VICTORIA'S TRANSPORT ACCIDENT REFORMS — IN PERSPECTIVE

BY IAN MALKIN*

[*On 1 January 1987 Victoria's Transport Accident Act came into force. The legislation radically alters the status of individuals injured as a result of transport accidents. The no-fault benefits provided under the statute are far more generous than had been the case prior to its enactment. At the same time, the common law right to sue for damages for non-pecuniary and pecuniary loss has been restricted. In this article, the author discusses the nature of no-fault compensation schemes generally and the background leading up to the implementation of the present Act. The scheme's most important provisions are described, as are various innovative plans enacted in other jurisdictions.*]

A. *INTRODUCTION*

This article examines the most important features of Victoria's Transport Accident Act 1986. This statute contains a number of significant and far-reaching provisions which prescribe the ways in which victims of transport accidents are to be compensated. It is the manifestation of a political compromise, an attempt to satisfy the concerns of the state government, the opposition, and innumerable community interest groups. The result is a scheme which provides compensation to individuals injured as a result of transport accidents, ostensibly irrespective of fault, while at the same time preserving the right to sue at common law in certain limited circumstances. Although the legislative reforms are not as radical as the government had intended, they do represent a major overhaul of Victoria's transport accident compensation system.

The scheme warrants analysis for two reasons: practically, it will have an enormous direct impact on individuals injured in transport-related accidents; theoretically, it is of interest to those persons concerned with the ways in which injured individuals' needs should be compensated.

In order properly to discuss Victoria's present legislation, consideration is given to the nature of various types of no-fault schemes and the traditional arguments raised for and against the implementation of such plans. Following that discussion is an examination of the background — both legal and political — to the enactment of the present scheme, including reference to the Motor Accidents Act 1973 (Vic.), the government's proposals for reform, and the reaction generated by those proposals. The next segment of this paper describes the Act's most significant provisions, with particular attention paid to the no-fault benefits provided under the statute as well as the common law relief still available to a restricted number of individuals.

A consideration of the situation in various other jurisdictions follows this discussion of Victoria's scheme. In any examination of transport accident programmes, the Australian situation is of special interest, in that various States

* B.A. (Manit.), LL.B. (Manit.), LL.M. (Lond.). Barrister and Solicitor of the Queen's Bench of Manitoba. Lecturer in Law, University of Melbourne.

have implemented a range of plans. A brief description of these innovative schemes will ensue, as will reference to some of the recent recommendations of the New South Wales Law Reform Commission. By way of comparison, a discussion of Manitoba, Canada's no-fault legislation is included. New Zealand's comprehensive no-fault compensation scheme is also considered, as are certain attempts that have been made in other jurisdictions to implement plans similar to that enacted in New Zealand.

The concluding portions of this article discuss Victoria's transport accident scheme in light of some of the major criticisms that traditionally have been levelled against no-fault compensation plans, as well as those criticisms that have been advanced specifically with respect to the scheme enacted in Victoria.

B. *THE NATURE OF COMPENSATION SCHEMES AND THE RÔLE OF THE FAULT DOCTRINE*

There are a number of ways in which individuals may be compensated as victims of transport accidents. The schemes implemented in various jurisdictions differ greatly in the kinds of benefits available and the methods of organization and administration. Some are administered by private insurers, whereas others are government-run. One of the most important differences is with respect to the rôle the concept of 'fault' has to play, that is, the availability of the right to sue at common law.

Automobile accident insurance schemes may generally be categorized as 'add-on plans', 'modified plans', or plans of a 'pure no-fault' variety.

> Add-on plans add a limited amount of no-fault coverage without removing any rights to sue under the traditional system. This concept . . . has been implemented by a number of Canadian provinces as well as several American States [as well as Australian jurisdictions].
>
> . . . Modified plans pay compensation in the same way as add-on plans but limit the extent to which a victim can sue for damages although some right to do so is preserved. In some instances, the right to sue for economic loss (general damages) is retained while the right to sue for special damages, such as pain and suffering, is severely restricted.
>
> . . . A 'pure' no-fault scheme would abolish all actions for tort damages for personal injury. Victims of accidents would be paid compensation entirely under a first-party insurance scheme.[1]

Until the implemenation of the Transport Accident Act, Victoria's scheme under the Motor Accidents Act 1973 (Vic.) could be described as an 'add-on plan'; the State's newly organized scheme is more akin to the 'modified plan' described above. The most significant features of the present statute are the provision of different types of no-fault benefits. The right to bring a cause of action is maintained in a severely restricted manner. It is not a 'pure no-fault scheme', which was the type of plan that the Cain Government had hoped to implement.

In a 'pure no-fault' system, all that the victim must demonstrate is that a loss has been sustained; then compensation will be payable irrespective of the blameworthiness of an individual for the accident. Such a scheme would eliminate the need for liability insurance. This is *not* the type of plan which Victoria has adopted, and is not the type of scheme that had existed between 1973 and 1987.

[1] Brown, C., 'Deterrence and Accident Compensation Schemes' (1979) *University of Western Ontario Law Review* 111, 123.

Prior to the enactment of the Transport Accident Act on January 1 1987, the issues concerning transport accident reforms were considered and debated on many planes. These changes were, and are, the products of arguments that are not of a purely legal nature. They are comprised of fundamental philosophical concerns, economic and financial considerations, and, ultimately, political realities.

