective deterrents against unsafe conduct, then it seems highly unlikely that the risk of an increase in the cost of insurance will have the desired effect".⁵ Again the level of the damages, forgetting for the present the existence of compulsory insurance, bears no relation to the culpability of the conduct. Clearly a moment's carelessness can result in an award of £50,000. With industrial accidents it is clear that no matter how careful employers are and no matter how many regulations are made, accidents will still happen. What part can fear of an award of damages play in the conduct of employees? "Passing a law does not prevent a man from dropping something on another's head".⁶

The whole question of deterrence and accident prevention is extremely complex, but it is clear that civil liability for fault presently is not, nor ever will be, a significant factor.

(b) Morality

No strong emphasis is placed on this element,⁷ since it is accepted that there can be moral blame without legal liability, and equally there can be legal liability without moral blame.⁸ Indeed it has been stated that "to relate reparation to morality leads not only to a misunderstanding of the law of reparation, but also to the frustration and eventual paralysis of this important part of modern law".⁹

It is suggested, however, that the advantage of a moral basis should be the wider acceptance of the results obtained by the operation of the fault system. But this seems increasingly not to be the case, particularly with motor vehicle accidents where the layman often appears to find it difficult to understand why no damages may be recovered by some children and innocent victims who are seriously injured. One has only to look at the correspondence in the press following a recent decision in the Court of Appeal in England to see this lack of comprehension clearly emerge.¹⁰

(c) Balancing of Interests

"The Courts are concerned not only with the need of a pursuer for compensation but also with justice for the defender".¹¹ It is claimed that the concept of fault enables a balance to be struck. It seems, however, that before the courts can evaluate and balance the interests of the parties, they would require to take all their circumstances into consideration. This is not done. For instance, if one party is obliged by law to be insured this is obviously relevant, but this fact is consistently ignored by the courts.¹²

(d) Flexibility

"The standard of care may alter not only with the facts of each case, but also with differing social conditions. The law can be applied to new situations because the categories of negligence are never closed".¹³ This is undoubtedly true in so far as it

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goes. It is necessary only to consider such outstanding examples as *Donoghue v. Stevenson*,¹⁴ *Hedley Byrne and Company v. Heller and Partners*,¹⁵ and, more recently, *Dutton v. Bognor Regis U.D.C.*,¹⁶ to appreciate the point. It is, however, difficult to disagree with the proposition that, due to the immense social, political, and economic changes which society has undergone this century, "the transformation of a law through judicial law-making so as to adapt it to social change, while immensely important, has inevitably proved inadequate".¹⁷ There are various reasons for this. Opportunity to change law is dependent on the raising of a suitable case, and also to a great extent on the philosophy of the judge who hears it. In addition, judicial decisions, despite the principle of stare decisis, do retain an ad hoc character which may restrict their application to future cases.

(e) Avoidance of Categories¹⁸

It is indisputable that a principle of liability which is general in its application can minimise anomalies. A glance at Butterworth's Workmen's Compensation Cases (37 volumes) reporting only Court of Appeal and House of Lords' decisions illustrates the point. Indeed the Report of the Departmental Committee on Workmen's Compensation referring to the famous phrase "arising out of and in course of employment" stated that: "It is safe to say that no other form of words has ever given rise to such a body of litigation".¹⁹ This advantage is not exclusive to or inherent in the fault system and could

equally be claimed by any system imposing a uniform standard of care, whether that standard is less demanding than reasonable care or is absolute.

In short, the main "advantages" claimed for the present system do not appear to provide significant advantages or benefits. A principle of liability which is general in its application is clearly desirable, but this does not necessitate the retention of the present system.

2. Criticisms Advanced of the Fault System

The present system based principally on fault liability has increasingly been subjected to criticism in recent years and it is necessary to consider and evaluate the principal criticisms which have been advanced.

These are discussed under four heads:-

- (a) Criticisms of the fault principle itself
- (b) Difficulties of proof
- (c) Delay
- (d) Cost

(a) Criticisms of the fault principle itself

The operation of the fault principle has been criticised as it operates in practice in relation to both pursuers and defenders.²⁰

So far as the pursuer is concerned, compensation is not paid according to his needs, his losses or his own conduct, but according to whether or not he is able to blame anyone.

So far as the defender is concerned, the award of damages bears no relation to his conduct, but depends on its consequences, which are often a matter of chance.²¹

(b) Difficulties of Proof

Events causing injury normally occur extremely quickly and the ability of the court to reach a correct decision depends on variable factors such as the ability of witnesses to recall accurately what happened long after the incident.

It has been estimated that in motor vehicle cases the chances of the court finding the facts correctly may be no more than 50%.²²

The difficulties have been summarised by several critics:-

"..... the accident occurs in a very short period of time; in most cases it is impossible to ascertain the behaviour of the parties; when such behaviour is clear it is very difficult to pass judgment on it; when it is possible to pass judgment on it this is unjustified. It is highly primitive justice to grant or refuse compensation to a victim of a traffic accident or to his family according to the quality of his reflex in 'the agony of the accident'".²³

"The process by which the question of legal fault and hence of liability, in automobile accident cases is determined in our courts is a cumbersome time - consuming, expensive and almost ridiculously inaccurate one. The evidence given in personal injury cases usually consists of highly contradictory statements from the two sides, estimating such factors as time, speed, distance and visibility, offered months after the event by witnesses who were never very sure just what happened when they

saw it, and whose faulty memories are undermined by lapse of time, bias, by conversations with others and by the subtle influence of counsel".²⁴

"Even when there is an abundance of direct evidence, in accident cases it is often of the flimsiest kind. The surprise of the incident, the brevity and limited perspective of the observation, the panic of the moment, the distorting effect of self-interest on the memory, the interval (usually two or three years) between the accident and the trial, and the notorious fallibility of human perception in matters of time and motion, all combine to render thoroughly unreliable the type of evidence on which our courts frequently rely".²⁵

In the Oxford Survey,²⁶ only 42% of those injured recovered any damages. A further 42% made no claim for damages and half of these stated their reason to be lack of evidence - either there were no reliable witnesses or the evidence which was available was inconclusive.

(c) Delay

Delay is acknowledged as a serious problem. More information is clearly available on the small number of cases which eventually go to court than on the majority which are settled by negotiation.

Ison estimated that the average time taken for a settlement in a negotiated claim was over fifteen months, but he also found that the time taken increased with the amount being claimed.²⁷

Where the amount claimed was under £100 it took only nine months on average, while claims over £2,000 took in excess of twenty-nine months.²⁸

Two reasons are advanced for this. Firstly, in more serious cases, it takes longer before medical prognoses are available, and, secondly, where there is more at stake, the negotiations are likely to be more protracted.

In the Oxford Survey, of those who recovered damages, 12% recovered in the first year, 20% in the second year, 6% in the third year and 3% in the fourth year. The results of the survey indicate that awards of damages are often received too late to relieve the injured person of the financial difficulties in which he may find himself. Over one-fifth of those injured indicated that they had found it necessary to utilise their savings or borrow money to meet their normal living expenses, and 21% of those who eventually recovered damages recovered less than their total economic losses, taking into account compensation received from all sources, including social security and private insurance benefits.

These results indicate that so far as pursuers are concerned, the present system is clearly unsatisfactory. It is necessary to bear in mind, however, that the survey was completed in 1968 and was intended to be a pilot survey. The sample of cases was too small to enable definite conclusions to be drawn and there is some reason to believe that the results of a similar survey at

the present time would indicate a rather improved position. The coming into force of the Legal Advice and Assistance Act 1972 and the relatively vigorous publicity campaign which followed in April 1973, might mean that a greater proportion of those involved in accidents would take legal advice and thereafter successfully pursue a claim. In the Oxford Survey only 67% of those interviewed had received advice from a solicitor.

The Interest on Damages (Scotland) Act 1971 was intended to provide the pursuer with compensation for the delay in settlement. The Act has, however, proved unsatisfactory, and has itself been the subject of considerable litigation. It is doubtful if its provisions have been of much assistance even in the limited number of cases to which it applies. Clearly it can not affect the vast majority of cases which are settled by negotiation.

It must be conceded that many of the causes of delay are not unique to personal injury litigation, but in this area there is more likelihood of financial hardship than in most other fields.

One reason for the delay in serious cases is the need to wait for the nature and extent of the injuries to become apparent, and so long as damages take the form of a lump sum payment assessed once and for all, delay appears to be inevitable.

Rule 89A of the Rules of Court which came into force on

1st October 1974 and which allows interim awards in certain circumstances does not appear to have improved the position significantly. In *Douglas's Curator Bonis v. Douglas and Another*,²⁹ an application for an interim payment of £10,000 was made in an action where the sum sued for was £60,000. Lord Maxwell while stating that he had "no wish to strangle this important new rule at birth" found himself unable to apply it. Lord Maxwell stated that in a case involving more than one defender it would not be sufficient to be satisfied that one or other or both would be found liable. It would be necessary to be satisfied as regards each defender before an interim award could be made. In *Littlejohn v. Clancy*,³⁰ where liability was admitted in an action where the sum sued for was £20,000, an application for an interim payment of £7,500 was made. Lord Robertson granted an interim payment of only £1,250 and this almost three years after the date of the accident.

(d) Cost

In practice, it is not worthwhile pursuing a claim if the defender does not have the means to settle it. A good illustration is the 1966 case of *Barry v. MacDonald*³¹ where a pedestrian stepped off the kerb without looking, thus causing a motor cyclist to collide with him. The motor cyclist died as a result of his injuries. His widow was awarded £3,264 but as the pedestrian was not insured and

had no means except his wages, it was agreed that damages would be paid at £2.00 per week for the next thirty-four years.

It is clear that in the vast majority of cases damages are not paid by individuals but by insurance companies under liability insurance policies or by large organisations such as Government Departments, which act as self insurers.

There are accordingly difficulties involved in ascertaining the administrative costs of the present arrangements, as insurance companies are not obliged to make this information available.

It is nevertheless clear that liability insurance is expensive.

Ison estimated that on average 40.4% of liability insurance premiums is absorbed in commission, administrative costs, payments to reserves and other payments; a further 9% is taken up in legal and other costs and approximately 50.4% is paid in respect of claims.³² Another more recent estimate is that 42.5% of premiums is taken up in administrative expenses, leaving 57.5% of gross premium income paid in respect of claims.³³

There appear to be two main factors involved in producing the high cost:-

- (1) the large sums paid in commission and advertising, and,
- (2) the procedure adopted for settling claims, which proceeds on the basis of case by case attempts to determine who was at fault. This in practice involves: firstly, an enquiry into

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the circumstances to discover whose "fault" the accident was, and, secondly, an assessment of the compensation to be paid, which, in the case of future loss of earnings, involves the evaluation of medical prognoses. In addition, each party will normally require to make his own inquiries, and this duplication results in an increase in expenses. Ison estimates that 3.6% of premiums are expended on insurance companies' own legal expenses, and 5.1% are expended on those of claimants.³⁴

Critics who concentrate on the economic aspects of the costs of accidents,³⁵ question whether expensive investigations of the circumstances of individual accidents provide sufficient benefit to the community as a whole to justify their cost. They emphasise that these investigations are carried out in spite of the fact that the accident costs will not be borne by individuals but will be spread by insurance. One commentator dealing specifically with skidding accidents involving motor vehicles concludes that the present law obscures the need for effective accident prevention measures by concentrating too much on the conduct of the motorist to the exclusion of more important factors.³⁶

A practical example is the survey made of fifty-five accident skidding sites before and after the sites were treated with an anti-skid road surface.³⁷ Before and after treatment over the same period of time, there were respectively 723 and 130 accidents, and so the number of accidents after treatment had

been reduced by 82%. This reduction and consequent saving in the overall cost to the community could not have been achieved by the fault system even after its expensive investigation of the circumstances of each of the 723 accidents.

3. Conclusion

None of the criticisms advanced of the present system would be decisive if the fault system found substantial support in our notions of justice. It was recently argued by the London Solicitors Litigation Association³⁸ and by a Joint Working Party of the Contentious^u Business and Law Reform Committees of the Law Society of England³⁹ that this is the case.

Their argument can be summarised as follows:-

It is just for those injured due to the fault of another to recover from him full compensation so far as that may be provided by money.

While some justification can undoubtedly be found for the fault system in such an argument, it does not in fact support the retention of the present system, and it does nothing to deal with the criticisms outlined above. Such an argument could only support the present system if the choice had to be which of two or more parties involved in an accident should pay for the losses which result from it. It clearly would offend our sense of justice if the injured party went without compensation if he did not recover it from the party at fault. It would also offend our sense of justice, if in the absence of a system based on fault, wrongdoers went unpunished.

Where, however, liability insurance is permitted and in certain

circumstances compelled, and where those at fault are liable to be punished, by the criminal law for example, then it is difficult to see how the fault system can be supported on the grounds of justice.

It is submitted that the criticisms outlined above are largely valid and steps should be taken to deal with them. These will be examined in Part Three.

II FINANCE - WHO PAYS FOR THE PRESENT SYSTEM?

It has been suggested above that individuals personally will rarely pay damages awarded against them, and that in the first instance awards are paid mainly by Insurance Companies. It is desirable to look at this question in rather more detail.

Atiyah⁴⁰ suggests that with regard to industrial accidents the costs are met in the first instance by employers. In general, employers insure against their liability, and the premiums as business expenses are an allowable deduction from profits for tax purposes. In one sense, therefore, the State can be said to contribute something to the cost. The rest of the cost is passed on by employers in the same way as normal expenditure. It may mean higher prices for goods or services, lower salaries to employees, lower profits or lower dividends to shareholders.

So far as road accidents are concerned, Atiyah points out the cost is still largely spread by insurance. Part of the cost, for vehicles owned by industrial or commercial concerns and local or public authorities, will be distributed in the same way as the premiums for employers' liability insurance. With regard to private cars, the insurance costs are met by individual owners, and as between them, the cost is apportioned according to various factors including the "accident-causing potential" of the individual.

It must be remembered, however, that not all the costs of industrial and road accidents fall on insurance companies and their policy holders. Many costs are met directly by the State. The National Health Service, the cost of running the courts and the cost of legal aid and advice are obvious examples. For a considerable proportion of accidents (if the figures in the

Oxford Survey are accurate), no costs fall on the insurance companies at all. This happens where there is no one at fault or where no one can be proved to have been at fault. Where the injured party is adjudged to have been contributorily negligent he must bear part of the cost himself, and if he is unable to do so part of the cost may have to be met by the Social Security system. Again, half the value of certain Social Security benefits received or to be received for five years and all the value of certain other benefit falls to be deducted from the award of damages. This is a point which will be considered in greater detail in the following section.

