

PART 3 – THE COMMON LAW ACTION

64. In the following six chapters the common law action is discussed in the following way:

Chapter VII—its general form.

VIII—argument concerning it.

IX—the position overseas.

X—previous discussion in New Zealand.

XI—submissions made to us.

Our conclusions concerning the common law action are set out in paragraphs 170 and 171, but have been brought forward in short form into paragraphs 82 and 83.

VII—GENERAL FORM OF THE ACTION

THE HISTORY OF NEGLIGENCE

65. There is a widely held belief that the negligence action has an age-old authority which extends back over the centuries. The submission was made to us, for example, that it would be wrong to interfere with a principle which had enabled justice to be done between citizens in many countries of the world for hundreds of years. An argument which relies upon the apparent mystique or antiquity of an institution could never be decisive in its favour; and certainly not if there seemed to be good practical reasons for discarding it. But actually the development of negligence as an independent tort is comparatively recent. Indeed it is characteristic of the way in which, despite the influence of precedent, the law has been prepared to respond, sometimes slowly, to changing social attitudes.

66. In earlier times actions for compensation looked to the interest harmed, with little or no regard for the quality of the conduct which caused the harm. The event determined liability. Winfield traced the evolution of the fault principle in a well known essay entitled *The History of Negligence in the Law of Torts*.⁷ In his

⁷42 Law Q.R. 184.

view its history goes back for something more than a century. But even in 1860 the great American judge Holmes abruptly dismissed the first attempt to classify remedial actions under the general heading of torts by writing: "We are inclined to think that torts is not a proper subject for a law book."⁸ The New Zealand jurist Sir John Salmond as recently as 1924 still ignored the existence of negligence as an independent cause of action.⁹

67. In his book on torts Professor John G. Fleming has described the rise of the fault principle as broadly coinciding with the industrial revolution, and he has said that the negligence concept in little more than a century's development completely transformed the basis of tort liability. He went on to say, nevertheless, that "Neither society nor law is static. The forces that moulded nineteenth century thought have long been spent, and the assumptions underlying the negligence concept are increasingly subjected to challenge. The individualistic fault dogma has been replaced by the mid-twentieth century quest for social security."¹⁰

THE STANDARD OF CARE

68. The concept of negligence depends upon an objective standard of reasonableness. The conduct complained of is compared with the conduct to be expected of the reasonable man of ordinary prudence in the same circumstances. A reasonably foreseeable risk of harm to others must therefore be the subject of precautions reasonably adequate to the risk and to the circumstances generally. It is not a standard of perfection. If it were, every conceivable risk of community living would have to be guarded against to the point of bringing to a halt many activities that seem to have a considerable social utility. The common law recognises that the inseparable risks of these activities are accepted by the community as part of the bargain which must be paid for them. On the other hand the standard requires care to be taken which is reasonably proportionate to the risks involved, and if injury occurs by an act or omission which fails to measure up, then the fault system takes charge, liability for the injury follows, and damages must be paid.

THE DUTY OF EMPLOYERS

69. Like everybody else, employers are liable for their own personal negligence, but they have a further vicarious responsibility for the negligence of their employees acting in the course of employment. Accordingly they have a responsibility for the overall system

⁸Seavey, 56 Harv. L. R. 72.

⁹Salmond, *Law of Torts*, 6th Ed.

¹⁰Fleming, *Law of Torts*, 3rd Ed., p. 108.

of work including the working conditions, the plant and machinery provided, the methods of supervision, and the way in which the work is carried on. Where responsibilities are delegated to managers or foremen or other employees, the employer himself must face the consequences if the delegated responsibility is discharged negligently. Where industry is organised and concentrated in large undertakings, the vicarious responsibility of the employer is naturally a matter of considerable significance. The body of shareholders, who are the real owners of large companies, must act through various levels of employees from management downwards. In these cases the Court is obliged, therefore, to examine their responsibility, not as employers in the real sense, but in terms of the acts or omissions of various employees who carry forward the undertaking.

70. Obviously enough, an employee acting in the course of his employment, who happens to be involved in an accident which can be attributed to the fault of some third person is entitled to recover damages from that person. In this event the employer is entitled to recover from his employee any amounts which may have been paid to the latter in terms of the Workers' Compensation Act.

CONTRIBUTORY NEGLIGENCE

71. But, of course, a plaintiff must take reasonable care for his own safety, and if he fails to do so he will be negligent himself. In this event, if he has succeeded in proving negligence against a defendant, whether it be his employer or some third party, the damages will be apportioned in such a way that an appropriate deduction will be made from the damages otherwise payable, because of his own negligence.¹¹

BREACH OF INDUSTRIAL STATUTES

72. There has been a volume of legislation designed to improve safety and health in factories and other industrial undertakings. This legislation frequently contains provisions obliging the occupier or the employer, as the case may be, to fence the dangerous parts of machinery, to provide scaffolding of designated construction for particular types of work, to provide a safe means of access to places of work, to place guard rails in certain circumstances, and general matters of this description. Sometimes the duty is qualified by the reasonable practicability of its performance, and sometimes it is not. In any event a failure to comply with the duty as laid down involves liability on the basis that the employer has failed to meet his duty and so is at fault without need to prove negligence.

¹¹Contributory Negligence Act 1947, section 3.

73. At one time there was much argument as to whether the breach of such a statutory duty gave rise to a civil action for damages. It was said that provisions of this description could be enforced only by penalty in the criminal courts, and it was claimed that a civil action based upon a breach of such a regulation could not succeed unless the breach was accompanied by negligence. In 1898, however, it was held by the courts in England that a breach of statutory duty, irrespective of negligence, would in fact give rise to an award of damages because enactments of this sort are intended by Parliament to be of benefit to workmen, and penalties received by the Crown obviously could not compensate them in any way for their injuries.

THE NATURE OF DAMAGES

74. Damages are awarded by the court as an indemnity. They are designed to put the injured person in the same relative position as he was in before the harm was done to him. In the assessment of damages certain recognised heads of damage are taken into account. They can be described as—

- (1) Actual economic losses including future losses by reason of diminished earning capacity;
- (2) Pain and suffering;
- (3) Loss of capacity to enjoy life.

75. On the principle that there must be an end to litigation the damages are assessed finally at the trial of the action and without possibility of subsequent review, no matter how greatly any of the relevant circumstances might alter in the future. And the assessment itself is supposed to be made with a detachment which disregards both the financial position of the parties and the degree of fault which caused the loss, whether it be slight or whether it be gross. Clearly enough the assessment as to future losses is an entirely conjectural exercise, and precision is impossible. In the case of future pain and loss of capacity to enjoy life, the difficulty is greatly increased by the need to put money values on physical disabilities. The disparity which occurs in awards of damages throughout the country is undoubtedly a reflection of all these difficulties.

76. If an injured person should die as the result of the injuries, his personal representatives are entitled to make a claim on behalf of any dependants for the losses which they have suffered. The measure of the losses is the extent to which it can be shown that the dependants would have been assisted by the deceased had he lived. This assessment is, of course, fraught with the same difficulty

mentioned in the preceding paragraph, since estimates must be made not only of the future earnings of the deceased had he lived and the length of his working life, but also the extent to which each of his dependants might have received regular or other benefits from him; and in the case of the widow, whether or not she might marry in the future and cease to need or be entitled to part of the award.

77. In all cases assessment of income loss must take into account the likely incidence of income tax. It is not the taxable income which is the significant figure but that income after tax has been paid.

VIII-DISADVANTAGES OF THE COMMON LAW PROCESS

78. There are four principal criticisms of the common law action. They describe the philosophy upon which it depends as illogical, the verdicts as entirely uncertain and affected by mere chance, the procedure as costly and slow moving, and the nature of the award and the whole process as an impediment to rehabilitation. On the other hand those who defend the remedy claim that only by this process can a complete indemnity be obtained for losses, that awards reflect current public opinion, that the nature of the action has a deterrent effect, and that capital sums can do much to help successful plaintiffs. These arguments must all be examined, but it needs to be emphasised that this remedy has significance for only a very limited number of persons.