In Victoria, during 1986, the philosophical arguments centred on the government's proposed abolition of the right of any individual to sue in tort for injuries suffered. The government relied on the traditional contentions of those theorists who see great disadvantages to individuals, and society, with respect to the need to prove fault in negligence cases. These arguments have not been confined to the impact of tort law on traffic accidents, but often encompass the wider considerations of the rôle of fault in all circumstances where accidents have been incurred.[2]

It has been argued that many individuals do not recover damage awards for injuries sustained in accidents because they may not know they have a cause of action in the first place. Further, even if they *are* aware of their rights they may not have the funds to sue, or may believe that the costs involved outweigh the potential value of the compensation being sought. Factors exist which militate against individuals being awarded tortious damages, aside from the very basic issue of being unable to prove the fault of the other party.[3]

The use of common law negligence actions to compensate transport accident victims is said to be discriminatory. It overcompensates individuals who are not particularly seriously injured, and undercompensates those who are severely disabled.[4] Moreover, reliance on negligence law is fraught with inefficiency and inherent delay, involving a considerable misallocation of resources.[5] Professor W. G. Gibson states:

> the fault system fails to live up to the philosophy that is said to support it. It does nothing at all for the innocent victims of no-fault accidents. By compulsory insurance it removes all personal responsibility from those who are supposed to bear the cost of fault accidents. It operates by shifting onto the broad shoulders of the general community the losses of carefully selected victims. And, paradoxically, without the obligation of insurance, its attraction for both claimants and those claimed against, would disappear.[6]

The proponents of 'pure no-fault' compensation schemes contend that such plans eliminate both the delays, which are the inevitable by-products of the investigative component of the fault process, and the general inequities of a compensation system dependent on litigation. The use of a single and final assessment of losses suffered by injured individuals is also a significant deficiency. Those favouring the implementation of no-fault schemes argue that the payment of benefits on a

[2] See, *e.g.*, Atiyah, P. S., *Accidents, Compensation and the Law* (2nd ed. 1975) and Ison, T., *The Forensic Lottery* (1967).

[3] Glasbeek, H. and Hasson, R., 'Fault — The Great Hoax' in Klar, H. (ed.), *Studies in Canadian Tort Law* (1977) 395, 420.

[4] *Report of Royal Commission on Civil Liability and Compensation For Personal Injury* (1978) vol. I, 64 (the 'Pearson Commission').

[5] Green, J., 'A Fish Out of Water — Classical Fault on the Highway' (1970) 35 *Saskatchewan Law Review* 2, 23-7.

[6] Gibson, W. G., 'The Principles of Fault and No-Fault in Automobile Accident Compensation in Manitoba' (1979) (unpublished paper in University of Manitoba library) 33.

periodical basis is integral to the successful operation of any compensation system.

One principle on which 'pro-fault' advocates rest their argument is the perception that tort law permits the calculation of human losses by courts on an individualistic basis, rather than in an abstract, predetermined manner. In this way, individual differences are taken into consideration. Damages are awarded with respect to the particular loss suffered by each person as a separate entity.[7] W. Griffiths states:

> the fault system is based on the concept of individual responsibility which many regard as the backbone of a strong and healthy society. The removal of this concept in this field by allowing a person to benefit from his own fault could substantially weaken the concept of individual responsibility.
>
> I am also satisfied that from the victim's point of view there is a psychological aspect which supports the fault concept. The idea that a person who causes an injury or damage to others should be held responsible for his own carelessness is deeply ingrained in the individual's concept of justice. Payment of damages by the offending driver or his insurance company is a form of redress for the injury he has caused. It satisfies the psychological need of the accident victim — something beyond giving him money to pay his medical bills and keep food on the table. Should the injured victim be denied this small solace?[8]

No-fault transport accident schemes intend to compensate all victims of such accidents, spreading the costs among the community by virtue of plans which provide security on a universal basis. The nature and amount of compensation available is predetermined. An injured individual will know whether or not compensation will be forthcoming, as well as the amount.

Many jurisdictions have moved towards the implementation of no-fault schemes to compensate automobile accident victims. Professor Belobaba notes that this principle has gained a great deal of acceptance. Issues remain in those jurisdictions which have enacted such schemes as to whether or not the limited 'add-on', or 'modified' status of such plans will eventually give way to more comprehensive plans where the right to sue at common law will be wholly eliminated.[9]

O'Connell and Brown, after referring to a number of studies which have documented the perceived deficiencies of tort law as a means of adequately and sufficiently compensating victims of personal injury, state:

> Yet even in the crisis area of automobile accidents change has been spasmodic at best, and in some jurisdictions non-existent or largely ineffectual.[10]

Having considered a number of the theoretical arguments advanced by proponents and opponents of no-fault accident compensation schemes, it is now necessary to examine the Victorian situation, within the sphere of transport accidents.

[7] Green, R., 'Compensation for Negligence Arising out of Automobile Accidents' (1984) 4 *Health Law in Canada* 68, 71.

[8] Griffiths, W. D., 'Don't Abolish Tort Law in Auto Accident Compensation' (1969) 12 *Canadian Bar Journal* 187, 190.

[9] Belobaba, E., *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization Vol. 1* (1983) 4.

[10] O'Connell, J. and Brown, C., 'A Canadian Proposal for No-Fault Benefits Financed by Assignments of Tort Rights' (1983) 33 *University of Toronto Law Journal* 434.