III CALCULATION OF THE AMOUNT OF DAMAGES

There are certain recognised "heads of damage".⁴¹ The three principal heads of damage recognised in Scotland are solatium, patrimonial loss, and outlays and expenses.⁴² The position in England is similar.⁴³ Where the award is made by a judge he will state how much is being awarded under each head.⁴⁴

I. Solatium

This is the part of the award made for intangible and non pecuniary or non economic loss. The type of losses for which it may be recovered are pain and suffering (to date and for the future), loss of limbs, damage to physical faculties, damage to the central nervous system, damage to mental powers and so on.⁴⁵

In theory every case is looked at individually but in practice, guidance can be obtained from comparable awards including comparable English awards.⁴⁶ Awards for the same type of injury will generally increase over the years to take account of the falling value of money.⁴⁷

2. Patrimonial Loss

The pursuer may also recover his proved financial loss suffered as a result of the accident. Compensation for loss of earnings to the date of the award can be calculated reasonably accurately. But, with regard to compensation for loss of future earnings, or more correctly for loss of future earning capacity, the present system has been the subject of considerable criticism.

It is a general principle that damages must be assessed once and for all,⁴⁸ The difficulties involved in calculating once and for all a lump sum (it being incompetent to award an annuity or periodic payment⁴⁹) to replace future lost earnings are indeed formidable. It is necessary to take into account such matters as inflation, taxation, interest rates, promotion prospects, uncertain medical prognoses, and what are referred to as the "vicissitudes" or contingencies of life (i.e. the possibility of premature death from natural causes, ill health, the chance of being killed or injured in other circumstances, the possibility of redundancy and so on).

The problem is clearly a complex one, and arises where a person suffering personal injury will sustain future loss, and also where a claim is made by the dependants of a person who dies as a result of his injuries. Indeed one judge recently remarked in this connection that "when a judge tries to perform the task which the law sets him he moves at once into a world of unreal speculation".⁵⁰

In personal injury cases, the normal method of calculating the loss is firstly to ascertain the net average annual loss (the "multiplicand"), the basic figure normally being the pre accident net earnings, and then to choose a number of years purchase (the "multiplier") by which the multiplicand is multiplied. The multiplier is calculated by ascertaining the number of years for which the loss is expected to continue, and this figure is discounted to take account of (i) the fact that payment is being accelerated and made in a lump sum, and (ii) the contingencies of life.⁵¹ A practical illustration is

the case of *Mitchell v. Mulholland*,⁵² where the plaintiff was seriously injured in a road accident in June 1965 when he was thirty-two. As a result of the accident he could not walk without support, he suffered double vision in all directions and there was a continuing and severe degree of mental deterioration. The evidence was that his life had not been shortened (his life expectancy was seventy-one) and he would have been employable until age sixty-five. At the time of the trial in June 1969 when the period of future loss of earnings was twenty-nine years the multiplier chosen was fourteen, and this figure was subsequently approved by the Court of Appeal in 1971.

In a claim by dependants for future loss of support, the normal first step is to ascertain the "dependency" (the multiplicand) which is the amount which the deceased made available for their support and would have continued so to do had he not been killed. Once again a multiplier is chosen, and this is usually arrived at by discounting as above the estimated period for which the deceased would have continued to give support or his estimated working life.⁵³ In *Mallet v. McMonagle*,⁵⁴ Lord Diplock outlined the method of calculating the multiplicand and multiplier. With regard to the dependency, the starting point is the annual value of the material benefits provided for the dependants out of the earnings of the deceased at the date of his death. Consideration must, however, be given to many factors which might have led to variations. Earnings might have been increased and with them one amount provided for the dependants.

They might have diminished with a recession in trade or the deceased might have had spells of unemployment. As children grow up and become independent the proportion of earnings spent on dependants would probably have fallen. With regard to the multiplier, the starting point is the number of years between the date of the deceased's death and the date when he would have reached normal retiring age. That falls to be reduced to take account not only of the fact that the deceased might not have lived until retiring age, but also the chance that by illness or injury he might have been disabled from gainful occupation. The former can be calculated from actuarial tables but the latter cannot. There is also the chance that the widow may have died before the deceased reached normal retiring age. In *Mallet v. McMonagle* both the deceased and the widow were about twenty-five years old, and the House of Lords thought that a multiplier of sixteen would be appropriate. The Lords also stated that that figure would seldom be exceeded although in the subsequent case of *Howitt v. Heads*⁵⁵ where the deceased was twenty-one and the widow twenty, a multiplier of eighteen was adopted.

Problems Associated with Calculation of the Lump Sum

It is perhaps worthwhile examining in more detail the methods adopted by the courts to deal with some of the problems which are encountered in the assessment of lump sums to compensate future lost earnings.

Three particular problems will be considered:-

- (a) Taxation
- (b) Inflation
- (c) Expert evidence

(a) Taxation

Since 1956 it has been settled that damages for loss of earnings must be awarded net of tax.⁵⁶ The following factors may operate to make awards covering future loss of earnings hopelessly inaccurate: changes in income tax rates, and the introduction of new taxes, e.g. Capital Gains Tax in 1965 and more recently Capital Transfer Tax. This problem has long been recognised.

Lord Diplock stated⁵⁷ -

"Fiscal policy too may have a considerable effect on the annual amounts which can be produced by a given capital sum - the changes in income tax and the introduction of capital gains tax during the last twenty years would themselves have been sufficient to falsify actuarial calculations of the capital value of an annuity made before those changes were introduced".

Quite clearly they would also falsify the rather less accurate calculations made by judges.

The Inland Revenue is, therefore, the loser in such cases, since the tax which the injured person would have paid over the years is lost. In their own language the Courts can be said to be "benefiting the wrongdoer" (or rather his insurance company) at the expense of the State. Yet in other circumstances they have refused to deduct collateral benefits from awards of damages for the very reason that they would be so

benefiting the wrongdoer at the expense of the State.⁵⁸

(b) Inflation

If anything approaching an accurate award is to be made, one would imagine that the Courts would have to take inflation into account.

Yet in 1969, Lord Diplock⁵⁹ stated that:-

"The only practical course for courts to adopt in assessing damages is to leave out of account the risk of further inflation, on the one hand, and the high interest rates which reflect the fear of it, and capital appreciation of properties and equities which are the consequence of it, on the other hand. In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the award, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as four or five per cent should be adopted".

In *Taylor v. O'Connor*⁶⁰ decided in January 1970, Lord Reid⁶¹ thought it would be quite unrealistic not to take the risk of further inflation into account at all, but Lord Morris of Borth-y-Gest⁶² and Lord Pearson⁶³ thought the prospect of continuing inflation was an important factor, in view of which it should be assumed that the damages would be invested with the aim of obtaining some capital appreciation to offset the probable rise in the cost of living. Lord Pearson in particular thought that you should, therefore, assume a relatively low net income

because the fund is assumed to hold a fair proportion of low yielding capital growth stocks.

In *Cunningham v. Harrison*,⁶⁴ a personal injuries case decided at the end of 1973, Lord Denning said that he did not think that an elaborate exposition of the effect of inflation on investments was at all helpful.

The most recent case where the question was considered was *Young v. Percival*.⁶⁵ In this case the Court of Appeal thought that if the courts tried to protect from inflation those who were awarded damages for personal injuries, they would be putting them in a favoured position "as compared with the generality of the community". This argument is not really sound, given the present system. The court should have tried to answer the question - "what will the widow's loss of support be following the death of her thirty-two year old husband when inflation during the rest of his working life was likely to be substantial?". The Court recognised that *Taylor v. O'Connor* might be distinguished on the ground that it related to the economic position in January 1970, and was not appropriate to the 1974 situation when the rate of inflation was very much higher and the stock market had fallen steeply. Despite "misgivings" about continuing to ignore inflation, the Court of Appeal decided to do so in the absence of any workable alternative principle which the judges could adopt in assessing damages. There was, therefore, excluded from the assessment evidence given about the effect of anticipated inflation upon future levels of earnings.

(c) Expert Evidence

In view of the difficulties involved in questions of taxation and inflation, it is rather surprising that the courts have been reluctant in this field to take expert evidence. In *Taylor v. O'Connor*,⁶⁶ Lord Reid said that in the ordinary case judges and counsel have a wealth of experience and any expert evidence is rightly discouraged. In *Mitchell v. Mulholland*,⁶⁷ it was felt that the cases would be rare when expert evidence as to the effect of inflation on prices would be of assistance and that the particular evidence of an economist relating to assumed national trends was too vague and speculative. Evidence with regard to future increases in the plaintiff's real earnings on the basis of a likely increase in productivity per head of the working population was also rejected on the same grounds.

An interesting feature of *Mitchell v. Mulholland* was that the court was pressed to consider the recommendations of the Law Commission⁶⁸ with regard to the adoption of an actuarial method of calculating a lump sum which would, if properly invested, ensure that the plaintiff received in each year an annual sum equal to his earnings, discounted by 2 - 4% for contingencies such as sickness or redundancy. The Court of Appeal rejected the arguments, however, stating that the actuarial method was not sufficiently precise, since it was based on the 'average' man and paid insufficient regard to the particular plaintiff, assuming that he must be

considered as average until the defendant showed that he was not. The suggested deduction for contingencies was likewise rejected, the view of the court being that such contingencies could not be allowed for by ignoring the individual case and making an arbitrary selection. It was conceded, however, that actuarial calculations might well be used as a means of cross checking calculations and in the selection of a multiplier.

The introduction of more expertise was strongly criticised in 1973 in *Cunningham v. Harrison*.⁶⁹ Lawton L.J. said that those who would like to see more expertise used in the assessment of damages should remember that High Court judges who hear these cases are themselves experts in the assessment of damages. As a body he felt they had more knowledge of the problems involved than anyone else in the Kingdom. Yet immediately before these remarks, and apparently without appreciating any inconsistency, he stated that he did not have the knowledge to take matters such as inflation and investment policy into account.

It is not surprising that the multiplier principle has been attacked because of its actuarial weakness⁷⁰ in view of the hostile attitude of the courts to expert evidence and the application of a vaguely chosen multiplier, the choice of which does not appear to have been affected in the cases cited above by the very great changes in economic circumstances between 1969 and 1974.

An Alternative Approach

An alternative approach to the problem has been recently suggested by Kidner and Richards⁷¹ taking the case of *Howitt v. Heads* referred to above as an example. In that case on the basis of net of tax remuneration of £26 per week, the dependency was calculated at £18 per week or £936 per annum, and a multiplier of eighteen was taken assuming a working life of forty years. Thus if from the capital sum of £16,848, £936 were to be withdrawn at the beginning of each year the fund would be exhausted after forty years so long as 5% net of tax were gained on the capital still available each year (including capital appreciation as well as interest both taken net of tax). Kidner and Richards suggest that the "best expectation" of the rate of inflation in the future could be 6% compound per annum, and that real incomes would increase at a rate of about 3% compound per annum. In addition, they felt it was necessary to estimate the likely rate of increase in real income as a result of promotion, and adopted the rather arbitrary figure of 2% per annum. Allowing for these three factors the rate at which post-tax money should increase to provide an equivalent real standard of living for the widow and child is, therefore, approximately 11% per annum. The final factor to be considered is the net of tax return (including capital appreciation) which can be earned on the capital sum. If you assume a net of tax return of 13%, which is extremely high, the life of the fund awarded in *Howitt v. Heads* in these circumstances would be only twenty-two years, and for it to last forty years a multiplier of twenty-nine would be necessary. Assuming a more realistic return of 7% per annum net of tax, the fund would be exhausted after fourteen years, and for it to last forty years a multiplier of eighty-nine would require to have been adopted.⁷²

Lump Sum Awards or Periodic Payments?

It is clear that even if actuarial methods were adopted the problems involved in calculating the lump sum cannot be overcome completely.

The method suggested by Kidner and Richards is based on a series of assumptions all of which could be wrong and in any event changes in the tax system of themselves could render the calculation incorrect.

The basic problem lies in the idea of a lump sum payment to compensate future income loss. If a system of periodic payments were to be adopted for this part of the loss, many of the problems would not arise. The idea of periodic payments has not been greeted with enthusiasm. The Law Commission considered the idea of periodic payments to supplement or replace the lump sum system, but rejected it, in view of "the vehement opposition" of "almost every person or organisation concerned with personal injury litigation".⁷³ The Law Reform and Contention^us Business Committee of the Council of the Law Society of England in an Interim Memorandum to the Pearson Commission stated that they disagreed entirely with the periodic payments system.⁷⁴

The members of the Committee knew from experience that claimants always prefer a lump sum and, therefore, a system of periodic payments "would not commend itself to public opinion". The Committee, however, was not able to cite any evidence to support its views. They say that their members' experience is that claimants always prefer lump sums, yet under the present system they either recover a lump sum or nothing at all, so such a preference is hardly surprising. If, however, people had to opt before involvement in an accident for

the possibility of a large lump sum recovery some years ahead, or the certain continuation of their pre-accident income at substantially the same level, it would be surprising if members of the public choose the former.⁷⁵

The Law Commission has failed to give full consideration to the question. Its recommendations were based on the views of those with a professional and financial interest in the operation of the present system rather than on the basis of the preferences of those who pay the insurance premiums or claim damages. It is also pertinent to point out that the general public has an interest in the matter.

The investment of lump sum awards is not supervised by the courts and indeed no steps are taken to ensure that recipients actually receive any investment advice. Accordingly, if the award proves inadequate or is poorly invested or if it is simply frittered away then it is likely that claims will be made on public funds, such as the Supplementary Benefits fund which is funded out of general taxation. The Law Commission fail to explain why a supervisory power should be acceptable for the Criminal Injuries Compensation Fund but not for common law damages; nor do they attempt to explain why the system of periodic payments seems perfectly acceptable in other areas such as Social Security. In an earlier Working Paper they simply state that "the paternalistic arguments" based on the risk of the plaintiff's prodigality would not find much support "in today's climate of opinion".⁷⁶

A possible arrangement was recently suggested by D.R. Harris and J. Phillips,⁷⁷ who considered the possibility of building a periodic payments system on to the existing arrangements for payment of

social security benefits. They suggested that it might be possible for the liability insurance companies to make lump sum payments to the Social Security Fund to "purchase" the payment of the benefits over the expected future periods, and the Social Security Fund could then average out the risks of variations in the benefits arising from contingencies affecting the recipients. The Social Security Fund would be protected against the risk of the recipients of lump sum awards becoming claimants of ordinary benefits at a later stage, but on the other hand would have to undertake the burden of increasing payments in proportion with other benefit increases in subsequent years.

Another possibility would be the purchase of an annuity linked to increases in the cost of living. At the moment it is possible to purchase an annuity which increases by a small percentage each year, but the cost of an index-linked annuity would be very high, as the Insurance Companies would have to take the whole risk of high inflation and it is clear that the present levels of damages awards would not permit the purchase of such an annuity.

So far as the victim is concerned, his primary need is the replacement of his lost income. It is submitted that the payment of a lump sum to certain victims a considerable time after the accident is not an appropriate method of compensating this type of loss though different considerations may apply in the case of solatium. Far more appropriate would be a system of periodic payments, taxable as income, paid at regular intervals starting as soon as

possible after the accident and designed to keep pace with future increases in the cost of living and the nation's standard of living. Other systems, which will be considered later, do find it possible to compensate accident victims in this way.

3. Outlays and Expenses

An injured person is also entitled to recover all expenses and outlays incurred by him to date and likely to be incurred in the future.