79. During the 12-year period to 1965 the statistics show that no more than eight-tenths of 1 percent of persons injured in industrial accidents were successful in consequent claims at common law.¹² Moreover, a considerable number of the successful claims have involved contributory negligence and a consequent deduction from the damages on that account. And often it is the more serious and consequently the larger claim which is contested. An example of what can happen is disclosed by reference to the fate of all 61 of the claims for personal injury which reached a hearing in the Supreme Court at Wellington during the two years 1962 and 1963.¹³ The plaintiff succeeded outright in only 22 of these cases. Three were settled during the hearing. In as many as 20 others the verdict went either to the defendant outright (10 cases) or the Judge ordered a new trial (which did not take place) or the plaintiff was non-suited or the jury disagreed. In the remaining 16 cases the plaintiffs concerned had their assessed general damages of £43,879 reduced by £17,666 to £26,213. On average, therefore, each of them was left to bear himself 40 percent of the loss which the Court considered he had suffered in the accident. These deductions ranged in individual cases from 10 percent to 90 percent, and from £45 to £4,875.

80. In addition it seems from other figures produced by the insurance companies¹⁴ that over 90 percent of all successful claimants prefer to compromise their claims by accepting the offer made to settle out of Court.¹⁵ The same figures disclose that 25 percent of all claimants in the group finally abandoned their claims altogether,

¹²See Appendix 5.

¹³See Appendix 6; and paras. 102 and 107.

¹⁴See para. 101.

¹⁵See also Appendix to Report of Committee on Absolute Liability (1963), p. 46, paras. 11, 12.

or were unsuccessful in the Court action. If social justice is the quest, as Fleming has said in his book on torts,¹⁶ then these figures are enough in themselves to show that the damages action falls far short of providing any satisfactory solution to the problems of those who are injured.

81. Nevertheless the debate concerning the common law process continues, and whenever suggestions are raised that something should be done about the position the old arguments are put forward by some of the proponents of the system, regardless of figures like these, and unaffected by any earlier findings of inquiries such as our own. For example, the Committee on Absolute Liability which reported so recently upon the matter reached the important conclusion that—

“There is a case for an accident insurance scheme which would cover all persons who are injured in any way without negligence on their part, provided the community can afford to bear the cost on an equitable basis.”¹⁷

Yet this finding is virtually ignored. Accordingly it is necessary for us to embark upon a further analysis of the whole issue; and in the hope that the argument might finally be laid at rest we do so at some length. At this point, therefore, it may be helpful to provide a short summary of our conclusions.

SHORT CONCLUSIONS

82. The statistics apart, we have no doubt where the balance of argument must lie. The moral basis for the application of the fault principle cannot be explained in terms of the legal conception of negligence because the test of negligence is objective and impersonal. Moreover, it becomes quite irrelevant in a system which requires through compulsory insurance that the loss be borne not by individual defendants but by the whole community. All this might not matter if the principle was justified by the achievement, but it is not. Nobody can predict with any assurance the outcome of a damages action. There are long delays inseparable from the very nature of the process. The investigatory procedure and the trial of the action in Court are costly. And throughout the plaintiff is not only left in some considerable suspense, but he is also left to carry his loss without assistance. Finally, during all this period there is not merely an absence of any encouragement for him to minimise his potential damages by returning to work: in fact the converse applies. Many plaintiffs are reluctant to return to work until their claim is finalised lest the damages be reduced in proportion to their effort.

¹⁶See para. 67 *supra*.

¹⁷Op. cit. para. 40; and see paras. 137 to 140 *infra*.

83. The common law action has performed a useful function in the past, but without doubt it has been increasingly unable to grapple with the present needs of society and something better should now be found. We turn to consider these various matters in more detail.

THE FAULT PRINCIPLE

84. The critical question in the common law action is whether or not the defendant was at fault. If fault is not proved, then no matter how innocent the plaintiff, the common law will leave him to bear the whole burden of his losses, even though they might have been catastrophic. Those who have grown up with a legal doctrine which ignores positive arguments for one party because it can only operate upon the shortcomings of the other may think that this is just. It happens to be the law, but it is nonetheless a negative process, and it is a negative process because it has adopted the fault theory as its justification. It is supported by feelings that those at fault deserve to pay, even if they have not intended the consequences of their actions. The attitude is described by Lord Atkin in the famous case of *Donoghue v. Stevenson*. He said:

“The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘*culpa*’, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.”¹⁸

85. However, it is a curious fact that this attitude stops short of attempting to see that the damages do not become disproportionate to the conduct which is said to justify them. The extent of liability is not measured by the quality of the defendant’s conduct, but by its results. Reprehensible conduct can be followed by feather blows while a moment’s inadvertence could call down the heavens.

86. On the other hand the plaintiff’s conduct is entirely disregarded until the defendant is shown to be legally responsible. There is no thought that a person who is the innocent cause of an injury might reasonably be asked to share with his equally innocent victim the loss he has caused. To common lawyers such a thought approaches heresy, but we observe that in the Eighteenth Series of Hamlyn Lectures, delivered in November 1966, Lord Kilbrandon was not unattracted by its logic. In discussing the development of the Soviet conception of responsibility he said:

“Paragraph 403 of The Soviet Civil Code was interpreted by a commentator in 1924 as follows: ‘The plaintiff must show that the injury was caused by the defendant. Beyond that he need

¹⁸(1932) A.C. 562, 580.

not show anything.' The whole idea of allowing a defendant to escape liability by showing that he was not at fault, as of course our requirement that the onus of proving fault lies upon the plaintiff, was dismissed on the perfectly intelligible ground that 'the innocent injured is still more innocent than the innocent injurer'.¹⁹

87. The fact should be faced that despite the moralising which has enabled the fault theory to develop it is really not possible to equate negligence as an independent tort with moral blameworthiness. Negligence is tested not in terms of the state of mind or attitude of the actual defendant, but impersonally against the (occasionally remarkable) performance of a theoretical individual described as "the reasonable man of ordinary prudence". If in all the circumstances which surrounded the defendant it is likely that the reasonable man would have avoided the accident, then the defendant's failure to measure up will be regarded as negligence, irrespective of his mental attitudes or even his ability to reach the required standard.²⁰ It is for such reasons (as the textbooks usually are at pains to point out)²¹ that the use in law of the word "negligence" to describe an independent civil wrong has created a good deal of confusion even among lawyers. Because the word carries in its ordinary application overtones which seem to warrant some disapproval, the name of the remedy tends to become its vindication.

88. But apart from the fact that conduct can hardly deserve moral censure unless it reflects a subjective and moral attitude (which the objective standard of the reasonable man displaces) there is a further reason why the damages action cannot find its justification in theories concerning fault. The fact is that through compulsory insurance (at least for industrial and highway risks) society has considered in New Zealand that it is appropriate to spread the economic consequences of negligent conduct over the whole community. Everybody must share in the losses whether characteristically inclined to this sort of negligence, or whether marked by the uniform prudence of the reasonable man. Against this background the search for negligent defendants who might deserve to pay is really a search to control the aggregate sum that will become payable. In a modern world of many accidents and community-wide insurance to cover them the fault theory has developed into a legal fiction.

¹⁹Kilbrandon, *Other People's Law*, 22; Goikhburg and Koblents, *Commentary on Civil Code*, 1924, p. 87.

²⁰See for example Street, *The Law of Torts*, 2nd ed., p. 125.

²¹Fleming, *op. cit.* p. 108.

89. Nor is the philosophy behind the fault theory currently accepted by the man in the street. People have begun to recognise that the accidents regularly befalling large numbers of their fellow citizens are due not so much to human error as to the complicated and uneasy environment which everybody tolerates for its apparent advantages.²² The risks are the risks of social progress, and if there are instinctive feelings at work today in this general area they are not concerned with the greater or lesser faults of individuals, but with the wider responsibility of the whole community. It is for these reasons that compulsory insurance for highway and industrial accidents is generally acceptable.