C. *BACKGROUND*

1. *Motor Accidents Act 1973 (Vic.)*

Prior to the enactment of the Transport Accident Act, motor vehicle accidents in Victoria were governed by the Motor Accidents Act. The scheme implemented by this statute became operational on 12 February 1974, with no-fault benefits grafted onto common law rights. It was the first such no-fault scheme in Australia, coming into existence some twenty-eight years after the organization of Saskatchewan, Canada's pioneering 'add-on' plan.

Under the 1973 statute the Motor Accidents Board had the responsibility of paying benefits to those injured as the result of motor accidents, irrespective of their fault. Generally, coverage was provided to residents of Victoria whose injuries or death were caused by or arose out of the use in Victoria of a motor car, or persons in Victoria whose deaths or injuries were caused by or arose out of the use in Victoria of a registered motor car, and others in certain specific circumstances.[11]

The Act permitted the payment of compensation to an accident victim who suffered deprivation or impairment of her/his earning capacity to a maximum of $20,800.[12] Payments were also available in the case of the death, within two years of the accident, of an individual who left a dependent spouse (or spouses, as de facto spouses were included) or dependent children.[13] Certain household expenses, to a maximum of $2,000, were compensable, as were reasonable funeral, burial, or cremation costs; the reasonable costs associated with hospital, ambulance, medical, nursing, therapeutic and pharmaceutical services were also available as no-fault benefits.[14]

Two features of the scheme were of significance. First, the right to sue at common law remained. An injured individual, or a dependant of a deceased 'breadwinner' under the Wrongs Act 1958 (Vic.), could institute a claim in court alleging the fault or negligence of another party involved in the accident, in the hope of recovering damages at common law. The Act prescribed the way in which such actions were to be instituted, and outlined how such proceedings interact with the no-fault claims made to the Motor Accidents Board.[15] Secondly, even the so-called 'no-fault benefits' were *not* available in *all* circumstances to *all* individuals. For example, the Motor Accidents Board was not liable to compensate a person injured as the result of an accident if he or she was under the influence of intoxicating liquor or any drug to such an extent as to make him or her incapable of having proper control of the motor car, or had a blood alcohol reading greater than 0.05%. However, compensation could be paid in the above circumstances if the individual was able to satisfy the Board that the percentage of alcohol in the person's blood did not in any way contribute to the accident.[16]

11 Motor Accidents Act 1973 (Vic.) s. 13 (2).
12 Motor Accidents Act s. 25.
13 Motor Accidents Act ss 26, 27.
14 Motor Accidents Act s. 30.
15 Motor Accidents Act s. 79.
16 Motor Accidents Act s. 16.

There were a number of other circumstances which allowed for the non-payment of compensation, including situations where the driver was unlicensed, the licence was suspended or cancelled, the car involved in the accident was uninsured, the car was being used in connexion with the commission of an indictable offence, or the car was used in a race or other competition or trial, or was being tested for such an event.[17] By permitting the denial of these so-called 'no-fault' benefits, these provisions have been properly criticized in that they allow elements of 'fault' to be considered in what would otherwise be cases where payment is made automatically. Similar exclusionary provisions may be found in the newly-enacted Transport Accident Act. They, too, have been the subject of a great deal of criticism. It should be noted, however, that under the old scheme, as is the case under the newly-formulated plan, medical, rehabilitative and similar expenses generally would be paid, notwithstanding the impact of these exclusionary provisions in the denial of monetary benefits.[18]

2. *Government proposals for reform, 1986*

One of the predominant features of the Motor Accidents Act, its provision of no-fault benefits in conjunction with the continued availability of the common law right to sue for negligence, was the subject of criticism.

> While fault is not relevant in the actual entitlement to compensation, it is extremely relevant to the extent of compensation available. There is no justification for perpetuating a system which discriminates between two classes of accident victims — those who can prove fault, and those who cannot.
>
> A further criticism of the Victorian scheme is that it preserves all of the aspects of the common-law system that have been criticized and questioned . . . These include the long delays in hearing a common-law claim, the possibility of an inadequate assessment of damages, the retention of once-and-for-all lump-sum payments, and the anti-rehabilitative effects of common-law actions. The maintenance of the common-law system preserves the heavy administrative and associated costs that are involved in the litigation process.[19]

In May 1986, the Victorian Government attempted to implement changes to the State's motor accidents scheme. The government specifically endorsed the views of the New South Wales Law Reform Commission Report, 'A Transport Accident Scheme for N.S.W.'[20] wherein the following concerns were noted: the failure of the negligence action in providing any compensation for a large proportion of transport accident victims, the difficulties of fulfilling the stated aims of the fault principle in practice, the problems in assessing damages on a once-and-for-all basis, the difficulties in assessing non-economic loss, the adverse affects of negligence actions on rehabilitation, the delays in receiving damage awards, and the cost to the court system and community at large of the negligence action.[21]

17 Motor Accidents Act s. 16.

18 According to the government, about one-third of the claimants receiving no-fault benefits from the Motor Accidents Board subsequently received common law benefits from the State Insurance Office (the body responsible for common law actions) after establishing fault. See Government Statement, *Victoria Transport Accident Compensation Reform* (May 1986) 5. A number of those no-fault benefits were used to finance the common law actions.

19 Robinson, M. A., *Accident Compensation in Australia — No-Fault Schemes* (1987) 25.

20 New South Wales Law Reform Commission, *Report on a Transport Accident Scheme for New South Wales* (1984).

21 Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 40.