So far as medical expenses are concerned the Law Reform (Personal Injuries) Act 1948 S.2 (4) provides that there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of the facilities of the National Health Service. This is a deliberate statutory contravention of the principle that a victim should minimise his loss. The injured person may also make a double recovery if he is a member of a private medical scheme.⁷⁸ There is no justification for this provision which should be repealed. An injured person should, of course, not be prevented from having private medical treatment but whether the cost of this can be recovered should be decided on the basis of the principle of minimisation of loss.

The position of expenses incurred by persons other than the victim is more complex and there have been in this matter recent Scottish decisions of some interest.

The most recent case was *Jack and Another v. Alexander MacDougall and Co. (Engineers) Limited*⁷⁹ where an employee alleged that he

was seriously injured in the course of his employment. Included in the damages claimed was the sum of £280 representing loss of benefit to the family income resulting from his wife's giving up work to nurse him and £30 expenses incurred by her visiting him in hospital. Lord Keith allowed the husband's averments about loss of the benefit of the wife's earnings to be admitted to probation but refused to allow proof of the husband's averments on the expenses incurred by his wife in visiting her husband in hospital. The wife's action was dismissed as irrelevant.

Lord Keith considered two earlier cases where one spouse claimed damages as a result of injury to the other.

In *McBay v. Hamlett*,⁸⁰ Lord Cameron held that a husband, whose wife was injured due to the fault of a third party, had a relevant claim against the third party for the expenses incurred by him in employing a housekeeper while his wife was unable to perform her household duties due to her injuries.

In *Edgar v. Lord Advocate*,⁸¹ the First Division held that averments by a husband that while he was off work due to injuries sustained in a road traffic accident, his wife lost wages when she discontinued full-time work to look after him were irrelevant.

In *Jack*, it was averred that the pursuers used their earnings jointly to defray household expenses, and the loss of the wife's wages could, therefore, be a loss to the husband. Lord Keith did not commit himself on whether such loss was too remote to be recoverable. The husband's claim for the wife's expenses of visiting him in hospital

was not a claim for loss suffered by him and was, therefore, irrelevant.

In dismissing the wife's action, Lord Keith stated that he did not agree with the decision in *McBay*, and in his view no duty of care was owed to the wife.

The question of existence of a duty of care was not considered in *McBay* as both the husband and wife were travelling in the same car and both suffered injuries. A duty of care was, therefore, owed to both of them.

The Scottish position on this question contrasts sharply with recent views expressed in England. In *Cunningham v. Harrison*,⁸² a husband was severely injured in a road accident and was a complete tetraplegic, with the distressing side effects associated with that condition. The plaintiff's wife died shortly before the case was heard but Lord Denning considered what the position would have been had she survived. Acting on legal advice the husband had signed an agreement undertaking to pay his wife £2,000 per annum for her nursing services. Lord Denning stated that if the wife had given up paid work to look after him, the husband would clearly have been entitled to sue on her behalf, because the family income would have been reduced.⁸³ Lord Denning considered that although in this case the wife had not been doing paid work but only domestic duties, all extra attendance on her husband called for compensation. Discussing the advice to enter the agreement, he considered that it was only right and just that

if the wife renders services, instead of a nurse doing so, the wife should recover compensation for the value of the services rendered without resort to drawing up such agreements.

It is submitted that the approach of Lord Denning is a commendable one which produces a desirable and equitable result preferable to the approach of Lord Keith in Jack.

4. Deductions to be made from awards of damages

(a) General considerations

Having calculated the lump sum to be awarded, it may be necessary to take into account other sums which the pursuer may have recovered. The principle is that any factor which goes to diminish the pursuer's financial loss consequent on the injury or death must be taken into account.⁸⁴

It is settled that the following are not to be taken into account:-

- (i) Payments received from a charitable fund.⁸⁵
- (ii) Gifts made by a relative or employer.⁸⁶
- (iii) Insurance monies payable to an insured person following an accident or to his dependants following death. The policy is res inter alios in a question with the defender.⁸⁷

The position regarding inherited estate is different in England and Scotland. In England the practice appears to be that a small deduction is made for accelerated payment.⁸⁸ In Scotland there is little authority but in a recent case where the matter was not properly considered what was deducted

was the capitalised value of the income which the inherited estate would produce.⁸⁹ It is submitted that in this instance the English approach is more appropriate.

(b) State Benefits

A major category of benefits is provided by the State for those who suffer physical injury or financial loss following an accident. These benefits are available whether or not damages are recovered. Clearly, therefore, there is the possibility of over-compensation for some victims, and it is proposed to consider in some detail the extent to which state benefits affect awards of damages.⁹⁰

(i) Industrial Injuries Benefits

Under the National Insurance (Industrial Injuries) Act 1965 S.5 (now the Social Security Act 1975), an employee suffering an accident arising out of and in course of his employment may recover

- (i) Industrial Injury benefit, or
- (ii) industrial disablement benefit, or
- (iii) both (i) and (ii).

In terms of S.2 of the Law Reform (Personal Injuries) Act 1948, one half of the total value of either or both of these forms of benefit accruing over a period of five years from the time the cause of action accrued is to be taken into account against loss of earnings or profits.

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The proportion to be deducted was based on the consideration that the employee was paying almost half (five-twelfths) of the cost. As will be seen later this is no longer the case, but in any event this deduction does not really stand up to examination and was specifically rejected by the Monckton Committee in 1946.⁹¹

The five year period was "a shot in the dark".⁹²

Another factor was that in 1946 courts did not itemise awards of damages⁹³ and this too is no longer the case.

This provision is accordingly very unsatisfactory.

(ii) National Insurance Benefits

The following benefits are all paid out of the National Insurance Fund, into which compulsory contributions are paid by all employers and employees.

- (i) sickness benefit
- (ii) invalidity benefit
- (iii) unemployment benefit
- (iv) constant attendance allowance
- (v) state retirement pensions

Under S. (2) (1) of the Law Reform (Personal Injuries) Act 1948, as amended by Schedule 5, paragraph 1 of the National Insurance Act 1971, sickness and invalidity benefit are to be treated in the same way as industrial injuries benefits. No statutory guidance is given with regard to the other benefits.

So far as unemployment benefit is concerned, recent English decisions have held that this benefit should be taken into account in full.⁹⁴ The only stated reasons were that it would be unjust for defenders or their insurers "to have to surrender, as it were, to a claim twice over for the same damage".⁹⁵ Similarly, in two recent Scottish cases the same view has been taken.⁹⁶ These decisions have been the subject of criticism,⁹⁷ but it is submitted that the decisions are consistent with principle - not to deduct would result in a double recovery of compensation. Whether or not the defender or his insurer should be entitled to the benefit of the deduction is an entirely separate question.

There seems to have been no decision on the question of attendance allowance but state retirement pensions have been held to be deductible⁹⁸ following the general views expressed in *Parry v. Cleaver*.⁹⁹

(iii) Supplementary Benefits

Unlike Industrial injuries and national insurance benefits there are no contribution requirements, and supplementary benefits cannot, therefore, be likened in any way to insurance. It is rather State financial assistance available as of right, and in a recent Scottish case it has been held that it should be deducted in full.¹⁰⁰ Lord Reid in *Parry v. Cleaver*¹⁰¹ stated "It is difficult to draw a distinction between unemployment benefit and national

assistance. The former could be regarded as a combination of insurance and national benevolence while the insurance element is absent from the latter." He expressed no concluded view on the matter. Earlier, however,¹⁰² he had stated "We do not have to decide in this case whether these considerations (relating to charitable payments) also apply to public benevolence in the shape of various uncovenanted benefits from the Welfare State, but it may be thought that Parliament did not intend them to be for the benefit of the wrong-doer".

While that may be the case, it is undoubtedly true that Parliament did not provide Supplementary Benefits to enable double recovery of compensation to be made, and once again it is submitted that Supplementary benefit should be deducted in full so that the victim does not recover more than his loss.

(iv) Family Income Supplement

Like Supplementary Benefit, this is a payment made as of right under the Family Income Supplement Act 1970. It is a cash payment. There appear to be no cases dealing with the question of deductibility.

It is worth noting that both Family Income Supplement and Family Allowance will be replaced if Government proposals for a tax credit system become effective.¹⁰³

Under these proposals each person within the scheme will receive a tax credit entitlement for himself and each child. He is then taxed at the full rate on the whole of his income, including any industrial injuries and national insurance benefits, and receives by way of credit against the tax due the full amount of his tax credit. If the credit is greater than the tax due, the excess is paid to him with his wages. This, if enacted, will further complicate the rule that damages must be paid net-of-tax.

(v) State benefits in kind

The National Health Service is the main consideration here. As far as awards of damages are concerned, the use of the National Health Service saves considerable sums in medical expenses which would otherwise have been payable by those partly or wholly at fault or their insurers. It was submitted above that S.2 (4) of the Law Reform (Personal Injuries) Act 1948 should be repealed.

In *George v. Pinnock*,¹⁰⁴ the question raised concerned a claim for the future expense of employing a State Enrolled Nurse to look after the plaintiff in his home. The Court of Appeal held that the trial judge was right in allowing a deduction for the very real possibility that at some stage the plaintiff would have to enter a hospital or other institution.

In *Cunningham v. Harrison*,¹⁰⁵ Lord Denning stated that "in the light of state assistance - to say nothing of the voluntary organisations - I think a claim for nursing expenses and accommodation should be kept within reasonable limits".

All three judges agreed in *Cunningham* that it was in order for the attention of the Court to be drawn to the fact that the plaintiff was unlikely to incur all the alleged expenses but would make use of state or local authority facilities. It was stated that S.2 (4) of the Law Reform (Personal Injuries) Act 1948 does not provide that a plaintiff shall be entitled to recover expenses which he will not, in fact, incur, and staff shortages made it inevitable that free services would be utilised. The damages awarded were accordingly reduced to take account of this.

(vi) Local authority benefits in kind

Local authorities are now empowered or obliged to provide a wide range of services which will assist, inter alia, those injured and entitled to recover damages.

Specific mention was made by Lord Denning in *Cunningham v. Harrison* of the Chronically Sick and Disabled Persons Act 1970 under which Local authorities had a statutory duty to provide inter alia suitable accommodation, nursing and general assistance, meals, television and holidays.¹⁰⁶ The local authority is not empowered to make a charge for these services.

No statutory guidance is given with regard to whether or not such benefits are to be taken into account.

(c) Conclusions

There are many other benefits provided by the State, but those discussed above give an indication of the way in which the State helps those injured or disabled. There is clearly no discernible principle governing deductibility from damages, and indeed Lord Denning has stated:¹⁰⁷

"I can find no sound principle for saying what matters should or should not be taken into account in reduction of damages. As each new point comes up, it is decided by the courts according to what is considered the best policy to adopt".

Various attempts have been made to decide who is, in fact, paying for the benefits, so that if the recipient contributes in some way to the fund which pays the benefit - as is the case with National Insurance and the National Health Service which are financed mainly, but not exclusively, by contributions by the self employed, employers and employees - some judges¹⁰⁸ have taken the view that in these circumstances the benefits are of the nature of insurance and, therefore non deductible.

This view seems incorrect and very superficial. National Insurance contributions are a compulsory deduction from earnings just as income tax is,¹⁰⁹ and are, in fact, a form of taxation. This is made clear by the Social Security Act 1973 which abolished the stamp card system and enables the

contributions to be collected with income tax in the same administrative process. The Government was empowered to make this arrangement by S.3 of the National Insurance Act 1959, and it is surprising that it has taken so long to introduce the new system which will reduce administrative expenses of the Government, the Post Office and Employers. It is also clear that there is, in fact, no need to differentiate these "taxes" at all in that the whole cost of the Social Security system could be funded out of general taxation.

Others have sought to discover the intention of Parliament in trying to decide whether benefits should be deductible. For instance, Lord Reid stated that Parliament did not intend State Assistance to be for the benefit of the wrongdoer.¹¹⁰

Again it is submitted that such views cannot be justified and are indeed inconsistent with judicial practice in applying the rule of *B.T.C. v. Gourley*. Does not that rule benefit "the wrongdoer" by allowing him to pay loss of earnings net after tax and by failing to impose an obligation on the "wrongdoer" to account to the state for the tax it has lost and will lose as a result? Are not wrongdoers and their insurers being subsidised by the state in these circumstances?

It is submitted that it should be possible to deal with these cases in two stages.

Firstly, from the point of view of the pursuer, the question is what has he lost. It is wrong in principle to overcompensate

those injured and the dependants of those who die for their losses, and accordingly both in personal injury cases and cases brought by dependants, all state benefits should be taken into account.

Secondly, from the point of view of the wrongdoer or his insurers, he should not be subsidised by the State. He should compensate the victim for his net loss but should be obliged to account to the state for all benefits paid and to be paid.

PART TWO
STATE COMPENSATION

PART TWO

STATE COMPENSATION

I SOCIAL SECURITY

1. The Main Benefits Available

(i) Industrial Injuries Benefits

(a) Injury Benefit

(b) Disablement Benefit

(c) Industrial Death Benefit

(ii) Sickness Benefit

(iii) Invalidity Pension

(iv) Widow's Benefits

(a) Widow's Allowance

(b) Widowed Mother's Allowance

(c) Widow's Pension

(v) Supplementary Benefit

2. Administration of Benefits

3. Finance

4. Criticisms

II CRIMINAL INJURIES COMPENSATION

1. Administration

2. Finance

3. Compensation

4. Operation of the Scheme in Practice

5. Criticism

PART TWO

STATE COMPENSATION

The state provides compensation for those who are injured. The social security system in operation today owes much to the Beveridge Report¹ which sought to streamline the Workmen's Compensation system and the provisions of the National Insurance Act 1911. The main principles of the National Insurance Act 1946 and the National Insurance (Industrial Injuries) Act 1946, which followed the Beveridge Report, are still the basis of the system. The flat rate contributions and benefits for which the 1946 Acts originally provided, have been replaced by contributions and benefits related to income. A large number of benefits, some with contribution conditions, others non-contributory are now available. The principal benefits will be discussed together with the administration of the Social Security system.

While some Social Security benefits have been characterised as a combination of insurance and national benevolence,² it was suggested in Part One above that the analogy with voluntary private insurance is a false one and it was submitted that all the benefits provided are, in fact, financed by a form of taxation. It is accordingly proposed to consider under the heading of state compensation the Criminal Injuries Compensation Scheme which is financed out of general taxation.

I SOCIAL SECURITY

A basic scheme for contributions and benefits has been consolidated in the Social Security Act 1975. All benefits are paid net as there is no liability to income tax.

An injured person (or his dependants if he dies as a result of his injuries) will be treated differently according to the circumstances in which the injury

occurs. Those suffering accidental injury "arising out of and in course of employment" are compensated on a different basis from those otherwise injured.

I. The Main Benefits Available

(i) Industrial Injuries Benefits

These benefits are payable where an "employed earner" suffers personal injury by accident arising out of and in course of his employment.³ There is no requirement for the injured person to show that the accident was caused by anyone's fault, and there is no reduction of benefit if the accident was partly or wholly the fault of the injured person. Certain types of disease are also covered.