DETERRENT EFFECT

90. Some who favour the retention of the common law action have argued that it plays an important part in industrial safety. Similar arguments have been advanced in opposition to proposals that there should be automatic compensation, regardless of fault, for the victims of road accidents.²³ It is claimed that the threat of damages provides a financial incentive to be careful, and also that employers or motor drivers are influenced by the stigma which attaches, so it is said, to negligent defendants. We find it impossible to accept these views. The second point has no validity for the reasons we have set out when discussing the concept of fault in the preceding paragraphs; and the claim that the prospect of damages has a financial implication loses all its force against a background of compulsory insurance by means of which these losses are so widely shared. Indeed, in the case of the employer the expensive disruption in the pattern of work which usually accompanies injury at work is incentive enough, if a cost incentive of this sort is needed at all.

91. The contribution which financial incentives could make to industrial safety was considered to be insignificant on three separate occasions in the United Kingdom during the past 63 years.²⁴ And we have found no evidence either in New Zealand or elsewhere which provides any affirmative support for the so-called deterrent effect of the common law action. In any event other factors are clearly far more important. On the highway, for example, motorists who are not deterred from dangerous driving by the instinct for self-preservation or the chance of a cancelled driving licence will not be

²²See Report of Committee on Absolute Liability (1963), para. 40; and para. 15 at p. 47.

²³Ibid. para. 35; and see also paras. 328 to 336 *infra*.

²⁴See Report of the Minister of Reconstruction (U.K.), 1944 (Cmd. 6551) on Social Insurance, Part II, para. 31 (ii) and the Reports of the Departmental Committees of 1904 (Cmd. 2208) and 1920 (Cmd. 816).

greatly moved by the passing thought that damages might have to be paid, not by themselves but by their insurers. If conscience, safety education, enforcement by inspection, and self-interest all fail, then the sanctions of the criminal law still remain, and in our view at this point they should be applied. Employers and motorists cannot insure against fines, cancelled driving licences, or in the final resort, imprisonment.

THE RISKS OF LITIGATION

92. Those who support the common law action claim that by this process alone can an injured plaintiff recover a complete indemnity for his losses. It is not argued that the system can produce absolute justice, but it is certainly expected that awards will reflect with reasonable accuracy the losses they are supposed to indemnify. The truth is that often the result of an action is far removed from doing so.

93. In the first place whenever there is contributory negligence the damages must be reduced, and not infrequently unhappy plaintiffs have discovered that the final figure they must accept for damages is well below the assessed losses. But of more significance (because it cannot be controlled) is the evident disparity which occurs in awards for similar incapacities.

94. Disparities arise from all the risks of the adversary system—from difficulties of proof, the ability of advocates, the reactions of juries, and unquestionably mere chance itself. Some plaintiffs achieve successes which seem quite dazzling; others are dismayed by failures which surprise even the defendant. In fact the uncertainty which inevitably must surround such a contest has prompted the comment that the system has the attraction of a lottery with every hopeful plaintiff satisfied that in his case the result must certainly be a major prize. Accidents occur, however, in circumstances which frequently defy the subsequent disembodied attempts to recapture them; and indeed there may be no eye-witnesses able to come before the Court to give evidence. In every common law jurisdiction there is growing criticism of all this.

95. In the United States observers have been led to describe the system as one which—

“ . . . is loaded with unfairness. Some get too much—even many times their losses—especially for minor injuries . . . Others among the injured, as we have just suggested, get nothing or too little, and most often it is the neediest (those most seriously injured) who get the lowest percentage of compensation for their losses.”²⁵

²⁵R. E. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim* (1965), p. 2

The authors go on to remark—

“Because of the role of fault in the present system, contests over the intricate details of accidents are routine. Often these contests are also exercises in futility, since all drivers must continually make split-second judgments and many accidents are caused by slight but understandable lapses occurring at unfortunate moments. Such contests, and all the elaborate preparations which must precede them, wastefully increase the costs of administration.”²⁶

96. When Fleming wrote the *Law of Torts* (regarded generally as one of the important modern works on the subject) he was still in Australia. From this vantage point he criticised the fault system as one—

“which is content to leave the compensation of casualties to the fortuitous outcome of litigation based on outdated and unrealistic notions of fault. What is required is to assure accident victims of compensation and to distribute the losses involved over society as a whole or some large portion of it.”²⁷

And he later refers to the accelerating obsolescence of tort doctrines resulting from the pressure of modern social forces.²⁸

97. We have been privileged to read in advance of publication an admirable book by a Canadian author who has wryly given it the title of *The Forensic Lottery*. He has referred to “the complex problems of causation” which are inherent in the system and which carry “their inevitable toll of mistakes and injustices.”²⁹ In his view “liability for negligence is a capricious and unsatisfactory method of compensating the victims of injury or disease.”³⁰

98. In the United Kingdom, too, there has been criticism, led in fact by the Lord Chief Justice of England, Lord Parker of Waddington, who proposed when delivering the presidential address to the Bentham Society in London on 16 February 1965 that the fault concept should be abolished in relation to claims arising from road accidents and a comprehensive insurance scheme should take its place. He said—

“The law and its administration in this field is out of date, lacking in certainty, unfair in its incidence and capable of drastic improvements.”³¹

²⁶Ibid. pp. 2-3.

²⁷3rd Ed. pp. 9-10.

²⁸Ibid. p. 13.

²⁹T. G. Ison, *The Forensic Lottery* at p. 22 (to be published, Staples Press, London).

³⁰At p. 28.

³¹1965 Current Legal Problems, pp. 1, 5; and see A. L. Goodhart, Address to the 27th American Assembly published in 1966; 39 Aust. L. J., p. 400.

And later in the address he added—

“Surely in these circumstances the time has come when we should recognise that the present methods, even if capable of improvement, are no longer adequate and that some other method is called for. It is not a lawyer’s problem: it is a social problem, and I venture to think an urgent social problem of ever-increasing extent. Is compensation of victims to continue to be administered under the present outmoded methods by which recovery depends on the proof of fault, or is it to be recoverable regardless of fault under a comprehensive insurance scheme?”³²

99. The author of a book widely used by practising members of the legal profession when dealing with aspects of employer’s liability for work accidents provides some interesting comment upon the whole matter in the opening chapter.³³ There is reference to the “striking fact that many accidents seem to be due to impersonal causes”. Then he has described how in his view the negligence concept is applied by the courts in England where today juries are rarely used—

“... The workings of the concept of ‘negligence’ have been brought into the open, because, with the disuse of juries in civil actions, the verdict is now given by a judge who has to disclose his reasons. ‘Negligence’ as the criterion of liability involves the further test of ‘reasonable foreseeability’, which has been shown up as vague, capricious and subjective when applied to anything much more complex than bows and arrows, or horses and carts. Some learned Judges are able to foresee very little; others, by taking a complex succession of events step by step, are able to foresee almost anything. This difference of mental approach may be seen even when cases reach the House of Lords. Thus the common law is in the position which used to be a standing reproach to Courts of equity, where justice varied ‘according to the length of the Chancellor’s foot’. It may be doubted, indeed, whether the question of fault or blame has any legitimate place in the law of compensation for civil injuries: it is a concept which is properly associated with punishment for wrong doing, and therefore belongs to the criminal law.”

³²Op. cit. p. 11.

³³John Munkman, *Employer’s Liability at Common Law*, 6th ed. (1966), p. 24.

100. The problem of proof was discussed by the present Chief Justice of New Zealand, Sir Richard Wild, when Solicitor-General. In the appendix to the report of the Committee on Absolute Liability, July 1963, he said—

“Irrespective of whether the trial is before a jury (as in New Zealand) or a Judge alone, the rules of negligence developed in the days of the horse and buggy are not suited to the situations produced by speedy modern traffic. The fallibility of witnesses asked months afterwards to relate the events of split seconds is too great. The sheer amount of time and money spent by assessors and lawyers in seeking to reconstruct the course of a collision illustrates the difficulty of attributing fault and apportioning blame. It is too difficult to be sure of the truth.”³⁴

We entirely agree.