Further, the continued financial viability of the 1973 scheme was of concern, as it had arguably reached a 'crisis point'. Among the statistics which illustrated this critical financial situation were the following: an estimated unfunded liability of $1.6 billion, or 62 *per centum* unfunded as of 10 June 1986, and a proposed cashflow shortage of $91 million in the 1985-86 financial year.[22] The income generated from complusory third party insurance premiums was unable to meet the payouts incurred, and the system was said to be losing $2 million a day; the third party insurance scheme had an outstanding liability of $2.54 billion as of July 1986.[23]

The proposed scheme would have provided several types of no-fault benefits, including compensation for total or partial loss of earnings for the first 18 months of incapacity, impairment benefits in the form of a lump sum as well as an annuity, payments for loss of earning capacity, death benefits, and the provision of medical and rehabilitation services.

The crux of the scheme was the total elimination of the right to sue at common law for the injuries sustained in transport accidents. Had the scheme been enacted, Victoria would have joined the rather exclusive club of jurisdictions where the availability of common law negligence actions within the sphere of transport accidents has been abolished, namely, New Zealand, Israel, Quebec, and the Northern Territory.

The Government stated:

> Benefits should be related to the cost of the injury to the individual independently of the ability of the individual to establish fault. As a consequence, benefits should be related to loss of income or loss of earnings capacity, but the cost of an injury to an individual should also include costs other than earnings loss and take account of life cycle changes.
>
> Given the nature of the transport accident scheme whereby benefits are financed by a broad based community levy, compensation should be concentrated on individuals who have the most severe injuries with the greatest personal costs. Benefits should be limited for minor injuries.[24]

The provision of the types of benefits envisaged by the Government was contingent on the elimination of the common law negligence action. Although the Government made every effort to do so, it was not able to implement its new transport scheme in the way it had anticipated, as the concerns of various interest groups, as well as the opposition it faced in the Legislative Council, proved insurmountable.

3. *Opposition to the Government's proposals for reform*

The Law Institute of Victoria responded swiftly, and critically, to the Transport Accident Bill.

> The most significant area of criticism is of the Government's intention to abolish the common law right of motor accident victims to sue for damages. This criticism is based on both the established community disapproval of such abolition and the low level of benefits to be paid to those injured when compared with the benefits provided by the present system.[25]

The Institute published detailed papers expounding upon the argued unfairness of the proposed reforms. For example, it stated that there were inequities in the

22 Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 28.
23 *Age* (Melbourne) 2 March 1987.
24 Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 15.
25 Law Institute of Victoria, 'Government Faults — Where the Transport Accident Bill Takes Turns for the No-Fault Worse' (1986) 60 *Law Institute Journal* 768.

level of benefits payable to individuals injured in a transport accident as opposed to those injured at the workplace, under the Accident Compensation Act 1985 (Vic.).

The Institute was critical of the level of no-fault benefits contained in the proposal, with respect to loss of earnings in the first 18 months immediately following the accident, as well as the loss of earnings capacity available beyond the first 18 months after the accident. Additional criticism was focused on the impairment benefits, which utilized a 'Guide to Assessment of Permanent Impairment', oftentimes referred to, somewhat inelegantly, as a 'Table of Maims'.

> The Guide draws heavily on an American model and the public can have little confidence in this bureaucratic mechanism which is proposed will take the place of the judicial assessment of Pain and Suffering and Loss of Enjoyment of Life.
>
> This method of assessment and the forerunner to the Guide to Impairment were originally proposed in the Accident Compensation Bill where they were rejected by the trade union movement as wholly unacceptable. Indeed, the Accident Compensation Act 1985, as passed, retains the right to those injured workers who are able to establish fault to sue at common law for damages for Pain and Suffering and Loss of Enjoyment of Life.[26]

The Institute concluded that the impairment benefits provided under the proposed scheme were an inadequate substitute for common law damages for pain and suffering and loss of enjoyment of life. They would be unavailable to a large number of accident victims, who are deemed by the Impairment Guide to be suffering injuries so 'minor' that they are outside the scope of the Guide.[27]

The Law Institute presented the Government — and provided the public — with counter-proposals which it believed would reform the transport accident system in a way that was more just then what the Government had suggested. It recommended that the right to sue at common law be retained in situations where individuals had been badly injured, with reliance placed on a narrative threshold applicable to these 'seriously' injured individuals. The essential difference between the Government and the Institute's proposals may be summarized as follows:

> The Government intends to abolish the right of innocent victims to sue for damages at common law, whereas the Institute regards the right to sue as *fundamental* to a proper system of compensation.[28]

The Law Institute did not restrict its criticism of the Government's recommendations by merely submitting detailed proposals of its own, and debating the issues within the confines of articles appearing in legal journals. The 'public at large' became involved in the debate, and was said to be supportive of the Law Institute in its attack on the Government reforms. The results of an Institute sponsored public opinion poll were said to clearly demonstrate public opposition to the removal of the right to sue at common law for damage awards, the elimination of the provision of lump sum awards by courts of law, and the bureaucratization or standardization of the process such that individualized assessments of particular victims' needs would no longer be formulated. According to the Institute, the poll showed that the Government's proposals were based

26 *Ibid.* 769.
27 *Ibid.* 771.
28 *Ibid.* 768.

on an ill-conceived, inherently erroneous philosophy, and that the community recognized this by virtue of its continued support for the proposition that victims be permitted to sue.[29]

The Law Institute enlisted the assistance of other interested groups in its criticism of the Government reforms. The Victorian Bar as well as the State opposition also put forward recommendations to reform the system of transport accident compensation. Although there were differences in their suggestions, they did agree with respect to the significant and fundamental issue over which most of the debate raged: they advocated that the common law right to sue be retained, claiming that the innocent victim of an accident had a moral right to compensation superior to that of the road user who is negligent.[30]

4. *Compromise*

As a result of a political *impasse*, that is, the numerical majority of the National and Liberal Parties in the Legislative Council, the Labor Government had to relinquish many of the proposals formulated in the May 1986 Transport Accident Bill. A new scheme was devised, which retained the ability of injured individuals to sue at common law. However, such causes of action have been severely restricted. Common law actions are available only where the disability is 'serious'. The amounts payable at common law are subject to statutorily imposed *minima* and *maxima*.