The system does not extend to the self-employed. It is, however, difficult to understand why a shopkeeper is not covered if he is trading with unlimited liability, but is covered by the scheme if he converts his business into a limited company of which he becomes an employee.⁴

The most important benefits are:-

- (a) Injury Benefit
- (b) Disablement Benefit
- (c) Industrial Death Benefit

Contributions are payable, but benefits do not depend on satisfying any contribution conditions.

(a) Injury Benefit⁵

Injury benefit is a weekly benefit paid for up to six months

to a person who is incapable of work as a result of an injury arising out of and in course of employment or as a result of contracting a prescribed industrial disease.⁶

The first three days off work are not compensated.

Earnings related supplement is payable and can increase benefit up to 85% of the claimants pre-accident gross average weekly earnings. In this situation it is possible because of the tax factor for certain people to receive a higher amount in benefit than their pre-accident net earnings. In general this will only happen in the short term, until the cessation of the earnings related supplement after six months. None-the-less this anomaly could be removed by increasing benefits and making them taxable like income. In this situation no one would recover more than his net loss of income.

The flat rate of benefit for industrial injuries has always been higher than the corresponding level of sickness benefit.⁷

The rate of benefit is increased to take account of the dependants of the injured person.

(b) Disablement Benefit⁸

This is paid as a result of an industrial injury or disease and normally follows a period of receipt of injury benefit. The basic benefit depends on medical assessment of the degree of disablement which is expressed as a percentage. For assessments up to 20%, a disablement gratuity is paid,⁹ and for

assessments over 20% a disablement pension is payable weekly.¹⁰ Provisional assessments may be made in the first instance, and so where a pension is payable in the first instance, it may be terminated or reduced when the final assessment is made if the injured person's condition has improved in the intervening period. The assessment is objective and completely ignores the personal characteristics of the claimant.¹¹

The degree of disablement is assessed in terms of a tariff, which is not extensive nor is it binding in any particular case. What is prescribed is the percentage appropriate to particular kinds of disability. Thus, loss of both hands, very severe facial disfigurement, and complete deafness are all assessed at 100% in the tariff. Loss of two fingers of one hand is assessed at 20%. It is clear from the limited examples mentioned that even the maximum 100% assessment does not mean that the injured person is completely helpless, and cases where the injured person is actually completely helpless qualify for a number of special allowances, such as unemployability supplement,¹² constant attendance allowance¹³ and exceptionally severe disablement allowance.¹⁴

There is provision for the increase of injury benefits and disablement pensions where there are dependants.¹⁵

(c) Industrial Death Benefit¹⁶

The widow of a man who dies from an industrial accident or

disease is entitled to receive a pension for life or until she remarries. On remarriage she receives a gratuity of an amount equal to one year's pension. The rate of pension is higher for the first twenty-six weeks, and thereafter the rate varies according to circumstances.¹⁷

An allowance is also payable in respect of children of the deceased.¹⁸

(ii) Sickness Benefit

A flat rate of sickness benefit is payable if the claimant is incapable of work because of illness or disablement and satisfies the contribution conditions, which depend on contributions paid as an employee or a self-employed person.¹⁹ The contribution conditions are not very onerous,²⁰ and if they are only partially satisfied, benefit at a reduced rate is payable.²¹

The standard rate of benefit is increased for an adult dependant and for each dependent child.²²

No flat rate benefit is payable for the first three days off work and sickness benefit is replaced by invalidity pension after 168 days although a person who does not qualify for invalidity pension continues to receive sickness benefit for up to 312 days in any period of interruption of employment.

An earnings related supplement is payable for twenty-six weeks after the first twelve days off work and may increase the benefit to a level of 85% of gross earnings.²³

(iii) Invalidity Pension

A claimant who has made national insurance contributions for three years qualifies for invalidity pension if his incapacity continues after he has received sickness benefit for 168 days in any period of interruption of employment.²⁴ Thus, after the earnings related supplement is no longer payable, the effect of its loss is cushioned to some extent by the payment of this pension which is at a higher flat rate than sickness benefit.²⁵

Again increases are payable for an adult dependant and each dependent child.

An invalidity allowance is also payable varying according to the age of the injured person.²⁶

(iv) Widow's Benefits

A widow is entitled to widow's benefit if her late husband satisfied the contribution conditions, and again a reduced rate of benefit is payable if the contribution conditions are only partially satisfied. The different types of benefit available are:-

(a) Widow's Allowance²⁷

This is a high rate of benefit payable for the first twenty-six weeks after the death of the husband and the amount is increased for each dependent child.

(b) Widowed mother's allowance²⁸

When widow's allowance ends or is not payable, then widowed mother's allowance is payable as long as the

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widow has a son or daughter under nineteen years of age living with her. Increases are payable for other dependent children.

(c) Widow's pension²⁹

When widow's allowance and widowed mother's allowance are not payable or cease to be paid, then widow's pension is payable if the widow is over forty years. The standard rate is payable to widows over fifty years old, but that rate is reduced by 7% for each year under fifty, so that a forty-year old widow receives 30% of the standard rate.

(v) Supplementary Benefit

Supplementary benefit is state financial assistance available as of right to anyone over sixteen whose resources are deemed insufficient to meet his needs. It can be claimed by anyone who is not in full-time employment, and is a flat rate benefit with discretionary additions for such items as rent. The benefit is reduced if the income or capital of the beneficiary exceed stated limits.³⁰ Benefit is not payable to a person undergoing full-time education at school level nor to a person engaged in an industrial dispute, although it can be paid for his dependants.

The interesting point about supplementary benefit is that the principal requirement is proof of need, and all the claimant's resources are taken into account, as is the receipt of all other social security benefits. Thus, if a claimant has even modest savings, is privately insured or if he recovers damages, payment

will not be made.

2. Administration of Benefit

Administration in the vast majority of cases is extremely straightforward. Claim forms are completed and sent to the local office of the Department of Health and Social Security. In the first instance a decision is taken by an insurance officer, who is a civil servant.

Claims for industrial injuries benefits and sickness benefit are supported by a medical certificate to the effect that the applicant is unable to work.

So far as industrial injuries are concerned, medical questions, such as percentage degrees of disability are decided in the first instance by a Medical Board which consists of two medical practitioners.³¹ There is an appeal open both to the claimant and the Secretary of State from the decision of the Medical Board to a Medical Appeal Tribunal.³²

One principal advantage of the system is that estimates about the extent or duration of injuries are unnecessary. Provisional assessments which are open to review may be made, and the system generally has developed to cope with changes in circumstances. In 1974, for instance, approximately half of the cases dealt with by Medical Boards were re-assessments of claimants who had been examined in earlier years.³³

All other matters are dealt with initially by the insurance officer, from whose decision an appeal lies to a local appeal tribunal.³⁴

This consists of three members, being an independent chairman and two members chosen from panels representing employers and employees.³⁵ From the decision of the local appeal tribunal an appeal lies on a point of law to the Commissioner.³⁶

It should be mentioned that the tribunals are not characterised by the adversary procedure which is omnipresent in the common law, their purpose being to ensure that the applicant receives what he is entitled to receive in terms of the relevant provisions. The system appears to work reasonably well in practice providing an informal speedy and inexpensive machinery for dispensing the various benefits.³⁷

One source of criticism has been the fact that legal aid is not available, and it seems that only in about one case per thousand will a claimant be legally represented.³⁸ It is possible that the Legal Advice and Assistance Act 1972 may have improved the position, since claimants are now able to seek advice from solicitors on the presentation of their case.³⁹

3. Finance

The Social Security system is financed out of compulsory contributions made by employees, employers and the self-employed, and out of general taxation. There can be little doubt that in terms of the sums of money provided in benefits the system is of much greater significance than the recovery of damages for personal injuries.

In 1974 the receipts of the Social Security Fund (excluding the industrial injuries scheme) amounted to over £4,280 million. Total

expenditure was over £4,041 million, and the total of all benefits paid exceeded £3,860 million. Administrative expenses were just over £181 million or approximately 4.5% of total expenditure.⁴⁰

So far as the industrial injuries scheme is concerned total receipts for Great Britain in 1974 amounted to over £173 million, total expenditure was in excess of £153 million and the total of all benefits paid exceeded £138 million. Administrative expenses were just over £15.5 million or approximately 10.1% of total expenditure.⁴¹

If the sources of receipts are broken down, the social security system received £1,682 million in flat rate contributions from employers and insured persons, £1,911 million in graduated contributions from the same source, and £665 million came from the Consolidated Fund and income investments.⁴²

Contributions to the industrial injuries fund from employers amounted to 49.3% of total receipts, from employees 22.7%, from the Consolidated Fund 14.8% and income from investments amounted to 12.9% of total receipts.⁴³

Expenditure on non-contributory benefits for the year to 31 March 1974 amounted to £1,386 million.⁴⁴ It is, therefore, not possible to compare this accurately with the total expenditure for 1974 referred to above, but it appears that expenditure on non-contributory benefits is approximately one-third of total expenditure.

The figures provide an interesting contrast with awards of damages. No precise figures are available, but it has been estimated that in the case of motor vehicle accidents, approximately £100 million is

available in the form of premium income for payment of claims.⁴⁵

In 1974 when casualties of road accidents numbered 324,602 (with 6,876 killed and 82,030 seriously injured)⁴⁶ £100 million would have provided an average recovery of only about £300 provided the entire premium income was available as compensation, and this is clearly not the case. It is, of course, not possible to say how many of those injured actually recovered damages.

4. Criticisms

The risk of abuse in any social security scheme is always present. In any system which is designed to deal speedily with millions of applications for benefits each year, there will be opportunities for abuse. One researcher⁴⁷ found no evidence of serious abuse in 1958. More recently, the Report of the Committee on Abuse of Social Security Benefits⁴⁸ was also unable to find evidence of serious abuse, but indicated that one reason for this was that procedures for checking abuse were in some cases less than adequate. It is disappointing that its recommendations in this respect particularly did not find favour with the Government.⁴⁹ The problem of abuse was debated in the House of Commons on 23 March 1976⁵⁰ when the Minister of State for Health and Social Security indicated that in 1975 there were 45,000 known cases of benefits being obtained fraudulently and provisional figures showed the total number of prosecutions to be 15,350. In the rest of the cases the amount involved was generally too small to justify the expense of prosecution. During the debate it was stated that in the course of 1975 18 million claims for benefit were processed.

Many of the criticisms formerly advanced of the social security system⁵¹ have been dealt with by the wholesale introduction of earnings related benefits as the general rule for short term incapacity lasting up to six months. The position of those incapacitated for long periods has also been improved by the introduction of the invalidity pension at a rate higher than the flat rate of sickness benefit.

Yet anomalies remain. The flat rate of industrial injury benefit is still considerably higher than the flat rate of sickness benefit and in general the victims of industrial accidents are treated very much more favourably than others. It is questionable whether this differentiation can be justified - why should a workman be treated differently if he is injured travelling to work according to whether he uses public transport or transport provided by his employer?⁵² The needs of the victim or his dependants are the same no matter how the accident occurred.

The Beveridge Report⁵³ recognised the force of this argument in 1946:-
"..... Acceptance of this argument and the adoption of a flat rate of compensation for disability however caused would avoid the anomaly of treating equal needs differently and the administrative and legal difficulties of defining just what injuries were to be treated as arising out of and in course of employment A complete solution is to be found only in a completely unified scheme for disability".

Despite this recognition, the Beveridge Report recommended a separate scheme for industrial injuries, though the reasons for so doing have been the subject of much criticism.⁵⁴ The main reasons

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were firstly that some work is specially dangerous and it is desirable that men should not be discouraged from taking up such work and, secondly a man injured at work is injured whilst working under orders and this situation can be distinguished from sickness and disease. These reasons are not convincing. For doing more dangerous work higher wages are paid, and it is submitted that there is no real distinction between accidental injury and sickness or disease. For Beveridge's second reason to be valid sickness would have to be contracted voluntarily.

II CRIMINAL INJURIES COMPENSATION

The Criminal Injuries Compensation Scheme came into effect on 1 August 1964. The Scheme was not established on a statutory basis but was set up by announcement in Parliament. This means that changes can be introduced in the same way and the Scheme was modified on four occasions between 1965 and 1969.⁵⁵ Since it has no statutory basis the Scheme does not create a legal right to compensation which is, therefore, paid ex gratia.⁵⁶

The Scheme provides for payment of compensation to the victims of "personal injury directly attributable to a crime of violence (including arson and poisoning) or to an arrest or attempted arrest of an offender or suspected offender or to the prevention or attempted prevention of an offence or to the giving of help to any constable who is engaged in arresting or attempting to arrest an offender or suspected offender or preventing or attempting to prevent an offence".⁵⁷

Where the victim has died as a result of his injuries, provision is made for payment to his dependants.⁵⁸

Offences against a member of the offender's family living with him at the time are excluded.⁵⁹ This is to avoid "the difficulty in establishing the facts and ensuring that the compensation does not benefit the offender".⁶⁰ Application of this provision may occasionally be harsh (where, for instance, a wife leaves her husband for good after the incident).

In addition no compensation will be payable unless the circumstances of the injury have been the subject of criminal proceedings or were reported to the police without delay.⁶¹

1. Administration

The Scheme is administered by the Criminal Injuries Compensation Board, whose members, all legally qualified, are appointed by the Home Secretary and the Secretary of State for Scotland, after consultation with the Lord Chancellor.⁶² The Board is assisted by a staff of approximately 125. The office of the Board is in London where it mainly sits, but it visits other cities according to the volume of work.

Applications for compensation are made on a form provided by the Board. The form requires the applicant to describe the incident and detail the injuries sustained. If the incident has been reported to the police details of this are required. The applicant is also required to authorise the Board to obtain any relevant information and this normally consists of police and medical reports and information relating to employment and social security benefits.⁶³

Applications are dealt with in the first instance by a member of the Board's staff, who will obtain any necessary information. His duty is to see that all relevant facts are obtained whether or not the facts enhance or prejudice the application. When he completes his enquiries, a brief case summary is prepared and this, together with the application form, reports, any other documents and correspondence is sent to a single member of the Board, who makes a decision, unless he considers that he is unable to reach a just decision when he will refer the case to three other members of the Board for a hearing.⁶⁴

The decision of the single member is communicated in writing to the applicant. If the applicant is not satisfied with the decision, either because his claim has been rejected or because he considers the compensation offered to be inadequate, he is entitled to a hearing before three other members of the Board.

The procedure at the hearing is to be as informal as is consistent with a proper determination of the application.⁶⁵ It is for the applicant to make out his case and both he and a member of the Board's staff are able to call, examine and cross-examine witnesses - The Board are to reach their decision solely on the evidence brought out at the hearing. Legal representation is permitted, but the Board will not pay legal expenses, although they do have a discretion to pay the expenses of witnesses.⁶⁶

The effect legal representation has on the success rates of claims which go to a hearing is difficult to assess. A survey by the Board in 1966 - 67 found that those who were not legally represented had only a slightly better success rate,⁶⁷ but a survey in 1970 - 71 found that those legally represented fared considerably better.⁶⁸ A higher success rate for those legally represented is to be expected, on the basis that claims clearly outwith the Scheme would not be pursued by counsel or a solicitor.