101. Potential litigants themselves are not unaware of the hazards they face in the court. At our request 40 of the private insurance companies in New Zealand obtained details of all common law claims made to them in respect of industrial accidents in the year 1964.³⁵ The claims made total 608, and of these as many as 394 (64.8 percent) were settled out of court. A further 143 (23.3 percent) were never proceeded with at all, and only 47 (or 7.7 percent) of the actions actually went to trial. Of these 38 produced verdicts for the plaintiffs concerned, and seven were unsuccessful. There is a disparity in the figures, but it could not be explained when the information was provided to us. In any event it is clear that a very large number of plaintiffs were not prepared to face a trial and preferred to abandon their claims or to settle out of court.

102. These figures can be compared with the analysis to which we have already referred,³⁶ made of all the personal injury actions commenced in the Wellington Registry of the Supreme Court during the years 1962 and 1963. It was necessary to go back as far as this in order to take a sample of actions which probably would have been brought to finality by now. No more than 61 of the 364 actions were brought to trial, and outright victories were achieved by plaintiffs in only 22 cases or 6.1 percent of the cases dealt with in court. All the others resulted in verdicts for the defendants or were settled or abandoned or (in 16 cases) involved deductions for contributory negligence. If any of these cases are still outstanding then they have been hibernating, not for months, but for years.

³⁴Page 44, para. 5.

³⁵See also para. 80 *supra*.

³⁶See Appendix 6; see also paras 79 and 107.

THE INFLUENCE OF JURIES

103. Despite the uncertainties of litigation there are those who argue that unduly strict or legalistic applications of the fault principle can be avoided because of the part still played in New Zealand by juries. Decisions, it is claimed, are kept in tune with current social attitudes. This may be true, but juries do more than fix the quantum of damages. Implicit in the argument, as critics like to point out, is the feeling that on occasions even the verdict might properly be influenced against the legal merits of the case by lay notions of equity. In regard to this matter Professor G. Sawyer has said—

“Various forms of strict liability tend to be established, *de facto* if not *de jure*, in a manner which makes loss distribution unnecessary. Thus in New South Wales, it is an almost irrefutable presumption that a motorist is liable to a pedestrian he injures, since there is compulsory third-party insurance, and this is known to the juries which try all such claims.”⁸⁷

The fault principle can scarcely be said to be in harmony with such a departure as this from it. Nor can the administration of justice gain by adherence to a system which needs to be kept so regularly in touch with the community conscience.

104. There have been suggestions that juries should be disposed of in favour of some other tribunal—a judge sitting alone, for instance. As long ago as 1936 in the course of the debate on the Judicature Amendment Bill of that year the Attorney-General (the Hon. H. G. R. Mason) was prompted to deal with such a suggestion in the following terms—

“I may say that I believe that the real solution is not to alter the tribunal that deals with road accidents, but to alter the nature of the claim. There is no logic in having a road accident claim based on the negligence of the vehicle driver. What is the basis for giving a right to proceed against a man that is negligent? The logical justification for the remedy in tort is that . . . the loss is shifted if it has been due to someone's guilt and it becomes a form of punishment . . . If the driver of the vehicle is indemnified by the insurance pool he is not punished, and consequently the logical basis for the law confining the remedy to the case of negligence is gone. If, then, the jury is diverting from the law through considerations of sympathy, it is because the logical basis of the law is gone, and the jury is using instinctive common

⁸⁷Geoffrey Sawyer, *Law in Society*, 1965, p. 145.
See to the same effect Fleming, *op.cit.* pp. 12-13.

sense. . . . It is inevitable that the law is what requires alteration. We should not seek a new tribunal to sustain the present law, which is illogical. All injuries on the road should be compensated, irrespective of whether the driver was negligent."³⁸

105. If, as we think likely, substantial numbers of plaintiffs actually do deserve contact with the public conscience, it is difficult to find any answer to the view expressed 30 years ago by the then Attorney-General. It is Ison's opinion that to deal with these general problems by procedural reform alone ". . . would, at best, only enable us to pursue the wrong objectives more efficiently".³⁹ We agree with this crisp assessment. The only consistent reaction to the situation is to provide a system which will ensure on grounds that are valid and in accord with the law the uniform application of the general public attitude in every case.

DELAYS AND SUSPENSE

106. Apart from the hazards of litigation plaintiffs encounter other serious practical disadvantages. For example, until the claim is finalised a plaintiff will receive nothing from the defendant, and the delay which follows his accident may last a very long time. The process demands careful investigation before the action can be commenced formally in the Court; then attention must be given to procedural problems, preparation for trial, and perhaps negotiations for settlement.

107. In the Wellington group of 364 cases to which we have referred⁴⁰ there was an average time lag of between 13 and 14 months before the first formal step was taken in Court. And then a further period elapsed which averaged six months before those cases which came to trial were ready and a fixture available. Clearly there can have been no difficulty in obtaining these fixtures during the two years concerned, and the time which elapsed between accident and decision can therefore be regarded as due to the normal requirements of the process.

108. But even cases which are settled are frequently not finalised until the parties make their bargain at the very door of the courtroom; and the larger the amount at stake the more likely it is that the settlements will be delayed. During all this period of suspense and anxiety the injured litigant is left unaided to carry the whole

³⁸246, N.Z. Parl. Debates, p. 56.

³⁹*The Forensic Lottery*, at p. 30.

⁴⁰See Appendix 6, and paras. 79 and 102.

strain of his losses; and in addition as time goes on he becomes increasingly responsible for expense associated with the investigations being carried out on his behalf, and finally for the costs of the trial of the action itself.

109. In New Zealand people are accustomed to such a situation and take it for granted. We think it would soon become entirely unacceptable if it were realised that such a laggard achievement could be replaced by a modern system able to provide immediate financial assistance for all who might be injured as an instalment of compensation that in every way was fair and adequate.

110. It is not difficult to make the point by example. As this part of our Report goes to the printer we take the two most recent cases to be heard before juries. They followed one another in the Supreme Court, at Hamilton, in the same week of October 1967:

(A) The first case concerned a young man, aged 23, left a paraplegic in an industrial accident which had occurred two years earlier. His annual income loss (tax paid) was considered to be \$2,020, rising perhaps to \$4,500 in about 20 years. He refused to accept \$50,000 paid into court, and the jury assessed his loss at \$60,000. This sum included \$2,000 for special damages. But 35 percent (or \$21,000) was deducted for contributory negligence, and as a result he received the reduced sum of \$37,700 for general damages and \$1,300 for special damages. Under the proposal made in Part 6 of this Report there could be no deduction for contributory negligence; the income prospects would influence the assessment of compensation; and provision would be made for the cost of an attendant. It is clear that the capital value of the resulting pension could exceed by as much as \$12,000 the reduced award of damages for which this young man had waited two years.

(B) The next two days were occupied with a claim concerning a road accident which had taken place three years earlier. It was brought by a young Maori labourer. He had spent a year in hospital and was left with a shortened right leg, restricted knee movement and developing arthritis in the right ankle. General damages were assessed at \$4,000, but they were then reduced by 85 percent to \$600 for contributory negligence. He had run on to the highway from behind a car. Whether or not \$4,000 may seem a modest enough sum in itself, certainly \$600 will not go far to aid this young plaintiff.

EXPENSE OF THE PROCESS

111. The ordinary observer would expect that payments of damages to successful plaintiffs would absorb a high percentage of the total sums needed by the common law system. We do not think that this is so. It is not possible on the evidence at present available to us to determine with precision the overall expense associated with the process, but we think it likely that more than 40 percent of the amounts which are paid into the system are for various administrative and legal charges. If this be so, it means that an overall sum equal to two-thirds of the amounts finally received by plaintiffs is swallowed up in administration, despite the reasonable control which we believe is exercised in regard to all the individual items incorporated under this general heading of administration.