The legislative package is a political compromise. The protagonists on both sides of the debate seem to have won and lost the issues that they had so vehemently contested.

D. *TRANSPORT ACCIDENT ACT 1986 (VIC.)*

The Transport Accident Act 1986 (Vic.), effective as of 1 January 1987, radically alters the ways in which individuals who are injured or die as the result of a transport accident are to be compensated. The statute sets up a comprehensive scheme whereby both no-fault benefits and common law damages may be available to individuals meeting the legislation's definitional and eligibility requirements. Attention will now be focused on those provisions concerning the subject-matter of greatest significance, namely, (1) eligibility for coverage, (2) exclusions and disqualifications, (3) benefits, (4) the common law, (5) interrelationship with the Accident Compensation Act 1985 (Vic.) and (6) accidents occurring prior to 1 January 1987, in order to develop an understanding of the scope and effect of the new scheme.

1. *Eligibility for coverage*

Compensation is payable to a person injured as a result of a transport accident if the accident occurred in Victoria. Compensation may be paid when injuries have occurred in another State or in a Territory and involved a registered motor

[29] *Ibid.* 773.
[30] Law Institute of Victoria, 'The Liberal Party's Scheme' (1986) 9 *Law Institute News*.

car, as long as, at the time of the accident the person was a resident in Victoria, or the driver of, or passenger in, the registered motor car. Relevant extensions of this principle are made with respect to the dependents of deceased victims of transport accidents.[31] This provision must be read in conjunction with the statute's definition section, in which 'transport accident' means 'an incident caused by, or arising out of, the use of a motor car, a railway train or a tram'.[32] The meaning of the phrase 'caused by, or arose out of, the use of a motor car . . . ' must be read in light of the case law interpreting a similar phrase under the repealed Motor Accidents Act 1973 (Vic.).

The breadth of the eligibility provision, with its extension to cover incidents involving railway trains and trams, is significant. The enlarged scope of the scheme is further illustrated by the fact that the Commission may permit the payment of benefits to a person who incurs an injury or dies as a result of a transport accident in another State and involved a registered motor car but was not resident in Victoria on the date of the accident, nor a passenger in nor driver of the registered motor car, if the Commission is satisfied that the person was, on that date, *likely* to reside in Victoria for at least six months immediately after the date of the accident.[33] This gives the Commission a wide discretion, capable of bringing a number of otherwise ineligible individuals within the parameters of the scheme. It will take some time to assess whether or not this is a necessary feature of the plan, and to see the types of cases in which the Transport Accident Commission exercises this discretion in favour of claimants.[34]

2. *Exclusions and disqualifications*

The statute describes a number of situations which give the Commission the right to exclude, limit, or reduce the benefits which would otherwise be available to injured victims of transport accidents. These include cases where compensation may be payable under other statutes, such as the Police Assistance Compensation Act 1968 (Vic.), the Country Fire Authority Act 1958 (Vic.), or the Accident Compensation Act 1985 (Vic.).[35]

Of particular concern are those provisions which reduce or deny the scheme's benefits as a consequence of the commission of certain acts, and omissions. For example, the Commission need not pay *any* compensation, including medical and like benefits, if an accident report is not filed with a member of the police force, or an 'operator' of a railway train or tram in instances involving such modes of transport.[36]

The denial or reduction of benefits is dependent upon the nature of the activity undertaken or the benefit affected. For example, the Commission need not pay impairment benefits (lump sum and annuity), or loss of earnings capacity benefits in a number of situations. Generally, these benefits would accrue 18 months

31 Transport Accident Act 1986 (Vic.) s. 35.
32 Transport Accident Act s. 3(1).
33 Transport Accident Act s. 36.
34 Ian Dunn has questioned the need for such generosity: Dunn, I., 'No-Fault Benefit Provided by the Transport Accident Act', in *Motor Car Injuries — Transport Accident Act* (1987) 6.
35 Transport Accident Act s. 37.
36 Transport Accident Act s. 39(1).

after the accident has occurred, and may be referred to as 'post-18 month benefits'. They may be denied where individuals have been convicted under s. 318(1) of the Crimes Act 1958 (Vic.) (culpable driving) and under a number of sections of the Motor Car Act 1958 (Vic.), such as not submitting to a breathalizer test.[37]

Further, if a driver who is injured in a transport accident is convicted of being under the influence of intoxicating liquor or any drug to such a degree that she or he is not capable of having proper control of the motor car, or has a breathalizer reading of 0.15 *per centum* or more, the Commission need not pay the 'post-18 month benefits' to that person. However, such compensation is payable if the individual satisfies the Commission that the liquor, drug, or percentage of alcohol in the blood did *not* contribute to the accident in any way. This latter clause militates somewhat against the harshness of this section.[38] As noted earlier, a similar provision appeared in the Motor Accidents Act 1973 (Vic.), with respect to the denial of no-fault benefits as a result of drinking and driving, with an amendment enacted in 1981 which allowed the Motor Accidents Board to make payments to the injured individual if the percentage of alcohol in that person's blood did not contribute in any way to the accident. The significant breathalizer reading under the repealed statute was 0.5 *per centum* grams *per* 100 millilitres of alcohol in the blood. At first glance, there appears to be a great difference between the repealed statute's use of a level of 0.5 *per centum* as opposed to the Transport Accident Act's level of 1.5 *per centum*. This apparent difference may be explained after consideration is given to some of the additional provisions under the new statute which give the Commission the right to deny benefits which are otherwise payable in the 18 month period *immediately* following the accident.