2. Finance

The Board is financed through Grant-in-Aid, and their expenditure falls on the Home Office and the Scottish Office.⁶⁹ In the year to 31 December 1975 the Board paid over £6.2 million in compensation.⁷⁰

Administration costs are normally less than 10% of total expenditure.⁷¹

3. Compensation

Compensation is by lump sum payments. Assessment of loss is generally made on the basis of common law principles with the following important differences:-

- (i) no award will be made unless the injury was one for which over £50 would be awarded⁷²
- (ii) the maximum loss of earnings which can be taken into account is twice the average of industrial earnings at the time the injury was sustained⁷³
- (iii) social security benefits are deducted in full,⁷⁴ as are awards of damages and those compensated by the Board have to undertake to repay the Board from any damages they subsequently recover.⁷⁵

Interim payments are permitted where, for example, only a provisional medical assessment is available.⁷⁶

The Board have a discretion⁷⁷ to arrange for the administration of any sums awarded as compensation. This is not restricted to children but extends to adults and may be contrasted with the position where an award of damages is made by a court.

The Board will reduce an award, or reject it altogether, if, having regard to the conduct of the victim (both before and after the incident) it is inappropriate that he should be granted a full award or any award at all.⁷⁸ Thus, where a professional housebreaker was shot by the occupant of a house which he had broken into, he was

refused an award, even though the occupant of the house had been convicted of an offence.⁷⁹

Substantial sums have been awarded under the Scheme. In 1971 a claimant aged 28 was severely paralysed as a result of an assault by two men. His life expectancy was twenty-five to thirty years. His pre-accident earnings were £31 per week and the weekly charge at a nursing home to which he awaited admission was £21. An award of £40,000 was made.⁸⁰

4. Operation of the Scheme in Practice

The operation of the Scheme puts an applicant to little inconvenience or expense, and decisions are made by the Board relatively quickly. The majority of applications are dealt with within six months, and those which take longer are likely to be cases involving a hearing or cases where interim awards have been made.⁸¹

From an administrative point of view, the Scheme has been a success. Claims are dealt with speedily and administrative expenses are not excessive.

There have been problems in deciding whether certain claims fall within the Scheme, and in some cases, what appear to be simply accidental or unintentional injuries have been compensated. In one case, compensation was paid to the dependants of a policeman killed while driving on a slippery road surface on his way to premises where men were reported to be acting suspiciously. His death was considered by the Board to be directly attributable to attempted

prevention of a crime.⁸² On the other hand, a policeman who in answer to an emergency call followed another officer out of the police station and injured his wrist when the glass panel of a swing door released by the first officer, smashed was not granted an award.⁸³ The latter decision seems more correct, and it appears that in the former case the Board were clearly influenced by a desire to award compensation to the victim's dependants. In any scheme which provides compensation for a particular class of injured person such problems are inevitable.

5. Criticism

A leading article in 'The Times' on 3 February 1976 criticised the fact that the Scheme had never been placed on a statutory basis,⁸⁴ and recommended that in assessing compensation the Board should be guided solely by the principles of the common law.

These criticisms are rather misguided. The fact that the Scheme is not established on a statutory basis makes no practical difference to applicants. The Board has stated:-

"..... victims of crimes of violence are entitled to compensation. We use the word 'entitled' advisedly; for though payments are made ex gratia we are instructed and compelled to make payments to all who come within the ambit of the Scheme".⁸⁵

So far as the assessment of compensation is concerned the inadequacies of the common law principles in this respect have been discussed in Part One, and it is submitted that the way in which double

compensation is restricted under the Scheme by full deduction of social security benefits and awards of damages, is preferable and more correct in principle. So far as the restriction on the amount of earnings is involved, this Scheme should be modified so that this no longer applies. The amount of money saved by the restriction is negligible.⁸⁶

Other criticisms of the Scheme have mainly centred on the singling out of crimes of violence for special treatment. This point was recognised even by those who advocated the introduction of the Scheme. Lord Longford stated:-

"I cannot myself find a logical reason why crimes of violence should be singled out except that on the whole they tend to arouse more sympathy than other crimes do If we are going to make progress over the whole wide front of compensation to victims we must begin in the sector where public opinion is more favourable to our cause".⁸⁷

Ison, however, emphasised that from the point of view of the victim, the nature and consequences of his condition are infinitely more important:

"In the case of an industrial worker what difference should it make whether he is disabled at work, on the highway or at home? The needs of his family are the same. Or if a pedestrian is injured by a blow on the head, why should he be entitled to compensation from the state if the blow came from the cosh of a robber but not if

it came from an object carelessly dropped by some person unknown."⁸⁸

Attempts have been made to justify special treatment for the victims of crime,⁸⁹ but in the end these fail to deal with the basic issue which is why give compensation to one group of unfortunate victims and not to others?

Lord Denning's conclusion was that so far as compensation was concerned, crimes of violence could not be distinguished from other misfortunes and accordingly no responsibility should be accepted by the state.⁹⁰ Ison correctly points out that the absence of any ground of distinction could with equal logic be put forward as a reason for extending compensation to all who are disabled by personal injury or disease, regardless of cause.⁹¹

It is submitted that Ison's view is preferable and that it is not just or equitable to select particular categories of injuries for special treatment.

It has been suggested that the Government would not have regarded the Scheme with favour had the total cost not been comparatively small.⁹² £6.2 million is indeed a small drop in a large welfare state pool.

PART THREE

PART THREE

I REFORMS WITHIN THE EXISTING SYSTEM

1. Awards of Damages
 - (a) Procedural Reforms
 - (b) Legal Aid
 - (c) Insurance
 - (d) Assessment of damages

2. Social Security

3. General

II THE ADOPTION OF NEW RULES FOR MOTOR VEHICLE ACCIDENTS

1. No fault insurance covering economic losses only
2. No fault insurance covering economic and non-economic losses
3. Strict Liability
4. Conclusions

III TOWARDS A SYSTEM OF SOCIAL INSURANCE

IV CONCLUSIONS

PART THREE

Having examined in Parts One and Two the principal means, apart from voluntary private insurance, by which the victims of accidents may obtain compensation, Part Three will be devoted to a consideration of the ways in which the present systems might be reformed.

Possible reforms will be considered under the following heads:-

- I Reforms within the existing systems
- II The adoption of new rules for motor vehicle accidents
- III Social insurance

I REFORMS WITHIN THE EXISTING SYSTEMS

It would be possible to retain the basic structure of the present systems while attempting to modify them to meet the criticisms discussed.

I. Awards of Damages

(a) Procedural Reforms

A number of procedural reforms might be introduced.

One possible improvement¹ would be to divide the court procedure into two stages. At the first stage, the issue of liability would be determined, and if the defender were found liable an interim award of damages would be made. The final award would be decided at the second stage, which would take place when the medical prognosis was available. It has been suggested that this would enable the courts to decide the question of liability sooner than is the case at present, and as a result the witnesses would be more

able to recall accurately the circumstances of the accident. It is doubtful whether this would bring about a considerable improvement over the present system where interim awards are possible in certain limited circumstances. A preliminary investigation of the circumstances would still have to be undertaken by both parties, and there would still be a period of negotiation with the defender or his insurance company. This normally takes several months, and it would only be after the breakdown of negotiations that an action would be raised to have the question of liability decided. There would then be a period of adjustment of written pleadings and it would almost certainly be several months more before a proof, assuming that there was no need for a debate.

Other minor procedural reforms could be instituted, such as making the exchange of witnesses' statements compulsory, but it is doubtful if the procedure can be speeded up very much. Courts do take a considerable time to reach decisions. Procedure is very formal, there must be a period of adjustment of written pleadings, debate on legal questions may be necessary and thereafter a proof may be required. All of this takes time, and the action is only raised after attempts to achieve a negotiated settlement have failed.

The fundamental question to be posed is whether our courts are an appropriate forum for determining personal injury disputes. If they were formerly considered to be appropriate, can they still be so regarded when set beside the administrative efficiency and speed of the social security system?

(b) Legal Aid

Legal aid should be more readily available. An individual's bargaining position is very weak if he is unable to risk going to court for fear of being ruined by having an award of expenses made against him. The income limits for qualification for legal aid are set too low, and many people with modest incomes are effectively barred from suing in the Court of Session if there is even the slightest doubt about the issue.

Consideration should perhaps be given to introducing with appropriate safeguards the contingent fee system. This system has produced in the United States a class of highly skilled pursuer's lawyers.²

(c) Insurance

The existence of insurance should be acknowledged by the courts. Some judges have attempted to do this. Lord Denning, in particular, has tried to reduce the emphasis on the role of fault. In *Morris v. Ford Motor Co. Ltd.*,³ he stated:-

"The damages are expected to be borne by the insurers. The courts themselves recognise this every day. They would not find negligence so readily - or award sums of such increasing magnitude - except on the footing that the damages are to be borne not by the man himself but by an insurance company".

In *Nettleship v. Weston*,⁴ a learner driver collided with a lamp post and her driving instructor was injured. Lord Denning in deciding that the standard by which the learner driver was to be judged was the standard of a competent and experienced driver stated:-

"We are in this branch of the law, moving away from the concept 'no liability without fault'. We are beginning to apply the test 'on whom should the risk fall?'. Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her".

Other judges have not found themselves able to adopt this approach. In *British Railways Board v. Herrington*⁵ Lord Wilberforce said:-

"If the respondent is to recover, he must rely on our outdated law of fault liability, which involves the need to establish a duty of care towards him and the breach of it".

The traditional view that liability insurance must be ignored was re-affirmed in *Launchbury v. Morgan*⁶ where Lord Denning's approach was severely criticised.

(d) Assessment of Damages

If the courts are to fulfil their expressed intention of awarding full compensation so far as this can be given by money, then it is clear that the present method of assessment could be improved by greater use of actuarial tables. So long as lump sums assessed once and for all are awarded, accurate assessment will be impossible to achieve. It was noted earlier that even if damages are calculated on an actuarial basis and assumptions are made about rates of future inflation changes in tax law of themselves are sufficient to falsify calculations.

Further consideration should be given to establishing a system of periodic payments to compensate future income loss, perhaps along the lines of the proposals made by Harris and Philips discussed above.⁷

2. Social Security

Following what was said in Part Two, the benefits for long term incapacity should be improved, and distinctions on the basis of how the accident took place should be removed.

Consideration should also be given to extending the legal aid scheme to cover social security tribunals.

3. General

Steps should be taken to reduce the number of situations where over compensation takes place. The most simple solution would be to deduct all state benefits from awards of damages.

II THE ADOPTION OF NEW RULES FOR MOTOR VEHICLE ACCIDENTS

Atiyah states that in practice about 90% of damages claims arise out of road accidents and industrial accidents.⁸

So far as industrial injuries are concerned, the industrial injuries scheme, which provides for compensation without proof of fault, was examined in Part Two. In addition to recovering industrial injuries benefits, an injured workman is entitled to raise an action for damages against his employer, and if he is successful only half of the industrial injuries benefits to be received for a period of five years will be deducted. Ison estimated that around 10% of those injured at work recover damages;⁹ others have put the figure at around 12%.¹⁰

The other principal claimants, those involved in motor vehicle accidents, have no special scheme, and require to prove fault in the normal way. There is increasing dissatisfaction with the operation of the law as it affects road accident victims. It has been suggested that if special rules were introduced for those injured in motor vehicle accidents, this would go a long way towards meeting many of the criticisms which have been discussed. Mr. Graham Page recently introduced a Private Member's Bill, the Road Accident Compensation Bill, which sought to make the user of a motor vehicle on a road responsible for any death or bodily injury arising out of the use of that vehicle on the road whoever was to blame. The Bill failed to get a second reading in the House of Commons on 12 March 1976.

Once again, the problem is that of justifying special treatment for road accident victims. The reasons advanced are:-

- (i) There are already special features involved in this area, particularly compulsory 3rd party insurance cover,¹¹
- (ii) Road accidents are very frequent in this 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,¹²
- (iii) The adoption of a new system would be relatively easy because of two factors -
 - (a) the existing fault liability insurance, which could simply be transferred into no fault loss insurance, and,
 - (b) a sufficiently dangerous and defined activity (driving) such that it is possible to identify easily who is to pay for the loss.

Several different types of scheme have been suggested for motor vehicle accidents and these vary considerably in the extent and type of compensation provided.

1. No fault insurance covering economic losses only

The principal difficulty of the existing compulsory insurance arrangements for motor vehicles is said to be that "the insured event is too complicated, turning as it does on legal liability The result is not a system for paying people road accident insurance after road accidents, but a system for fighting people about paying them road accident insurance after road accidents".¹³

The solution for motor vehicle accidents is now seen in the United States as a system of no fault insurance, under which each accident victim is paid his own monetary losses by his own insurance company

without the question of fault being considered. Payment is made as losses accrue on a month to month basis.¹⁴ Each party, as a condition of recovery, is required to waive his damages claim against the other. Non-pecuniary losses are not covered.

This idea has received widespread support in the United States, and several state schemes are now in operation. In the Oxford Survey, only 42% of those injured recovered any damages at all, but 21% of those who recovered received less than their total economic loss taking into account compensation from all sources.¹⁵ The adoption of this type of scheme would, therefore, represent some improvement. More injured people would recover and their income would continue without interruption. For those not earning, such as students and housewives, the scheme would not represent any improvement on the present position, but would leave them free to sue for damages.

The American schemes, have been developed to meet the high cost of motor vehicle insurance premiums there,¹⁶ and because of the fundamental differences in social conditions in the United States, there would be little to gain by looking in any detail at the various State schemes.

2. No fault insurance covering economic and non-economic losses

Recent proposals for reform in this country have clearly leaned heavily for their basic principles on the American schemes outlined above, but have attempted to modify them to suit British conditions.

Justice¹⁷ and Elliot and Street¹⁸ have made fairly radical suggestions for reform, and an outline of the type of scheme they favour follows:-

Finance

Both consider that the cost should be met principally by the motoring community. Each vehicle would require to be insured, both suggest an extra levy on petrol to reflect the increased risk of higher mileage, and Justice also suggest an extra levy on drivers paid when the driving licence is renewed. The levy on drivers would be graduated according to the individual driver's safety record.

Administration

Elliot and Street favour the administration of the scheme being undertaken by the State, mainly because of the large savings on commissions and the existence of the industrial injuries scheme machinery for dealing with claims. Justice express no view on this.

Compensation

So far as economic loss is concerned Justice recommend that full recovery of economic losses should be possible. Elliot and Street on the other hand suggest an income limit of $2\frac{1}{2}$ times average industrial earnings, and would exclude vehicle damage which they consider could be adequately handled by private insurance companies.¹⁹ It is doubtful if this rather arbitrary limitation would actually result in a considerable saving.²⁰

Both favour periodic payments largely because of the advantages of flexibility - payments can be adjusted to meet the changing circumstances of the recipient and the effects of inflation and the problems of prognosis

are eased. Justice would include a discretion to award a lump sum.

So far as non-economic losses are concerned Justice favour unlimited recovery of a lump sum, unless this can be shown to be financially impossible. Elliot and Street consider that this is the case and suggest that it would require a four or five fold increase in premiums. They favour much lower lump sum awards based on a flexible tariff system.