112. In paragraphs 213 to 215 there is reference to the amounts needed by the insurance companies handling the compulsory insurance scheme for work-connected injuries. It is beyond doubt (despite the long-distance reservations of some New Zealand observers) that the annual charges of the comprehensive Ontario scheme are only one-fourth of the administration expenses of the insurance companies in New Zealand. The latter require an amount equal to 40 percent of payments to claimants, even when all the less contentious claims made under the Workers' Compensation Act are included.

113. But successful plaintiffs do not receive the whole of the costs of litigation from the defendant as part of the award. Accordingly there are deductions from the amounts paid over to them for various expenses which cannot be claimed in the judgment, and also for legal fees—modest though these seem to be in New Zealand when compared with similar charges made by the legal profession in certain other jurisdictions. Ison has conducted a survey in England from which he has concluded that—

“ . . . about 48.91 percent of the total amount of money flowing into the system is absorbed by the cost of its administration. Thus the administrative cost is equal to about 95.75 percent of the total amount received by injury victims as net compensation . . . Although some margin of error must be allowed for in the figures, it is indisputable that the cost of administration of tort liability is extremely high compared with the total amount flowing into the system, or with the total amount flowing out as net compensation.”⁴¹

Although the precise figures may differ in New Zealand in a number of respects we believe that the position probably justifies a somewhat similar comment.

⁴¹Ison, *op. cit.* p. 28.

114. It is necessary to refer to two other matters. The first is concerned with what has been called lump sum finality. Related to it is the important question of rehabilitation.

LUMP SUM AWARDS

115. Although loss of future income is the substantial head of damages in most cases, the assessment must of necessity be made at once and it is then paid over as a present capital sum. If suitable administrative arrangements were made an alternative method of handling the matter would be by way of periodic payments.

116. The question generally has provoked conflicting arguments which can be found in the reports of previous inquiries and in the literature extending back over the past 60 years. They were repeated before us. After considering them we are left in no doubt that in general lump sum payments are not in the best interests of injured plaintiffs. In certain special circumstances and for minor disabilities there is a case for them, but subject to this we consider that a better system can and should be devised. The general arguments on the one side and the other are set out in the following paragraphs.

117. The argument in favour of lump sums refers to the attraction of capital in hand, and the claim that with an award which is available and waiting plans can be made ahead. For example, in the area of rehabilitation, wise investment might enable the establishment of a small business; or the fund could be applied with advantage to the purchase of a home or repayment of a mortgage.

118. It is said, too, that there is administrative convenience in bringing a claim to finality—something that would be lost in the alternative method of payment by periodic instalments for an uncertain time ahead. Other arguments relate to the difficulty of ending an anxiety condition if damages or compensation were to be paid at intervals; and the stimulus of self-help which would come with the knowledge that the lump sum was a final settlement would be lost.

119. Most criticisms of lump sum payments are concerned for the interests of the injured plaintiff and his future security. Comment has been made in paragraphs 75 and 76 upon the impossibility of forecasting the future with any real accuracy. To the extent that inaccuracies must occur, whether small or great, they can never be adjusted in favour of the plaintiff because the assessments are made with absolute finality; and the occasional good fortune of some plaintiffs can bring no solace to others whose problems turn out to have been badly underestimated.

120. But other arguments support the view that the attraction of the capital sum is illusory. The award represents aggregated amounts which in the ordinary way could never have been obtained in this form, but which would have been received at regular intervals as income. The risk which the situation is said to carry is the temptation to mortgage the future.

121. We believe that most people are provident and attempt to handle their affairs with prudence; but many would find it difficult to resist the immediate and quite routine financial pressures which often bear upon families, particularly if earnings have been interrupted for any length of time. The present use of future income in the circumstances could, of course, result in much subsequent hardship.

122. Those in favour of lump sum awards argue that even if *plaintiffs were unwise enough to squander the capital amounts paid over to them, nobody could object as the matter should be regarded as one entirely for themselves.* We do not doubt that people are entitled to handle their affairs as they themselves might decide, but we do not think this is the real issue. The question is the form which the damages should take. There could be no injustice to plaintiffs if their future periodic losses were reimbursed to them as they arose, and the problem is simply whether this should be done. In any event it can reasonably be said that if the community as a whole must stand behind a man who is injured and once again when his damages have gone, it has some sort of claim to determine the method of paying him.

THE ISSUE OF REHABILITATION

123. We have referred in paragraph 118 to the suggestion that an anxiety condition might be prolonged unless final damages were provided in the form of a lump sum payment. There is, however, a divergent opinion (which we accept) expressed by the Department of Health.

124. The argument is really to the effect that if the cause rather than the condition is examined it will be found that in most cases this form of anxiety neurosis is created by the uncertainty, delay, and suspense associated with litigation. The remedy, it is claimed, is to substitute a system which would remove the cause of the trouble by enabling payments to commence at an early date and which would permit review of the assessment to be made in favour of the injured worker, if necessary.

125. The Health Department declared itself opposed to lump sum payments (except perhaps for minor disability) because until settlement the workman was concerned about the amount he would finally receive and had little encouragement to return to work or restore himself at the earliest moment to maximum health. In a matter of such importance any administrative convenience which might result from bringing claims to finality through the payment of capital sums could not balance the interests of the many individuals concerned.

PERIODIC PAYMENTS

126. It is necessary to mention at this point two important arguments by those who support the payment of lump sums. They criticise the proposal for periodic payments on the basis—

First, that an award in the form of periodic payments would leave the plaintiff concerned, anxious, and uncertain lest the amount be reduced following subsequent review; and

Second, that the value of the payments would inevitably be eroded by the gradual fall in the purchasing power of money.

127. Both matters are more conveniently dealt with in Part 6 where we consider the question of periodic payments within the general context of a comprehensive compensation scheme. For reasons provided there we consider that if a scheme of permanent periodic payments is adopted—as we think it should be—then any subsequent review should never be used to reduce the payment to the injured workman. As to the second point, we consider that the risks of inflation should be provided against by the automatic adjustment at two-yearly intervals of the regular periodic payments to accord with changes in the cost of living.

IX—THE ATTITUDE OVERSEAS TO THE DAMAGES ACTION

THE UNITED KINGDOM

128. Contrary to some opinions expressed before us, other countries have tended to eliminate or at least to restrict the civil liability of employers to their employees for industrial accidents. The United Kingdom was cited as a large industrial country (and as an example which New Zealand should follow) which has retained the common law action in this general area. In fact, however, it is an exceptional case, the reason probably being that the rather low level of benefits available under the new scheme of compensation introduced in 1946 made it impossible to withdraw the right of action from injured workers.

129. The matter was referred to by Beveridge in the following way—

“Retention of the employer’s common law liability unchanged, in spite of the development of workmen’s compensation, marks a departure in Britain from the practice of other countries, where the making of provision for the results of industrial accident and disease by way of social insurance has normally been accompanied by restriction of the employer’s liability to cases of wilful or gross negligence. It is obviously desirable as a matter of social policy to remove provision for the consequence of industrial hazards from the arena of litigation and conflict between the parties to production, so far as this can be done without condoning reprehensible carelessness by the employer.”⁴²

130. A number of reasons for the opinion that these issues should be removed “from the arena of litigation and conflict between the parties to production” are given later in the Beveridge report where it is said:

“If what is judged to be adequate compensation is provided from a Social Insurance Fund for industrial accidents, irrespective of any negligence causing them, there is no reason why this compensation should be greater because the employer has in fact been negligent. The needs of the injured person are not greater. With the inevitable uncertainties of legal proceedings, suits for heavy damages on the ground of negligence cannot escape having something of the character of a lottery. In so far as danger of such proceedings is a penalty for negligence, it is more effective

⁴²Op. cit. para. 98.

to make the penalty a direct one—of criminal proceedings undertaken by the public department responsible for securing industrial safety. Employers can and normally will insure against civil liabilities; they cannot insure against criminal proceedings.”⁴³

CANADA

131. These same opinions were held by the Provincial Government of Ontario in Canada as long ago as 1914. On 1 May of that year the Workers' Compensation Act was passed. It introduced a new system of compensation for industrial injuries following a report of the Chief Justice Sir William Meredith, who had been appointed as a sole Royal Commissioner to study the question. In framing his recommendations he had emphasised the necessity “to get rid of the nuisance of litigation”⁴⁴ which he considered to be totally unsuited to the needs and interests of both injured workman and employer. He stated that the whole purpose of a compensation system was “to have swift justice meted out to the great body of men”⁴⁵ who might be injured in the course of their employment. As a result he recommended that in this area the common law action should disappear and that administrative processes be used to handle all aspects of the compensation scheme to replace it.