For example, total and partial loss of earnings benefits, payable within the first 18 months following a transport accident, need not be paid to a person injured in such an accident if that individual was convicted of driving the car while under the influence of intoxicating liquor or any drug to such an extent as to be incapable of having proper control of the car, unless that person is able to satisfy the Commission that the drink or drug did not contribute in any way to the accident. The section does not prescribe a minimum blood alcohol level that must be reached for this section to become operative. Generally, payments of this sort can *also* be denied in cases where the injured individual is a driver or passenger in the car at the time of the accident and the vehicle is owned by that person, but registration fees had not been paid. In addition, the Commission has the right to deny payment of total and partial loss of earnings benefits if the injured person was driving at the time of the accident and never had a valid licence to drive a motor car, or held a licence that was suspended or cancelled at the time of the accident. Further, these benefits are not available in cases where the injured person was the driver or passenger in a motor car that was used in relation to the commission of an indictable offence and is convicted of such an

[37] Transport Accident Act s. 39(2).
[38] Transport Accident Act s. 39(3).

offence. The same provision applies with respect to the theft or attempted theft of a motor car, and resisting lawful apprehension.[39]

The Commission may wihthold payment of the loss of earnings benefits where a charge has been laid, or it appears will be laid, with respect to one of the offences encompassed in the provisions noted above.[40] As Ian Dunn noted, this could, and probably *will*, become a problematic provision, as many cases may arise where individuals might have to wait a number months for the results of prosecutions, in order to determine the status of their claims.[41]

The Commission also has the right to *partially* reduce the loss of earnings benefits otherwise payable within the first 18 months immediately after the accident in cases where breathalizer readings are over 0.5 *per centum* grams *per* 100 millilitres alcohol in the blood. This is similar to the way in which a court could find a plaintiff contributorily negligent. If the percentage is more than 0.05 and less than 0.1, the loss of earnings benefits payable is reduced by one-third; if the percentage is 0.1 or more and less than 0.15, the reduction of loss of earnings payments is by two-thirds; loss of earnings is not payable if the percentage is 0.15 or more. Once again, these potential reductions may be avoided by the injured individual satisfying the Commission that the percentage of alcohol in the blood did *not contribute* in any way to the accident.[42]

Another provision with respect to the denial of compensation is worth noting. Generally, the Commission need not pay *any* compensation if the person is injured or dies in a transport accident involving a motor car which is participating in, or is testing in preparation for, an organized motor car race or speed trial if that person is a passenger or driver in such a motor car, a spectator at the race, trial or test, or an organizer of such a sport. A speed trial is defined in such a way that it does not encompass individuals involved in charity car rallies or races which do not involve excessive speed; if such individuals were injured, they would not be excluded from benefits.[43] *All benefits* are denied under this section: thus, in cases where accidents are not reported, and in situations involving motor

[39] Transport Accident Act s. 39(4). At common law, an individual is not disabled from bringing a common law suit by engaging in an illegal activity on her or his own. A duty of care is still owed to such a person, with the extent of that duty determined by the circumstances of the case. (See *Henwood and another v. The Municipal Tramways Trust (S.A.)* (1938) 60 C.L.R. 438, 446). Even in cases involving 'joint illegality', the erstwhile harsh principles precluding the defendant's liability have been modified substantially. According to the majority in *Jackson v. Harrison* (1978) 138 C.L.R. 438, a duty of care is owed by the defendant to the plaintiff in such cases; recovery would depend on the determination of the appropriate standard of care. It appears that even though an individual may be denied no-fault benefits as a result of the operation of s. 39, that person could nevertheless bring a common law action, as long as the requirements set out in s. 93 of the statute are satisfied. Note that, among other matters, s. 93 requires that an impairment assessment be made and that the injury be a serious one.

One further matter merits attention: s. 39(4) stipulates that if an individual is convicted for having committed certain offences prescribed in s. 80 of the Motor Car Act 1958 (Vic.), the Commission may deny partial or total loss of earnings benefits. These offences include the obstruction of a qualified medical practitioner who is attempting to take a person's blood sample from doing so, and the refusal to comply with a breath test when required to submit to one by a member of the police force.

[40] Transport Accident Act s. 39(6).

[41] Dunn, I., 'No-Fault Benefits Provided by the Transport Accident Act', in *Motor Car Injuries-Transport Accident Act* (1987) 13.

[42] Transport Accident Act s. 40.

[43] Transport Accident Act s. 41.

sport accidents, no compensation, including medical and like benefits, will be available. These provisions are unjustifiably harsh.[44]

The inclusion of *any* provision under which benefits may be excluded, limited, or reduced may be criticized for a number of reasons. No-fault benefits should be of a strictly no-fault variety. A disabled individual, in need of compensation for loss of earnings, impairment, loss of earnings capacity and medical expenses should not be penalized under a scheme where the issue of fault should not have any import.

The Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Commission) makes some interesting observations with respect to exclusions under no-fault schemes, including the view that the issues of punishment and compensation must be kept separate. The former is a matter properly dealt with by the criminal law, whereas the latter arises from the fact of the existence of the injury. The Commission refers to certain exclusions operating in the Canadian jurisdictions of Saskatchewan, British Columbia, and Ontario, stating:

> We do not think such sweeping exceptions are warranted. But most of us consider that there should be some provision for excluding from benefit those who suffer injury through their own serious misconduct.[45]

Despite its initial criticism of exclusionary clauses, the Pearson Commission maintains that some such provisions should be operative. Ron Beazley seems to concur, stating:

> The legislature, for good social reasons, has introduced statutory fault and, indeed, contributory statutory fault in respect of certain benefits . . .[46]

However, he notes that such exceptions will inevitably lead to certain anomalies under a scheme that is said to be one that is organized on a 'no-fault' basis.

> I am not without sympathy for the draftsmen and, indeed, the legislature, as to where one draws the line if exceptions are to be made to the 'no fault' concept. But having introduced statutory fault we inevitably spawn such anomalies.[47]

Despite that fact, he suggests that *additional* disentitling provisions be included in the legislation: for example, individuals who have committed serious traffic offences, such as driving in a manner or at a speed dangerous, should also be subject to disentitlement to benefits for the sake of consistency.[48]

It would seem that *additional* possibilities of disentitlement will do little more than cause hardship to a greater number of otherwise eligible victims, increasing the prevalence of anomalous cases. The only way out of this situation would be to eliminate any and all provisions which give the Commission the right to

[44] At common law, a duty of care is owed to individuals in cases where injuries are suffered in motor sport accidents, speed trials, races and the like; however, a lower standard of care may be imposed on such individuals if, for example, the driver is not experienced. *Cf. Walker v. Turton-Sainsbury* [1952] S.A.S.R. 159. Where an individual is injured in speed trials, races or motor sport accidents, that person's right to bring unrestricted actions at common law is preserved in s. 93(18).

[45] *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) vol. I, 218 (the 'Pearson Commission').

[46] Beazley, R., 'Transport Accident Act Disentitlement and Transition Provisions' in *Motor Car Injuries — Transport Accident Act* 10.

[47] *Ibid.* 12.

[48] *Ibid.* 10.

reduce, restrict and disqualify individuals from benefits in what should be a *no-fault* scheme.

3. *Benefits*

The benefits provided by the Transport Accident Commission may be categorized as follows: medical and like benefits, loss of earnings (both total or partial), impairment benefits (as lump sums and annuities), loss of earning capacity (total or partial), and death benefits. What follows is a description of the most important provisions in Division 3 of Part 3 of the statute.

(i) *Medical and like benefits*

The Commission is liable to pay the reasonable costs of medical, hospital, nursing, and ambulance services to those who are injured or die as the result of a transport accident.[49] Defining 'reasonable', the legislation stipulates that regard must be had to a number of factors, including the service or provision actually rendered or the expense actually incurred, and the necessity of the service or provision, or of incurring the expense, in the circumstances.[50] 'Medical', 'hospital', 'nursing' and 'ambulance' service are defined extensively in the statute. For example, 'medical service' includes attendance, treatment or examination of any kind by a medical practitioner, dentist, optometrist, physiotherapist or chiropractor. Psychological treatment is also covered where referral has been made by a medical practitioner. The repair and replacement of spectacle glasses, teeth, hearing aids, and the provision of medicine are also included within the definition of 'medical service'.[51] The Act prescribes that the first $286 of medical service expenses must be paid by the injured individual, as they are not liable to be borne by the Commission.[52]

If the injured individual had been engaged in housekeeping duties or child care without being paid, and there is a need to employ someone to perform those tasks after the accident, the Commission shall pay for the reasonable costs of employing such a person for a maximum period of five years, on the basis of the average weekly earnings of all Victorian employees as published on a quarterly basis. This is the method of calculation utilized if the other person is employed for not less than 40 hours per week. If the other person is employed for less than 40 hours per week, the amount paid is calculated at an hourly rate of one-fortieth of the amount based on the average weekly earnings of all Victorian employees. To determine what 'reasonable costs' entails, reference should again be made to the statutory definition of 'reasonable', noted above.

Further, the Commission is to pay the reasonable costs of employing someone to provide services of a domestic nature or of a type which relates to nursing and

49 Transport Accident Act s. 60.
50 Transport Accident Act s. 3(1).
51 Transport Accident Act s. 3(1).
52 Transport Accident Act s. 43(1)(b). The figure prescribed in the statute is $269. However, as a result of the application of the indexing formula stipulated in s. 61, the amount not paid by the Commission as of 1 July 1987 is $286. All figures used in this paper will be amounts indexed as of that date.

attendance care, subject to maximum levels. Reasonable burial and cremation costs are to be paid in cases where death results from the accident. In cases where a child is injured, the Commission must pay the reasonable travelling or accommodation expenses incurred by the child's parents as a result of visiting the child in hospital.[53]