Contributory Negligence

Both Justice and Elliot and Street consider in principle that contributory negligence should be ignored. Logically and economically, this makes sense. If the victim is entitled to recover without proof of fault of the driver, why should compensation be reduced because of the victim's own fault. Economically, the reduction in expenses achieved by removing the need for the circumstances to be investigated in each case is largely lost if contributory negligence is to be taken into account. There are difficulties where the driver was drunk or was driving recklessly and it is hard for those familiar with the present system to accept that such drivers should receive compensation. As drivers they will have contributed to a compensation fund. If they had contributed to a private insurance scheme covering accidental injury they would still recover from the insurance company despite their conduct. If a man insures his house against fire damage, and then negligently sets it alight while under the influence of alcohol, he will still recover from the insurance company. It is possible to separate the issue of compensation from the issue of punishment. If a drunken or reckless driver is killed you penalise only his dependants, and if he survives he will be punished

by the criminal law. A fine consistent with his conduct or even a period of imprisonment seems more appropriate than the unsatisfactory results which application of the doctrine of contributory negligence often achieves.²¹

Justice, however, certainly feel that the compensation should be reduced or denied altogether where the conduct was reckless or intentional.

3. Strict Liability

A third suggestion for motor vehicles lies in an extension of the rules of strict liability.

The Law Society of England advocated this course in its Memorandum to the Pearson Commission in January 1975, and favour the approach of the Council of Europe Convention on Civil Liability for Damage caused by Motor Vehicles.²² The Convention would make the "keeper" of a vehicle strictly liable for damage caused by it, subject to provision for cases where the victim has contributed to the damage himself.

Under the scheme proposed by the Law Society any person using a motor vehicle on a highway would be strictly liable for personal injury or death caused by it, but the complete or partial defence of the plaintiff's fault would remain available except against children below a certain age.²³ The defence would also be excluded in claims up to £250.

The Law Society accept that there would remain the problem of a driver of a motor vehicle injured in an accident where no other

vehicle is involved. They consider that this would be "quite rare",²⁴ and state that it should be the responsibility of the driver to insure against such an accident. They suggest that one solution might be to require an inclusion in the compulsory insurance cover under S. 143 of the Road Traffic Act 1972 of a modified version of the first party cover already given under the standard comprehensive policy, namely personal injury cover up to a certain figure for the driver of a vehicle injured in an accident where no other user of a motor vehicle is involved.²⁵

It is suggested by the Law Society that the adoption of their proposals ought to assist in speeding up settlement of claims.²⁶

It is submitted, however, that the proposals of the Law Society offer little more than a marginal improvement on present arrangements for the following reasons:-

- (i) the proposals eliminate the need to prove fault on the part of the driver, but since the defence of contributory negligence is retained it will still be necessary in the majority of cases to investigate all the circumstances of the accident. This investigation will be undertaken by both the pursuer and defender and there will, therefore, be only a small saving in administrative expenses. How will this speed up settlement?
- (ii) the proposals regarding single vehicle accidents are inconsistent with the general approach. For example, in an accident involving two vehicles where each driver was 50% to blame each will recover half of his losses from the insurance company of the other. But if one driver recklessly collides with a lamp

post, under the extension of first party insurance cover proposed he will recover all his loss or will recover up to the maximum amount of the cover. The Law Society fail to appreciate any inconsistency here.

- (iii) no indication of the cost of these proposals is given.
- (iv) no attempt is made to reduce the administrative cost of operating the liability insurance system.
- (v) there are no proposals dealing with compensation. If lump sum awards are to be retained, how will the proposals speed up settlement? One major cause of delay is the need to wait for the full extent of the injuries to become apparent. The proposals offer no assistance in this respect.

It is difficult to resist the conclusion that the proposals of the Law Society have been influenced by the professional interest which its members have in the preservation of the present system. Their proposals would not represent any major change in the present arrangements and fail to deal with the criticisms discussed in Part One. A larger number of people would probably recover, but the extra cost would simply result in higher insurance premiums.

4. Conclusions

Of the proposals outlined above, the most promising appears to be the no fault insurance scheme suggested by Elliot and Street and Justice. That scheme would result in recovery by very many more of those injured in road accidents. The injured would receive periodic payments.

to replace lost income, with lump sums for physical injury or disablement. Considerations of cost would appear to make it essential for the State to undertake the operation of the scheme, and the large savings in commissions would immediately become available to benefit the injured. Administrative expenses would also be reduced as there would be no necessity to investigate the circumstances of each accident.

More generally, motor vehicle accidents accounted for approximately 40% of total accident deaths in 1974, with industrial deaths accounting for a further 7½%.²⁷ Many of the remainder were accidental deaths in the home. In 1965, Ison estimated that 45% of all injury producing accidents took place in the home, and only a minute proportion of these would be compensated by damages.²⁸ It is not unreasonable to assume that today's figure would not be very different. Why should road accident victims, who are already compensated to some extent, have their position improved while nothing is done for the victims of accidents in the home?

This has been referred to by Hellner as the "bathtub argument".²⁹ If road accident victims are to receive special advantages, why should the same advantages not apply to those injured in all other circumstances, including the man who slips in his bath and suffers injury. All those injured are in need of compensation. Professor Hellner in principle accepts the argument, as Ison does, and Ison's proposals will now be considered.

III TOWARDS A SYSTEM OF SOCIAL INSURANCE

A more radical solution would be to rationalise and integrate the various sources of compensation examined in Parts One and Two to form a comprehensive system of social insurance.

Such a system was advocated some years ago by Ison.³⁰ His suggested scheme involved the rationalisation and extension of social security with a compensation fund being administered by the State. The income of the fund would be derived in two ways:-

- (i) to the extent that compensation payable out of the fund was due to injuries or diseases which could readily be attributed to identifiable activities, there would be a charge on those activities.
- (ii) compensation not covered by (i) would be met out of general taxation.

The main objective of Ison's scheme was income security, and provision would be made for earnings related periodic payments taxable as income. Provision would also be made for payment of lump sums to compensate loss of faculty, disfigurement and so on, to be payable whether or not the individual was also eligible for an income allowance. The lump sums would be laid down in tables which took account of the nature and extent of the injury and the age and sex of the claimant.

Benefits would be paid by an administrative process with appropriate provision for judicial review.

With regard to total costs, Ison estimated that if the money presently being used to fund liability insurance were channelled to social security and

other factors were unchanged, the income of the fund would have been sufficient to cover the cost of the extra payments to be borne by the social security fund.³¹ In addition, savings would also result from the elimination of over-compensation.

Ison's system would, of course, extend to those suffering illness or disease as well as those suffering injury.³²

A comprehensive system of social insurance covering those injured in accidents recently came into force in New Zealand. The new system adopted by New Zealand represents the most radical solution yet enacted to problems of compensating accident victims. An outline of the scheme is given in the appendix to this paper.

The New Zealand scheme will provide the Pearson Commission with useful information on the operation of a no-fault system. The information will be particularly useful in view of the similarity between the present position in this country and the system which formerly operated in New Zealand.

The legal system in New Zealand is a common law system derived from English law and was similar in its application to victims of accidents to the present law in Britain. Legal liability for accidents depended principally on the ability of the injured person to prove that the accident was the fault of a third party; there was compulsory liability insurance for the users of motor vehicles and industrial accident victims were covered by workmen's compensation.³³

Old age pensions were introduced in 1898, and the concept of the Welfare State has been in existence in New Zealand since 1935. The social security system is presently very extensive and most medical treat-

ment is provided by the State under the Social Security Act 1964.³⁴

The introduction of the new system in New Zealand followed a Royal Commission Report in 1967.³⁵ The system is unique in that for the first time there is a comprehensive system which applies to everyone injured in any type of accident. The Accident Compensation Act 1972 set up two compensation schemes, the first for "earners" who were covered in respect of all accidents whenever and however they happened, and the second for those who suffered personal injuries or death in road accidents. This meant that "non-earners" injured other than in road accidents were excluded and had to rely on their rights at common law. By the Accident Compensation Amendment (No.2) Act 1973, a third scheme was established to provide cover for those excluded by the original act.

The New Zealand Scheme is administered by a public body, the Accident Compensation Commission. Insurance companies were asked to estimate their likely administrative expenses for operating the proposed scheme, but their estimate was 16% of total costs³⁶ compared with 6 - 8% for the public body. It is doubtful if it was necessary to establish entirely new machinery to administer the Scheme, but the principal reason for separating the scheme from general social security was that social security benefits in New Zealand are paid on a flat rate basis, whereas the new Scheme makes periodic payments related to earnings.³⁷

The role of the legal profession, though less important, will still be significant in view of the extensive provisions for reviewing the decisions of the Accident Compensation Commission, and also because certain lump sum payments provided by the scheme will not be subject to any automatic formula.

The system is financed by contributions from employers, the self-employed, self insurers (such as the Government) and the owners and drivers of motor vehicles. Palmer feels that the emphasis is too much "on whom to pay and how much, rather than who will do the paying and how much",³⁸ and criticises the failure of the scheme to achieve the optimum level of "general deterrence". "General deterrence" is Professor Calabresi's name for market control or enterprise liability.³⁹ Palmer fails to appreciate that it is not really possible to operate a system of social insurance on the lines of the New Zealand scheme and still allow the forces of the market to control accident causing activities. New Zealand instead of allowing "general deterrence" to play a major role, has chosen a system of social insurance in which accident causing activities will be controlled by what Professor Calabresi would call "specific deterrence" measures. That is regulations dealing with specific activities and imposing safety standards, restrictions on use and so on. It is in this respect that the accident prevention section of the scheme has an important part to play, and this seems to have been overlooked by Palmer.

It is interesting to apply the provisions of the New Zealand scheme to recent cases in this country where the claimant succeeded in recovering damages. In *Howitt v. Heads*,⁴⁰ one of the cases considered in Part One, where the dependants were a widow and child, the dependency was taken to be £936 per annum. Apart from a small lump sum payment, the widow would have received under the New Zealand scheme initially approximately £1,000 per annum, based on the deceased's pre-tax earnings estimated at £36 per week (the only figure quoted in the case was a net figure of £26 per

week after deducting tax and national insurance payments). The sum would also be subject to review.⁴¹ The New Zealand payment is, of course, taxable whereas in this country only the part of the award which earns interest and any capital gains will be taxable. More important, however, is the fact that the capital sum awarded in *Howitt v. Heads* was extremely unlikely to last for the estimated period of the dependency. That could not happen in New Zealand. In *Gillan v. McGawn's Motors Limited*⁴² the deceased whose earnings in the year prior to his death were £4,036 was survived by a widow and two children. An award of £15,000 was made, being £12,000 loss of support and £3,000 solatium. Under the New Zealand scheme apart from a small capital sum, the annual payment would initially have been approximately £3,085.

It is too soon to evaluate the success of the New Zealand scheme. Much will depend on how the Accident Compensation Commission exercises its many discretionary powers with regard to awards, and it remains to be seen whether administrative expenses can be held in the 6 - 8% range. The scheme does appear to be a bold step in the establishment of a new style of compensation more in keeping with the needs of modern society. Many more people will recover than under the existing system in this country, and while the pretence of giving "full" compensation has rightly been abandoned, the New Zealand scheme will in the majority of cases, give adequate earnings related compensation, will be cheaper to operate, and will eliminate over-compensation.

The principal exclusion from the New Zealand scheme is disease.⁴³ The Woodhouse Report⁴⁴ accepted that this exclusion would lead to preferential treatment for the victims of accidents, but considered that

the necessary improvements in the accident compensation system should not be held up pending the introduction of a more comprehensive scheme also covering sickness and disease.

Australia, on the other hand, proposed in the National Compensation Bill, the setting up of a single compensation system covering every person incapacitated by illness, disease, or injury in all circumstances. The Bill followed the Report of the Woodhouse Committee under its chairman, Mr. Justice Woodhouse of New Zealand.⁴⁵ The Bill, which fell with the Labour Government in 1975, provided for earnings related payments for all those incapacitated through illness or injury of up to 85% of lost earnings. The maximum level of income to be taken into account was 26,000 dollars per annum. Non-earners such as housewives were to be treated as having a notional income of 2,600 dollars per annum, and benefits were to be reviewed quarterly as a counter inflation measure.⁴⁶ The proposals of the new Australian Government are awaited with interest.

IV CONCLUSIONS

Reforms within the existing system could be undertaken. While procedural reforms, extensions of the legal aid scheme, recognition of the role of liability insurance, and alterations in the method of assessing damages to compensate future income loss, would bring about some improvement, they can never provide the complete answer, and pressure for more fundamental change would almost certainly continue.

A new scheme for the victims of motor vehicle accidents would be a basic change and would undoubtedly improve the position of those injured. The problem with this type of reform is the "bathtub" argument of Professor Hellner. It is submitted that this argument is correct in principle, and that accordingly it would be necessary to adopt a complete system of social insurance along the lines of the New Zealand scheme and the proposed Australian scheme. These schemes show a major change of emphasis in the law relating to the provision of compensation for the injured, and they embody a recognition of the realities of modern life. As was stated in the Woodhouse Report.⁴⁷

"..... in the national interest and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them from the burden of sudden individual losses where their inability to contribute to the general welfare has been interrupted by physical incapacity.

..... Just as a modern society benefits from the productive work of its citizens, so should society accept the responsibility for those willing to work but prevented from doing so by physical incapacity. And, since

we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on the basis of equity by the community".

Since the passing of the National Insurance Act 1911, we have gradually developed a social security system which today provides assistance on a wide scale throughout the community. Over the same period, the recovery of damages for personal injuries has consequently diminished in importance. It has been asserted that in the enlarged scheme of social security, the function reserved for the law of reparation "is at best to supply additional aid and redistribute the accident cost with more discrimination".⁴⁸ It is clear, however, that the additional aid is not supplied on the basis of any satisfactory or acceptable discrimination. Whether it is given is often a matter of chance. It is not given where it is most needed or when it is most needed and it is administered in an expensive and wasteful manner.

It is submitted that any system for compensating the injured must be administratively efficient. The proportion of administrative expenses to benefits paid must not be excessive and claims must be dealt with without delay. The present law governing recovery of damages fails to meet these criteria, and would not do so even after the introduction of the procedural reforms discussed above. The social security system does meet the criteria, but persists in giving preferential treatment to those injured at work, failing to appreciate that the needs of those injured and their families are the same regardless of the cause of their injuries.

There is much wrong with our present system. If it is judged against the new approach in New Zealand it must inevitably be seen to be inadequate.

The report of the Pearson Commission is anxiously awaited.