132. This view was accepted by the Government and the lead thus provided was soon followed by all the other Canadian provinces. For 50 years, therefore, in a considerable Commonwealth country the damages action has been abolished for work-connected accidents. What is more important, it has the evident approval of all concerned. And there is complete acceptance, too, of the fact that even to the point of final appeal the ordinary Courts have no part in the assessment of claims.

133. An interesting comment upon this last point is made by Mr Justice Roach, who as Royal Commissioner reviewed the Ontario scheme in 1950. He wrote—

“Labour and management disagreed on other matters but they were unanimous on this, namely that there should not be even a limited right of appeal to the Courts.”⁴⁶

⁴³Op. cit. para. 262.

⁴⁴Minutes of Evidence taken before the Commissioner, January 28, 1913, pp. 511-512.

⁴⁵Ibid. p. 512.

⁴⁶Report on the Workmen's Compensation Act dated 31 May 1950, p. 78.

And 27 years later another Royal Commissioner in Ontario was able to refer to this statement in the following way:

"The situation as it appeared in the briefs and evidence before me has changed very little since that time and many briefs affirmed the view that the privative section of the Act, 72 (1), is necessary and desirable in the interests of speedy and efficient adjudication."^{46a}

UNITED STATES

134. The position concerning the common law action has been much the same in the State of New York during the last 57 years. In 1909 the Legislature set up a Commission to make inquiry into the state of compensation law, and this Commission which became known by the name of its Chairman, Senator Wainwright, produced a report which was outspokenly critical of the common law process.⁴⁷ It stated that only a small proportion of workmen injured in their employment were able to obtain any relief at all. It criticised the economic waste associated with the system. It complained that because the process could not produce speedy solutions there was considerable delay in payment (whether by way of recovery or as the result of settlement) for men "who stand in immediate need of funds". And it expressed the opinion that litigation and the whole adversary process tended to breed antagonism between employers and employees.

135. The Wainwright Commission proposed that for the future there should be a workmen's compensation law which would take care of injured workmen; and that as a part of the change to be made the damages action should no longer be available. This recommendation was acted upon by the State Legislature in 1910. Since then all the other States of the Union have followed suit. There are in addition four other Acts which affect the District of Columbia, Puerto Rico, Federal employees, and Longshoremen.

136. In 31 of these Acts employees in most employments are brought automatically inside the scheme concerned, and in these jurisdictions the common law action by such employees has completely disappeared. Under 23 Acts employers may elect to accept the Act or reject it and most exercise this option by accepting the Act. It is estimated that 80 percent of all employees in the United States are embraced by Workers' Compensation legislation and thus have no rights at common law against their employers.⁴⁸

^{46a}Report of Mr Justice McGillivray on The Workmen's Compensation Act (15 September 1967), p. 56.

⁴⁷See Gellhorn and Lauer, Administration of the New York Workmen's Compensation Law (1962) 37 N.Y. Univ. L.R., pp. 3, 7.

⁴⁸Summary of State Workmen's Compensation Laws, U.S. Department of Labor, Labor Law Series No. 10, Jan. 1967, pp. 2-3.

X—PREVIOUS DISCUSSION IN NEW ZEALAND

137. Dissatisfaction with the achievements of the common law action led to the adoption in New Zealand of the new principle contained in the Workers' Compensation Act 1900. The Act discarded fault as the test and replaced it with employer responsibility. From time to time since then there has been criticism of the fault system for the general reasons outlined in the foregoing paragraphs, and also because of anomalies relating to the social security scheme. But in addition, for 40 years past, particular attention has been given to it at intervals on behalf of the victims of road accidents. In 1962 the Minister of Justice, the Hon. J. R. Hanan,⁴⁹ appointed the Committee on Absolute Liability which was directed to report on the desirability of the introduction of some form of absolute liability for deaths, and for bodily injuries, arising out of the use of motor vehicles.

THE COMMITTEE ON ABSOLUTE LIABILITY

138. The Committee was under the chairmanship of the present Chief Justice, Sir Richard Wild, then Solicitor-General. In July 1963 the Committee presented a majority report which recommended that "it would be unwise to make fundamental changes in our present system until definite recommendations can be made that such changes will bring improvements". The Chairman dissented from the general conclusion—in his opinion something should be done at once—but he joined his colleagues in a number of important findings directly relevant to our own task.

139. The findings as extracted from the Report can be tabulated in the following way:

"On analysis of the problem it can readily be seen, first, that the toll of the roads is a very alarming one."⁵⁰

"Death and injury on the road seem to be as inevitable as casualties in war, and it can be fairly argued that the community which has the benefits of modern transport should also bear the responsibility for the harm it causes."⁵¹

"The common law right for damages for accidents on the road as administered in New Zealand is open to serious criticism."⁵²

"Many persons who are injured cannot recover under the present system."⁵³

⁴⁹See para. 147 *infra*.

⁵⁰Para. 39.

⁵¹Para. 40.

⁵²Para. 52.

⁵³Para. 39.

“There is a case for an accident insurance scheme which would cover all persons who are injured in any way without negligence on their part, provided the community can afford to bear the cost on an equitable basis.”⁵⁴

140. In deciding that no present change in the law could be recommended, the majority of the Committee certainly did not cast these important findings aside. The majority was influenced by three principal considerations. First, it felt that the whole matter required further detailed examination, and accordingly it recommended, “That a more detailed investigation of overseas systems should be carried out”.⁵⁵ The second and third reasons are related to one another. The Committee considered that, “It is clear that to meet the social problem of misfortune which follows accident the whole basis of the present system should be reviewed”.⁵⁶ And it felt that, in particular, attention must be given to the position of those injured in industry. In this regard the whole Committee agreed that, “It would not be logical or acceptable to introduce a system which would mean that persons injured in industrial accidents would be in a much worse position than those injured on the road”.⁵⁷ On this ground it was felt that road accidents and industrial accidents should be considered together.

141. The general findings of the Committee on Absolute Liability made so recently as the result of an inquiry into the special position of road accident victims and which we have set out in paragraph 139 of this Report are significant and of particular importance when we approach our own task. They should be read together with the conclusions which we have reached. In every respect they appear to confirm our conclusions.

EARLIER CONSIDERATION

142. The same Report refers to earlier consideration of these general questions in New Zealand, and it is worth while to make some reference to this here.⁵⁸

143. Even 40 years ago the number of casualties on the roads was causing increasing alarm. As a result the whole process of obtaining damages through the Courts and the ability of defendants to pay them began to receive critical attention. This resulted in the passing

⁵⁴Para. 40.

⁵⁵Para. 51.

⁵⁶Para. 52.

⁵⁷Para. 47.

⁵⁸Para. 7-16.

of the Motor-vehicles Insurance (Third-party Risks) Act 1928. Its object was the compulsory insurance by owners of motor vehicles against their liability to pay damages on account of deaths or bodily injuries which might be caused by their use. Although the Act did not introduce the principle of liability without proof of negligence this was mentioned during the debate upon the Bill. During the debate Mr Sullivan, the Member for Avon, urged that there should be cover against risk, no matter how the accident happened,⁵⁹ and in reply to the suggestion the Attorney-General (the Hon. F. J. Rolleston) who had introduced the Bill remarked, "That is a goal to which I should very much like to attain, and I hope it will eventually be possible to extend this scheme to that extent".⁶⁰

144. Ten years later Mr Rolleston was present at the Fifth Dominion Legal Conference when a remit was considered, "That this Conference approves of the principle of absolute liability in motor collision cases . . ." He supported the remit, and in doing so he made the interesting disclosure to the Conference that "it was just a toss-up whether the Bill . . . would contain the principle of absolute liability or not, and the only reason that it did not was that the whole subject was new and that we felt that we must proceed on safe lines . . . and not introduce the principle . . . until we had a little experience of the working of the system".⁶¹

145. We have referred in paragraph 104 to the views of the Hon. H. G. R. Mason, who as Attorney-General, stated in the course of the debate on the Judicature Amendment Bill 1936 that the only logical solution to the compensation of victims of road accidents was to exclude liability for fault in favour of a comprehensive scheme of insurance which would provide suitable payments for all accidents. In the following year he gave instructions for the drafting of a Bill which would exclude the fault principle, but the measure was not introduced owing, it seems, to considerable opposition which developed immediately from the motor unions.

146. Further criticism of the fault principle came from both sides of the House when the Contributory Negligence Bill was introduced in 1947 for the purpose of removing contributory negligence as an absolute defence to an action at common law. Dr A. M. Finlay, the Member for North Shore, stated that in his opinion liability based on wrongful conduct involved a concept that was out of place in a modern form of society, and he went on to say—⁶²

⁵⁹219 N.Z. Parl. Debates, p. 604.

⁶⁰Ibid. p. 617.

⁶¹14 N.Z. Law Jo., p. 124.

⁶²276, N.Z. Parl. Debates, p. 787.

"We should recognise that an accident is an accident and its results economically, socially, and in every other way, are the same wherever and however that accident may have happened. Whether it happened at home, at work, or on the road, or whether a person was on holiday, whether it happened because somebody was at fault, or because no one was at fault, it is still an accident, and it still has very grave economic consequences . . . In a word I believe we should adopt a system of real compensation for injury however received or however caused, and that whenever an injury is suffered by a person we should in the fullest sense of the word 'compensate' him for his loss."

147. In the same debate Mr Hanan, the Member for Invercargill, and the present Minister of Justice, expressed the view that the ordinary man is not interested in fine legal distinctions related to the law of negligence, but would wish to know how the new proposal would affect him if he was hit by a motor-car in the street. After considering the effect of the legislation he went on to suggest that some consideration should be given to the protection of persons being injured on the highway by introducing the doctrine of absolute liability, at least to the extent that the driver concerned should have an onus cast upon him of proving that he had not been negligent.⁶³

148. In a recent debate in Parliament upon proposed amendments to the Workers' Compensation Act there was criticism of the striking differences in treatment afforded people affected by similar problems. The Hon. W. A. Fox (Member for Miramar) said—⁶⁴

"It is manifestly wrong that under a common law claim a widow can receive as much as £20,000 whereas another widow with the same commitments can receive, under the Act as it is at present, a maximum of a little over £2,800. Then, too, both accidents causing death could have been identical except that in the one case there were no witnesses. It has never seemed right to me that we should have this great disparity between the amounts payable to dependants."

149. The problem of proving negligence was also referred to by Mr Riddiford (Member for Wellington Central), and he described the unreality of the present situation in the following way—⁶⁵

"It would seem to many people unjust that, where a worker suffers an injury in the course of his employment and no negligence can be proved, he can claim only the limited amounts under

⁶³Ibid. p. 796.

⁶⁴340 (1964) N.Z. Parl. Debates, p. 2293.

⁶⁵Ibid. p. 2299.

the Workers' Compensation Act, whereas if negligence can be proved against the employer a common law claim can be brought and a substantially greater sum of money can in many cases be obtained."

150. The same point had been mentioned by the Hon. T. P. Shand, Minister of Labour. He said⁶⁶ some countries have decided that—

"The difference between accidents giving rise to common law claims and accidents which do not provide grounds for common law claims, and can therefore be dealt with only under the workers' compensation legislation, is very often a matter of chance."

And in winding up the debate he referred to the need to ensure that techniques of litigation would not divert attention from the need to guard against the occurrence of accidents and rehabilitation of injured workmen if they happen. He said—

"It is so easy in the pursuit of what is called absolute justice to slide into the error of making the procedure of justice itself so expensive and so drawn out that the objective of the rehabilitation of the worker might be lost . . . I would stress that the most important thing is to avoid accidents. The avoidance of accidents is more important than any compensation can ever be."⁶⁷

⁶⁶Ibid. p. 2292.

⁶⁷Ibid. p. 2303.

XI—VIEWS OF ORGANISATIONS AND PERSONS MAKING SUBMISSIONS

151. The Federation of Labour and numbers of the Industrial Unions support the retention of the right of injured workers to claim damages against their employers, and addressed to us many of the arguments considered in the foregoing paragraphs. Similar submissions were made on behalf of Federated Farmers of New Zealand (Inc.), Sawmillers' Mutual Accident Insurance Company and by three persons who made submissions independently. These arguments claimed, for example, that damages would cover a man's full losses; that he would be assisted by a capital sum in hand; that both these facts were important to seriously injured workers in particular; that there were advantages in achieving absolute finality; and that the fault principle promoted industrial safety. This last consideration was the major reason advanced by the Sawmillers' Mutual Accident Insurance Company for its support of the common law process. In addition we were invited to consider whether there was any public demand for change.

152. Probably this last matter is regarded as no more than a talking point by those who put it forward. But there are three answers to it. First, there is the fact that the subject is not one to stir the imagination; and few people anyway are stimulated by potential trouble. Second, the capricious achievements of the common law remedy have never been the subject of surveys in New Zealand which would give a broad picture of what has been happening, nor has an attempt been made to record the reactions of a suitable sample of those who have actually journeyed through the system. As a result, on any statistical basis, its performance is enshrouded in comfortable obscurity.

153. However, in Ontario in 1965 a study was made of some of these matters by the Law Faculty of Osgoode Hall University at Toronto. It suggests that the claims of plaintiffs are satisfied by the common law process in inverse proportion to the severity of their injuries. A sample group of 590 victims of road accidents was taken. Of these, 226 who suffered minor injuries received 71.8 percent of what could fairly be assessed as their losses; but 307 who suffered serious injuries received only 32.7 percent of their losses; and the dependants of 57 persons who died received as little as 2.1 percent.⁶⁸

⁶⁸Report of the Osgoode Hall Study on Compensation For Victims of Automobile Accidents, 1965, Chap. I, p. 10, and Chap. II, p. 3.

154. Too much cannot be taken from a single study of this sort, but pieces and fragments of information are beginning to accumulate both here and overseas which confirm this general picture. Accordingly we do not think it at all surprising, that when the members of the Ontario group were asked to answer other questions directed to obtaining their opinion of the whole system they provided a series of markedly adverse replies. Of those with minor injuries 46.9 percent were against the present fault system, 53.8 percent of the seriously injured opposed it, and 61.5 percent of those concerned with the fatal injury cases were also opposed to it. As the Report suggests,⁶⁹ "if you want to know what war is like it may help to ask someone who has lived through one".

155. The third answer to the complaint that the whole topic has not been a burning public issue in New Zealand was provided by the New Zealand Law Society. In its submissions (referred to in the following paragraph) the Society remarked that the introduction of a new system should be approached with suitable caution, but stated—

"We agree that where society demands a change in the law because of a need socially in a particular sphere, then the law should be amended to meet that need; likewise we do not agree that change must necessarily await a public demand for it, if obvious improvements to existing law can be made to avoid hardship or injustice."

156. The submission of the New Zealand Law Society was presented on the basis that among its 2,500 members a wide divergence of opinion existed. The Society felt, nevertheless, that some general views could be expressed on the matters in issue.