APPENDIX

APPENDIX

AN OUTLINE OF THE NEW ZEALAND SCHEME FOR COMPENSATION FOLLOWING DEATH OR PERSONAL INJURIES SUFFERED IN ACCIDENTS

On 1st April, 1974 an entirely new system for compensation following death or personal injuries suffered in accidents came into force in New Zealand. The relevant statutory provisions are contained in The Accident Compensation Act 1972 as amended by The Accident Compensation Amendment (No. 1) Act 1973 and The Accident Compensation Amendment (No. 2) Act 1973.¹

Abolition of Claims for Damages

No claim, either under Statute or at common law, may be brought for damages following personal injury or death suffered as the result of an accident in New Zealand.²

The Act does not define "personal injury by accident" and so the meaning of the phrase will emerge only from the developing case law.³

Administration

The administration of the new system will be undertaken by a new body, the Accident Compensation Commission. The Commission is a corporate body consisting of three members, one of whom must be a barrister or solicitor who has practised for seven years. The members of the Commission are appointed for three years but may be re-appointed at the end of their term of office.⁴

The Commission is required to give effect to the policy of the Government in relation to the Commission's functions and powers, as the policy is communicated to it from time to time in writing by the Minister of Labour.⁵ Despite this power of governmental control, it is thought unlikely that the Government will exercise its

authority with regard to day to day administration, the power being included because the Commission will exercise control over large amounts of money the investment of which could dramatically affect the New Zealand economy.⁶

The Commission may appoint private insurance companies and other bodies to be its agents. The Act authorises delegation of collection of levies and payment of claims to these bodies.⁷

Claims must normally be submitted within twelve months of the accident.⁸ Notice of the accident must be given at the earliest practicable opportunity. Employees inform their employers who are obliged to keep a record of all accidents, and others must inform an agent of the Commission.⁹

No claim is allowed in respect of a personal injury which is self inflicted or following a death due to suicide. In addition, following a death, no claim is allowed by any dependant who is convicted of the murder or manslaughter of the deceased.¹⁰

Anyone who is dissatisfied with a decision of the Commission may apply to it for a review of its decision within one month.¹¹

The Commission may itself amend its own decision or may substitute another decision. It may alternatively appoint Hearing Officers and Medical Committees to hear the application.¹² A successful applicant will receive his expenses.

From decisions of the Commission or a Hearing Officer, an appeal lies to the Accident Compensation Appeal Authority, which consists of a judge, or a barrister or solicitor qualified to hold judicial office.¹³ The Accident Compensation Appeal Authority must sit in public and may rehear the evidence; it is not bound by the laws of evidence, may appoint someone with expert knowledge to assist it and may award costs.¹⁴

From the Accident Compensation Appeal Authority an appeal lies to the Administrative Division of the Supreme Court, with the leave of the Authority itself or the Court, on a point of law or a question of general or public importance.¹⁵

There is thereafter an appeal by way of Stated Case to the Court of Appeal, with the leave of the Administrative Division of the Supreme Court or the Court of Appeal.¹⁶

Finance

Three principal separate compensation schemes are established:-

- (1) The Earners' Compensation Scheme,
- (2) The Motor Vehicle Compensation Scheme, and,
- (3) The Supplementary Compensation Scheme.

The schemes are financed by separate independent compensation funds, and the intention was to ensure, so far as possible, that each fund should be self supporting and should not require subsidies from another fund or from general taxation.

(1) The Earners' Compensation Scheme

This scheme applies to all "earners" up to the age of sixty-five who suffer personal injury by accident in New Zealand.¹⁷ An "earner" can be either "self employed" or an "employee" and both terms are defined in some detail.¹⁸ The Earners' Compensation fund pays for all compensation and assistance given for the purposes of rehabilitation, except for an "earner" involved in a motor vehicle accident not in the course of his employment. In the latter case the compensation comes from the Motor Vehicle Compensation Fund.

The Earners' Compensation Fund is financed by levies on employers in respect of the earnings of employees, and by levies on the self employed. The rates of the levies can be varied according to several categories of industries and occupations. The Commission may also fix penal rates

for any employer or self employed person whose accident record is worse than normal for the particular category of occupation and may likewise fix a lower rate for those whose accident record is significantly better than normal.

The levies on earnings require to fall within limits set out in the Act,¹⁹ and these are payable to the Inland Revenue as agent of the Accident Compensation Commission.

(2) The Motor Vehicle Scheme

This scheme applies to all persons suffering personal injury by an accident in New Zealand if the accident is caused by or through or in connection with the use of a vehicle in New Zealand.²⁰

The Motor Vehicle Compensation Fund is supported by:-

- (a) Levies payable for every motor vehicle required to be registered and licensed annually. The rate varies according to the size, weight and type of the vehicle,²¹ and,
- (b) Annual levies on all those holding a driving licence.²²

(3) The Supplementary Scheme

This scheme covers anyone injured by accident in New Zealand who is outwith the scope of the first two schemes. The principal beneficiaries are, therefore, likely to be old age pensioners, housewives and children involved in non motor vehicle accidents.

This scheme is financed out of general taxation.

Benefits and Compensation

The benefits in respect of all schemes are the same.

(I) Loss of Earnings

Loss of earnings is compensated by periodic payments and the maximum amount of earnings to be taken into account has been fixed initially at 200 dollars per week, although there is provision for this limit and for benefit levels generally to be increased.²³ Anyone who earns more than this can, of course, take out his own private insurance cover. The first week off work may or may not be compensated. If the accident arose out of and in course of employment, the employer has to pay the employee's full basic salary for the first week, but otherwise the injured person bears the loss.²⁴

After the first week, the injured person receives earnings related payments in respect of his "loss of earning capacity" to cover 80% of his loss.²⁵

A person's "loss of earning capacity" is determined by deducting the amount he is capable of earning by his own exertions during the period from the amount of his "relevant earnings" (which are defined in great detail). The benefit is reduced if, when taken together with any sick pay paid by the employer, it exceeds the "loss of earning capacity".

This ensures that a person is never better off after an accident (periodic payments of compensation being taxable like income), although he will be no worse off if his employer chooses to make up his 20% loss. In difficult cases, power is given to make interim assessments of loss of earning capacity to avoid undue delay.²⁶

It has of course been necessary to devise special rules for certain categories of earner. Where the injured person is undergoing training, is an apprentice or is under twenty-one years, any permanent loss of earning capacity is to take account of what he would have earned after completion of apprenticeship or training or attaining the age of twenty-one.²⁷

In certain cases potential earning capacity may be considered. Thus an initial payment of 50 dollars per week is provided for potential earning capacity in respect of a claimant ordinarily resident in New Zealand who is under sixteen, or actively studying for an occupation career or profession or has within the year preceding the accident entered an occupation career or profession. The Commission is given discretion to increase the 50 dollars figure by up to 50% to allow for the gradual attainment of full earning capacity.²⁸ In other cases, however, it seems that loss of earning capacity cannot be fixed in accordance with promotion prospects or reference to incremental salary scales, and there are, therefore, some people who could possibly have recovered more before the introduction of the new system.

The Commission also has discretion to reduce, postpone, or cancel payment of earnings related compensation while the recipient is in hospital, in prison or another corrective institution.²⁹

In "very exceptional circumstances" the Commission is empowered to commute periodic payments of earnings related compensation wholly or partly into a lump sum.³⁰

(2) Other Losses

'Non-economic' losses are compensated under two main heads.

- (i) A lump sum, initially not exceeding 5,000 dollars, is payable where the injury involves permanent loss or impairment of any bodily function.³¹ Entitlement depends on the injured person surviving to the date of payment and at least for four weeks after receiving the injury. This is to avoid, so far as possible, making payments which will not in fact benefit the injured person.

The Act lists percentages of the maximum award appropriate for different types of loss.³² In cases not covered by the Act, the Commission has power to fix the percentage.³³

- (ii) An injured person may also claim a lump sum, initially not exceeding 7,500 dollars, in respect of pain and mental suffering (including nervous shock and neurosis), and loss of amenities or capacity for enjoying life, including loss from disfigurement.³⁴ There is no Schedule of percentages of the maximum award, and claims will be decided on their merits. Payment is made when the medical condition of the injured person has stabilised sufficiently to allow accurate assessment, or at latest two years after the date of the accident.

In fixing the amount payable the Commission "shall have regard to the injured person's knowledge and awareness of his injury and loss".³⁵ No payment is made under this head after death.

It has been suggested that these provisions will become the subject of interest from the legal profession, since they provide one method of increasing compensation not subject to any automatic formula.³⁶ Inclusion of provisions relating to non-economic loss owes much to the efforts of the Law Society of New Zealand, as the Royal Commission Report had recommended against any such flexible provisions, preferring the fixed Schedule method.³⁷ The introduction of flexibility into the system will inevitably result in an increase in the costs of operating the system, against which the benefits of the new provisions must be measured.

(3) Compensation for the Dependants of the Injured Person after Death

(i) Where the deceased was an earner

Widows, widowers and children receive earnings related compensation.³⁸ If the widow or widower was wholly dependent on the deceased, half the earnings related compensation which the deceased would have received had he survived but suffered a complete loss of earning capacity is payable. If the widow or widower was not wholly dependent, a lower rate is fixed by the Commission having regard to the degree of dependence.³⁹ A child wholly dependent receives one-sixth of the amount which the deceased would have received, unless both parents are dead when the rate is one-third. Again where the child was not wholly dependent on the deceased a lower rate is fixed.

For other dependants, the Commission has a discretion to fix a rate having regard to the degree of dependence, the maximum rates payable to a widow or widower or child, and all other relevant circumstances.⁴⁰

Dependants includes those whom the deceased regarded himself as under a moral obligation to support,⁴¹ but the total payable to all dependants cannot exceed the amount which the deceased himself would have received had he survived.⁴²

Benefits to widows and widowers cease on their remarriage,⁴³ and benefits to children cease on completion of their formal education, although the Commission does have discretion to continue payments to children in special circumstances.⁴⁴

(ii) Lump Sum Benefits

Dependants who survive the deceased by forty-eight hours are entitled to receive a lump sum payment, although the amounts are not large. A widow or widower receives 1,000 dollars and a child 500 dollars when they are totally dependent. The maximum payment is 2,500 dollars.⁴⁵ Again lesser sums are payable where the claimant was not wholly dependent on the deceased.

(4) Expenses

There is a general provision empowering the Commission to pay actual and reasonable expenses and proved losses resulting from the injury and death, subject to exceptions, which include damage to property and loss of profits.⁴⁶ If, for example, an injured person requires constant attention, the Commission has a discretion to pay for his care in any institution or even in his home or the home of another.⁴⁷

If a member of the injured or deceased person's household suffers any "quantifiable loss of service" following the accident, the Commission has a discretion to award some compensation,⁴⁸ and anyone at all who gives help to the injured person can recover any "identifiable actual and reasonable expenses" which he incurs.⁴⁹

Most medical treatment in New Zealand is paid for by the State,⁵⁰ but if any treatment is not covered, the cost may be recovered.⁵¹

In addition, in the case of those who die, if as a result their dependants lose or receive reduced payment of any pension, annuity, or superannuation, the Commission may make some payment to cover the loss or reduction, in the light of all other compensation which is payable.⁵²

Road Safety and Rehabilitation

The Act does not only impose an obligation on the Accident Compensation Commission to deal with claims and award compensation, it also imposes a positive obligation to promote safety in accident risk areas, and to promote a vigorous programme for medical and vocational rehabilitation of those incapacitated by their injuries.⁵³

There are to be two divisions, the Rehabilitation and Medical Division and the Safety Division. The work of these divisions should be greatly assisted by the fact that all accident compensation is being handled by one body. This will make it far more simple to produce accurate statistics and to identify areas of special need than under other systems where payment of various types of compensation is made by a number of organisations and where, consequently, production of accurate, useful, statistics is very difficult.

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REFERENCES

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24. D. Prosser: Handbook of the Law of Torts (3rd edition) 580.
25. Ison op. cit. II.
26. A survey of 90 road accident victims injured in Oxford in 1965 conducted by D.R. Harris and S.J. Hartz. A lengthy extract of their findings is published in 1969 New L.J. 492.
27. Ison op. cit. App. C pp. 178 - 180.
28. These results accord with the writer's experience, although it must be said that his firm does not handle a large volume of personal injury cases. A case recently settled where over £25,000 was recovered was not settled for more than five years after the accident.
29. 1974 S.L.T. (Notes) 67.
30. 1974 S.L.T. (Notes) 68.
31. Reported in "The Times" on 15th January 1966.
32. Ison op. cit. App. E pp. 206 - 207.
33. D. Lees and N. Doherty "Compensation for Personal Injury". Lloyds Bank Review No. 108 April 1973, 18.
34. Ison op. cit. App. E 206.
35. G. Calabresi: The Costs of Accidents (1970) 237 et. seq.
36. Leeming: Road Accidents - Prevent or Punish (1969) 58.
37. Research on Road Safety (H.M.S.O. 1963) 498.
38. In a Memorandum to The Pearson Commission (published in L.S. Gaz. 22nd January 1975).
39. In an Interim Memorandum (para. II) to the Pearson Commission in February 1974 (published in L.S. Gaz. 22nd January 1975).
40. Atiyah op. cit. 495.
41. cf. West v. Shepherd (1964) A.C. 326, 346 per Lord Morris.

42. D.M. Walker: Civil Remedies 883; Lewis v. Laird Line 1925 S.L.T. 316, 319 per Lord Constable.
43. Phillips v. L.S.W. Rly (1879) 4 Q.B.D. 406.
44. Walker op. cit. 884.
45. See, generally, Walker op. cit. 890 et. seq.
46. Allan v. Scott 1972 S.L.T. 45.
47. A point made by Widgery L.J. in Mitchell v. Mulholland (1971) 2 All.E.R. 1205.
48. Walker op. cit. 878.
49. Walker op. cit. 908.
50. Cunningham v. Harrison (1973) Q.B. 942, 955 per Lawton L.J.
51. Clearly simple multiplication by the number of years for which the loss is expected to continue would be inappropriate, as would a calculation based on the life rent principle – See Walker op. cit. 909.
52. (1971) 2 All.E.R. 1205.
53. An alternative method is discussed in Walker op. cit. 960 et. seq. – but the method which has been briefly outlined is more usual.
54. (1969) 2 All.E.R. 178, 190 – 192.
55. (1972) 1 All.E.R. 491.
56. B.T.C. v. Gourley (1956) A.C. 185.
57. Mallet v. McMonagle (1969) 2 All. E.R. 178, 190 – 192.
58. Parry v. Cleaver (1970) A.C. 1, 14, per Lord Reid.
59. Mallet v. McMonagle (1969) 2 All.E.R. 178, 190 – 192.
60. (1971) A.C. 115.
61. at 129.
62. at 132.
63. at pp. 142, 144.
64. (1973) Q.B. 942, 953.
65. (1975) 1 W.L.R. 17, 29.