157. It considered, as we do, that the whole field of inquiry opened up before this Commission is a social rather than a legal question, and that nobody would deny that an injured person is entitled to at least economic support from the community through one channel or another. However, in examining the question as to whether the fault system should remain, it made the following comment—

"There seems to be little justification for dealing with one class of injury cases without others. Although it might be urged that the industrial injury field is one in which the first step could be taken for removing fault as a consideration this view is not necessarily valid having regard to the availability of worker's compensation

⁶⁹Chap. VIII, p. 2.

payments (payable without fault) and, in the isolated cases where workmen's compensation is not available, of social security benefits. Equally so, the apparent illogicality of providing a degree of benefits at the expense of the employer without the necessity of establishing fault on his part whilst affording full recompense by way of damages at common law if fault is established cannot be overlooked. It would however we think be more illogical to introduce a system whereby a person of a particular category (e.g., the employee) was not required to prove fault to receive full recompense whilst all other categories of claimants were so required."

158. The Society stated that "there may be a case for the ultimate removal of fault as envisaged from all cases of personal injury claims", but was of the opinion that there must be consistency in relation to all personal injury claims. It was then said that the Society had no knowledge of the cost of such a comprehensive scheme and questioned whether the country would be able to afford it. The conclusion reached in this part of the Society's submissions is as follows—

"The end result of these comments on 'fault' then is that it is our view that the present system of damages awards be retained with fault as a necessary matter of proof before entitlement, subject to the reservation that if and when fault is removed as an ingredient in all cases where it now is relevant (or at least in all personal injury cases) then, and not before, should specific attention be directed towards the treatment of employee injury cases upon the same basis and in all respects as other injury cases. We are not seeking to preserve a form of remedy simply because of opposition to change; rather do we say that *if the change is warranted it should be universal in application.*" [The italics are ours.]

159. It should not be forgotten that these submissions do not represent the unanimous opinion of the large number of members of the New Zealand Law Society. It seems clear enough, nevertheless, that the Society as a whole was disinclined to search for positive arguments in support of the common law process. It has preferred to express its conclusion upon the negative basis that change might be more than the country could afford, and that it would be unjust to find something better for only one class of injured persons.

160. The submission presented on behalf of the various Railway unions took a different view. The unions were critical of the fault principle and described it as an "outmoded concept", and as a principle which did not provide a sound foundation for dealing either with road accidents or with the problem of industrial injuries. It was argued that "there can be only one true barrier to the immediate

institution of absolute liability in industrial accidents, and that is the barrier of cost". However, having criticised the concept the unions then went on to qualify their position by explaining that they would not be prepared to surrender the common law right to bring an action for damages if workers under some alternative system would receive less than they would receive under the present system.

161. The Public Service Association stated that while it did not favour the abolition of the right of action under the common law, it considered that the contrast between statutory compensation and damages in the event of a successful common law claim was anomalous. The Association stated that it agreed "that the future welfare of an incapacitated worker should not depend upon whether the employer or some fellow employee was negligent, but we see the solution in making the compensation available under the workers' compensation scheme realistic". The Association made the comment that if this solution were followed there would be fewer common law claims, and in due course the present anomalous situation would disappear entirely. Whatever the solution, this cannot be regarded as an enthusiastic endorsement of the damages action.

162. In addition to these arguments a numerically similar number of submissions was made which advocated the outright rejection of the fault principle. It is sufficient to mention three of these submissions.

163. The Safety Engineering Society of Australasia (New Zealand Branch) described the common law system as having a serious effect upon the important problem of accident prevention. The Society said—

"The fact that common law claims are made in only 0.9 percent of the total reported injuries, and yet adversely influence the investigations of the majority of the remaining 99.1 percent, is a serious indictment of the present system. The system promotes an air of controversy which also influences participation in accident prevention measures. As far as accident prevention in industry is concerned it should be a non-controversial matter thereby enabling all who are involved to work harmoniously towards this common goal."

164. The Health Department considered that the abolition of litigation would result in a dramatic reduction in the incidence of accident neuroses and would be of corresponding assistance in pushing forward the physical rehabilitation of those who were injured.

165. The same two arguments were advanced by the Social Security Commission which also was critical of the anomalous situations which arise as a result of past failures to integrate the various remedies available to injured workmen.

SHOULD WORK-CONNECTED CLAIMS BE DEALT WITH SEPARATELY?

166. It will be remembered that the Committee on Absolute Liability heard and accepted arguments that "it would not be logical or acceptable to introduce a system which would mean that persons injured in industrial accidents would be in a much worse position than those injured on the road".⁷⁰ This argument in reverse is the reason now given by the New Zealand Law Society for its conclusion that no isolated action should be taken in respect of industrial accidents. Unless road accidents and domestic accidents of all kinds are embraced in any new scheme the victims of industrial accidents could be placed at an advantage, so it is suggested.

167. In the event we believe that it is possible and desirable to abolish the fault principle in respect of all personal injury claims; but it needs to be emphasised that this certainly does not follow from arguments that it is wrong to remedy a large problem in stages. In his dissenting opinion annexed to the Report of the Committee on Absolute Liability, the present Chief Justice said that—

"If the basic aim is sound then the fact that all categories of misadventure cannot be provided for at once is not a ground for doing nothing."⁷¹

We agree. If it had seemed impractical to recommend the comprehensive scheme outlined in this Report we would have had no hesitation in acting upon this sensible principle.

168. A start must be made at some point and it seems clear enough that if that start were made in the field of work-connected injuries, then there could be no further objection (as foreseen by the Committee on Absolute Liability) to taking similar action at once for the victims of road accidents and others as well. Fortunately, however, the cost factor does not preclude the wider approach in dealing with the question, and accordingly it is the basis of our general recommendations.

⁷⁰Op. cit. para. 47.

⁷¹Op. cit. p. 52, para. 31.

169. In carefully documented submissions this wider approach accompanied by abolition of the common law remedy was strongly urged upon us by the Social Security Department at the outset of our public hearings and at a later stage by a group of four members of the Law Faculty of the Victoria University of Wellington led by the Dean of the Faculty, Professor C. C. Aikman. Similar arguments were addressed to us by other citizens who presented submissions on their own account.

XII-CONCLUSIONS CONCERNING THE DAMAGES ACTION

170. The preceding analysis of the common law process demonstrates, we believe, that few of the many persons who are injured are ever able to obtain assistance from it: and only a tiny proportion of those who are assisted receive a complete indemnity. The built-in barriers against relief make this inevitable. All unexplained or "accidental" occurrences are excluded at once. So are those where proof is lacking or the arbitrary assumptions of the rules of evidence fail to operate for the plaintiff. Moreover, if damages should be awarded they are assessed by speculative processes which receive judicial approbation only because the system must be made to work; they will be reduced if the plaintiff himself has failed at the one critical moment to exercise that uniform prudence which distinguishes the "reasonable man" throughout every moment of a long and prescient life; and then, when the damages are finally settled, they will be paid over in a lump sum (always assuming that the defendant is insured or has means) and so become subject immediately to the routine and temporary financial pressures of present living. In the meantime the mounting pressure of suspense and financial strain upon the plaintiff has been matched by the plodding course of his claim from accident to final disposition. All this is ill-suited to the reasonable expectations of men and women who become the fortuitous victims of accident in a complex and fast-moving society. The process hardly begins to meet the problem.

171. In summary our conclusions upon the topic are—

- (1) The adversary system hinders the rehabilitation of injured persons after accidents and can play no effective part beforehand in preventing them.
- (2) The fault principle cannot logically be used to justify the common law remedy and is erratic and capricious in operation.
- (3) The remedy itself produces a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for all the rest it can do nothing.
- (4) As a system it is cumbersome and inefficient; and it is extravagant in operation to the point of absorbing for administration and other charges as much as \$40 for every \$60 paid over to successful claimants.
- (5) The common law remedy falls far short of the five requirements outlined in paragraph 55 of this Report.