66. (1971) A.C. 115, 128.
67. (1971) 2 All. E.R. 1205.
68. Law Commission Working Paper 27.
69. (1973) Q.B. 942, 958.
70. See W. Phillips "What is thing thing called e?" 1965 S.J. pp. 722 - 725; J.H. Preveett, "Actuarial Assessment of Damages: The Thalidomide Case I and II". 1972 M.L.R. pp. 140 - 155 and 257 - 267.
71. "Compensation to Dependents of Accident Victims" Economic Journal, March, 1974, 137.
72. In Australia, the recent Report of the National Committee of Enquiry into Compensation and Rehabilitation (1974) shows that the value of high awards of damages was being gravely eroded in less than ten years. See the letter in "The Times" from Professor Atiyah on 7th December 1974.
73. Law Commission No. 56 (1973) paras. 26 - 30.
74. Interim Memorandum presented to the Pearson Commission by a Joint Working Party of the Contentious Business and Law Reform Committees of the Council of the Law Society of England - para. 33.
75. Although no empirical research appears to have been done in the U.K. several American Surveys indicate that this is the case. See J. O'Connell - "No Fault Insurance for Great Britain", 1973 I.L.J. 187, 194.
76. Working Paper No. 41, para. 226.
77. At the research seminar in law and economics held on 9th January 1976 at the Centre for Socio-Legal Studies, Oxford.
78. See Atiyah op. cit. 443.
79. 1972 S.L.T. (Notes) 81.
80. 1963 S.C. 282.
81. 1965 S.C. 67.
82. (1973) Q.B. 942.
83. Wattson v. Port of London Authority (1969) 1 Lloyd's Rep. 95. The English position is also unsatisfactory in that the wife could not have sued for the loss herself (cf. Best v. Samuel Fox (1952) A.C. 716); In Cunningham Lord Denning stated that any sums recovered by the husband should be held in trust for his wife.
84. Walker op. cit. pp. 915 - 923 and 965 - 983.

85. Parry v. Cleaver (1970) A.C.1.; Dougen v. Rangers F.C. 1974 S.L.T. (Sh.Ct.) 34.
86. Cunningham v. Harrison (1973) Q.B. 942.
87. Parry v. Cleaver; Shearman v. Folland (1950) 2 K.B. 43, 46.
88. Taylor v. O'Connor (1970) 1 All. E.R. 365.
89. Gillan v. McGawn's Motors 1970 S.L.T. 250.
90. See Atiyah op. cit. Ch. 18; also his article "Collateral Benefits Again!" 1969 M.L.R. 397.
91. Departmental Committee on Alternative Remedies (1946) Cmd 6860; Atiyah: Accidents Compensation and the law, 440 gives general criticism.
92. Per Lord Simon 152 Parl. Deb. (Lords) col. 1199.
93. Per the Attorney General 449 Parl. Deb. (Commons) col. 2170.
94. Cheeseman v. Bowater Paper Mills Ltd. (1971) 3 All. E.R. 513 which followed Foxley v. Olton (1965) 2 Q.B. 306 where deduction of unemployment benefit and redundancy payment reduced a claim of £1,338 to £107.
95. Per Davies L.J. in Cheeseman (supra) at 516.
96. Gallagher v. I.C.I. Ltd., 1970 S.L.T. (Notes) 40; Duffy v. Sportsworlds Ltd. 1971 S.L.T. (Notes) 19.
97. Casey "Damages and Social Security Benefits" 1972 J.R. 22, pp. 24 - 26.
98. Hewson v. Downs (1970) 1 Q.B. 73.
99. (1970) A.C.1.
100. Duffy v. Sportsworlds Ltd., 1971 S.L.T. Notes 19.
101. 1970 A.C.1., 19.
102. 1970 A.C.1., 14.
103. See Proposals for a Tax Credit System - Cmd. 5116.
104. 1973 1 All. E.R. 926.
105. 1973 Q.B. 942.
106. Chronically Sick and Disabled Persons Act 1970 Ss. 1 and 2 (applied to Scotland by Chronically Sick and Disabled Persons (Scotland) Act 1972).
107. Cunningham v. Harrison (1973) 3 All. E.R. 468.

108. e.g. Lords Reid and Pearce in *Parry v. Cleaver* (1970) A.C.1., though Lord Morris disagreed and would have confined the principle to voluntary and personal insurance.
109. Walker: *op. cit.* 901.
110. *Parry v. Cleaver* (1970) A.C.1., 14.

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PART TWO

1. Report by Sir William Beveridge on Social Insurance and Allied Services (Cmd 6404, 1942).
2. Parry v. Cleaver (1970) A.C.1, 19.
3. Social Security Act 1975 (hereinafter "1975 Act") S.50.
4. cf. Atiyah: Accidents Compensation and the Law, 354; Lee v. Lee's Air Farming (1961) A.C.12.
5. 1975 Act S. 56
6. 1975 Act Ss. 76 - 78.
7. For example in April 1975 the flat rate of industrial injury benefit was £12.55 per week compared with flat rate sickness benefit of £9.80 per week (Tables 3.01 and 20.01 Social Security Statistics 1974, H.M.S.O.)
8. 1975 Act S. 57.
9. 1975 Act Sch. 4 Part V, para. 2.
10. 1975 Act Sch. 4 Part V, para. 3.
11. 1975 Act Sch. 8 para. 1 (c).
12. 1975 Act Ss. 58, 59.
13. 1975 Act S. 61.
14. 1975 Act S. 63.
15. 1975 Act Ss. 64 - 66.
16. 1975 Act S. 67 - 75.
17. 1975 Act S. 68. Thus in April 1975 the rate during the first twenty-six weeks was £16.20 per week; thereafter if the widow was over fifty, was pregnant or was entitled to an allowance in respect of a dependant child, or was over forty when the period for which she was entitled to such an allowance ceased, the rate was £12.15 per week; in all other cases the rate was 30% of £11.60.
18. 1975 Act S. 70.
19. 1975 Act Ss. 13 and 14.
20. 1975 Act Sch. 3, Part I.

21. 1975 Act S. 33.
22. 1975 Act Ss. 41 - 48
23. 1975 Act S. 14, Sch. 6.
24. 1975 Act S. 15.
25. 1975 Act Sch. 4, Part I - £11.60 per week compared with £9.80.
26. 1975 Act S. 16, Sch. 4, Part I, para. 3.
27. 1975 Act S. 24.
28. 1975 Act S. 25.
29. 1975 Act S. 62.
30. 1975 Act Ss. 98, 99.
31. 1975 Act S. 108.
32. 1975 Act S. 109.
33. Social Security Statistics 1974 (H.M.S.O.) Table 21.09.
34. 1975 Act S. 100.
35. 1975 Act S. 97, Sch. 10.
36. 1975 Act S. 101.
37. Street: Justice in the Welfare State (1975) Chapter I.
38. Street: op. cit. 16.
39. L. Aitcheson: "Injustice in the Welfare State" 1975 J.L.S. 52;
A.W. Bradley: "Social Security Law" 1975 J.L.S. 207.
40. Social Security Statistics 1974 (H.M.S.O.) Table 50.44, Part I.
41. Ibid. Table 50.44, Part 2.
42. Ibid. Table 44.02
43. Ibid. Table 44.04. Thus contributions from employees are now only just over one-fifth of total receipts.
44. Ibid. Table 44.01.
45. Justice: No Fault on the Roads (1974) 46.

46. Monthly Digest of Statistics January 1976 (H.M.S.O.).
47. G.S. King: The Ministry of Pensions and National Insurance (1958) 40.
48. The Fisher Report (1973) Cmd. 5228.
49. 1973 I.L.J. 174.
50. 'The Times' 24th March 1976, 6.
51. Atiyah: op. cit. 389 et seq.
52. An accident travelling to work in a vehicle provided by the employer, even if there is no obligation to use the vehicle provided, is deemed to arise "out of and in course of employment". 1975 Act S. 53.
53. Cmd. 6404 (1942) para. 80.
54. George: Social Security - Beveridge and After (1968) 184; Report of the Royal Commission of Inquiry into Compensation for Personal Injuries in New Zealand (Woodhouse Report) paras. 52 - 54.
55. All references are to the appropriate paragraph of the Criminal Injuries Compensation Scheme as consolidated in 1969.
56. Para. 5.
57. Para. 5.
58. Para. 12.
59. Para. 7.
60. Compensation to the Victims of Crimes of Violence (1964) Cmd. 2323, para. 17.
61. Para. 6 (b). There is a discretion to waive this requirement.
62. Para. 1.
63. Paras. 19, 20.
64. Para. 21. Approximately 9% of claims are referred in this way. D.B. Williams: Criminal Injuries Compensation (1972).
65. Para. 23.
66. Para. 22.
67. Third Report (1967) Cmd. 3427 para. 19.

68. Seventh Report (1971) Cmnd. 4812 para. 14. Those unrepresented had a 45% success rate compared with 67% for those represented by counsel and 64% for those represented by a Solicitor.
69. Para. 2.
70. 'The Times' 3rd February 1976, 5.
71. e.g. 9.8% in 1970/71 (Cmnd 4812, para. 4);
72. Para. 6 (a).
73. Para. 11 (a). It is doubtful if this limitation actually reduces costs significantly. Of the first 3,000 claimants, only six had earnings over the limit.
74. Para. 14.
75. Para. 24. There have been almost no repayments under this provision.
76. Para. 10.
77. Para. 18.
78. Para. 17.
79. Case B. 306 (1970).
80. Case H. 98 (1971).
81. See D. Hirschell: "The Criminal Injuries Compensation Board" 1971 C. L. P. 40, 60 - 61, Table I.
82. Fifth Report (Cmnd. 4179 1969, para. 6 (7)).
83. Fourth Report (Cmnd. 3814 1968, para. 6).
84. Repeating the criticism in an earlier leading article on 24th March 1964.
85. First Report (Cmnd. 2782 1965, para. 5.
86. See note 73 above.
87. 257 Parl. Deb. (Lords) cols 1390 - 1.
88. Ison: The Forensic Lottery (1967) 35.
89. e.g. Justice: Compensation for the Victims of Crimes of Violence (1962). See the convincing criticism of the reasons given by Justice in Atiyah: Accidents Compensation and the Law, 323.

90. 245 Parl. Deb. (Lords) cols. 272 - 8.
91. Ison: op. cit., loc. cit.
92. Atiyah op. cit. 321.

PART THREE

1. Advocated by Elliot and Street: Road Accidents (1968) 234.
2. The recent action in California against McDonald Douglas following the D.C. 10 air disaster illustrate the expertise.
3. (1973) 2 W.L.R. 843, 846.
4. (1971) 3 All. E.R. 581, 586.
5. (1972) 1 All. E.R. 749, 769.
6. (1971) 1 All. E.R. 606, 618.
7. See Part Two, note 77.
8. Atiyah: Accidents Compensation and the Law, 17.
9. Ison: The Forensic Lottery, App. G 213.
10. Lees and Doherty: Compensation for Personal Injuries: The Economic Framework (1973).
11. For this and other arguments, see, Elliot and Street, *op. cit.*, 249 et. seq.
12. Justice: No Fault on the Roads (1974) 2.
13. O'Connell: "No-Fault Insurance for Great Britain", 1973 I.L.J. 187.
14. See generally, O'Connell, *op. cit.*
15. See Part One, note 26.
16. Atiyah *op. cit.* 607.
17. Justice *op. cit.* Ch. 4.
18. Elliot and Street *op. cit.* Ch. 9.
19. This would be almost essential if the scheme were to be a state scheme administered along the lines of the industrial injuries scheme.
20. It was noted earlier that the limitation on earnings imposed by the Criminal Injuries Compensation Scheme had actually saved very little.
21. See Atiyah, 184 et. seq. The New Zealand Scheme (*infra*) gives authority to withhold compensation during periods of imprisonment.
22. The Memorandum is published in L.S. Gaz. on 22nd January 1976.

23. Memorandum para. 8. The Scheme would not, therefore, extend to accidents in private drives, parks, and so on.
24. No statistics are offered to support this, yet Atiyah op. cit. 226 points out that in 1966 out of 291,775 road accidents involving personal injury, 57,000 involved only one vehicle.
25. Memorandum para. 11.
26. Memorandum para. 12.
27. See Annual Abstract of Statistics 1974 (H.M.S.O.).
28. Ison op. cit. App. G, 212.
29. J. Hellner "Social Insurance and Tort Liability in Sweden" 16 Scandinavian Studies in Law 1972 187, 194.
30. Ison op. cit. Ch.4.
31. Ison op. cit. 77.
32. Ison op. cit. estimated that only 17.8% of spells of incapacity for work resulted from "accidents poisonings and violence" the remainder being caused by illness or disease.
33. See Palmer "Compensation for Personal Injury: A Requiem for the Common Law in New Zealand" 21, American Journal of Comparative Law. (1973) 1, 12 - 14.
34. Ibid.
35. Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967), hereafter referred to as the "Woodhouse Report".
36. See Report of the Select Committee on Compensation for Personal Injury (1970) (New Zealand).
37. Palmer op. cit. 3 predicts that the new accident system will have a profound effect on New Zealand's social security system. He sees the final result as earnings related payments and perhaps even lump sums for all forms of disability.
38. Ibid 23.
39. See Calabresi: The Costs of Accidents (1970).
40. (1972) 1 All. E.R. 491.
41. S. 114 (4) Accident Compensation Act 1972 - empowers the Governor General to specify the percentage by which amounts payable shall increase to take account of inflation and increases in the nation's standard of living.

- 42. 1970 S.L.T. 250.
- 43. Apart from disease contracted in the course of employment.
- 44. Paras. 289 - 290.
- 45. Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia (1974).
- 46. See, generally, 48 A.L.J. (1974) 415.
- 47. Para. 55.
- 48. Fleming: Law of Torts (1967) 20.

- 1 All references are to the 1972 Act as amended. The legislation runs to almost 250 pages and therefore this outline cannot cover every point in detail.
- 2 S.5
- 3 A definition was proposed in the Second amending Bill of 1973, its main purpose being to exclude sickness but it was later omitted.
- 4 S.6 (2)
- 5 S.20
- 6 cf. Palmer, 21 American Journal of Comparative Law 1, 17.
- 7 Ss. 25, 29
- 8 S. 149
- 9 Ss. 139 - 142
- 10 Ss. 136 - 138
- 11 S. 153
- 12 S. 151
- 13 S. 155
- 14 Ss. 160, 164, 166
- 15 S. 168
- 16 S. 169
- 17 The Scheme covers seaman or airmen abroad and also extends to those temporarily abroad in connection with their business or employment (Ss. 60 - 63).
- 18 S. 2
- 19 Schedule 1, Part 1. Minimum 25 cents per hundred dollars; maximum 5 dollars per hundred dollars. The levy applies to salaries up to 10,400 dollars, because the compensation is also restricted initially to a percentage of this sum per annum.
- 20 S. 92
- 21 Schedule 1, Part 2.
- 22 Ss. 99, 100. Penalty rates may be fixed for drivers and classes of drivers whose driving or accident record is significantly worse than average. The initial levy on all drivers is 2 dollars per annum.

- 23 S. 15
- 24 S. 112
- 25 S. 113. There is provision, however, to pay up to 90% for lower paid earners.
- 26 S. 113
- 27 S. 117
- 28 S. 118
- 29 S. 129
- 30 S. 133
- 31 S. 119
- 32 Schedule 2
- 33 S. 119
- 34 S. 120
- 35 S. 120 (7)
- 36 Palmer: 21 American Journal of Comparative Law 1, 21.
- 37 Palmer: Ibid. Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967) paras. 198 - 201.
- 38 S. 123
- 39 S. 123 (1)
- 40 S. 123 (1) (c)
- 41 S. 2 (1)
- 42 S. 123 (4)
- 43 S. 125
- 44 S. 123 (7)
- 45 S. 124
- 46 S. 121 (1)
- 47 S. 121 (3)
- 48 S. 121 (2) (a)

49 S. 121 (2) (b)

50 Social Security Act 1964

51 S. III

52 S. 121 (4)

53 S. 48