One of the objects of the scheme is the provision of effective rehabilitation services. The statute defines 'rehabilitation service' as the provision of any aid, treatment, assistance, appliance, apparatus or any other service for the purpose of rehabilitation, and includes the provision of attendance care, household help, modifications of a home or car, counselling, and transportation costs. Limits are imposed with respect to these services: they must be a kind or type that is approved by the Commission, must be provided by a person approved by the Commission, and the costs associated with their provision must be 'reasonable'.[54]

(ii) *Loss of earnings — total or partial*

These benefits are provided on a short-term basis, and are payable during the first 18 months *immediately* following the transport accident; generally, payments begin five days after the accident or after the injury first manifests itself, whichever occurs later.[55] An earner who suffers a *total* loss of earnings as a result of, or largely the result of, a transport accident will be given a weekly payment amounting to 80 *per centum* of the earner's pre-accident weekly earnings, or a minimum amount of $224 if she or he has no dependants (with additional payments of $63 for one dependant, and $20 for each additional dependant), whichever is the greater. The maximum weekly payment is $457. Further, payments must not exceed 100 *per centum* of the earner's pre-accident weekly earnings. These payments are treated like salaried income, with income tax deducted at the source.

Although the Commission need not pay compensation to an earner for that person's loss of earnings during the first five days after the accident, or after the injury manifests itself, the Commission has the discretion to make such a payment if it feels that the worker would suffer 'acute financial hardship'.

If an earner who is employed suffers *partial* loss of earnings as a result of — or largely due to — the injury, 85 *per centum* of the difference between the earner's

53 In *Wilson v. McLeay* (1961) 106 C.L.R. 523, 527-8, Taylor J. held that the expenditure incurred by parents visiting their daughter, hospitalized out-of-state, could be taken into account in the court's assessment of general damages. The circumstances of that case required that the injured girl be given such comfort as her parents could provide, as their presence was important to the alleviation of her condition.
Other expenses, including the cost of moving one's residence to be nearer to an injured child, can, in certain circumstances, be compensable, whereas the loss of wages consequent upon such a move is not (*Timmins v. Webb* [1964] S.A.S.R. 250).
The Transport Accident Act compensates 'reasonable' expenses on a no-fault basis, limiting such payments to those associated with travel and accommodation costs. These expenses were also covered by the no-fault provisions in the Motor Accidents Act; however, those payments were limited to $500 in total to the parents or guardians of any child in respect of any particular accident (Motor Accidents Act ss 30(1A), 30(1B)).

54 Transport Accident Act ss 3(1), 8(e), 60(1)(a).

55 Transport Accident Act ss 44, 45. S. 44 concerns total loss of earnings whereas s. 45 is relevant to situations involving partial loss of earnings.

current weekly earnings and the earner's pre-accident weekly earnings will be payable, with the minimum and maximum amounts noted above applicable. If an earner is self-employed, the weekly payment for partial loss of earnings is 80 *per centum* of the earner's pre-accident weekly earnings, subject, once again, to the minimum and maximum amounts noted with respect to total loss of earnings.

There are several terms utilized in these provisions which require clarification. With respect to the compensation directed to an individual's partial loss of earnings, the term 'current weekly earnings' in relation to an earner means that person's earnings during the week, calculated at her or his ordinary time rate of pay for the normal number of hours per week; if there is no such 'ordinary' time rate, the earner's actual earnings during the week would yield the necessary figure. The purpose of the provision is to exclude overtime earnings from the Commission's calculations.

Other lengthy definitions, relevant to both the total and partial loss of earnings provisions, include the following: an 'earner' is generally someone over the age of 18, and in full-time or part-time employment as either an employed or self-employed person at any time during the 8 weeks preceding the accident, or during a period or periods equal to at least 13 weeks during the year immediately preceding the accident, or at least 26 weeks during the two years immediately preceding the accident, if, in any of those cases, at the time of the accident the individual had not retired permanently from all employment. An 'earner' is also someone who had entered into a contract of employment or was about to commence business as a self-employed person.[56]

'Pre-accident weekly earnings', as applied to an 'earner' who is not self-employed, is also defined extensively.[57] The calculation hinges on an average of the weekly earnings earned over the 12 month period prior to the accident. Overtime payments do *not* figure in the calculation. Ian Dunn notes that serious injustice may be felt by a recently promoted individual whose earnings are assessed on an average over a twelve month period rather than with due regard to the salary earned since the promotion was given. However, in a case where an individual has been employed by the same employer for *less* than four weeks, that person's average weekly earnings may be calculated having regard to the weekly earnings which the earner could reasonably have been expected to have earned in that employment had she or he not been injured.[58] Situations involving apprentices, full-time students, self-employed persons, as well as other particularized circumstances are also dealt with in great detail.[59]

As noted earlier, loss of earnings benefits are generally only available for an 18 month period immediately after the accident. However, such payments may be extended in certain circumstances.[60]

[56] Transport Accident Act s. 3(2).
[57] Transport Accident Act s. 4.
[58] Dunn, *op. cit.* 18. Dunn comments on certain inequities which exist under the present definition and problems in the determination of factors such as 'pre-accident weekly earnings'.
[59] Transport Accident Act ss 4, 5.
[60] Transport Accident Act s. 46.

(iii) *Impairment benefits — lump sum and annuity*

If an individual is to qualify for an impairment benefit, that person must have suffered a level of injury as a result of a transport accident which is assessed by the Commission, utilizing a detailed 'table of impairment', as being greater than a 10 *per centum* degree of impairment.[61] The level of disability is assessed 18 months after the accident has occurred, or when the injury stabilizes, whichever is later. For minors, the assessment may be postponed until the individual is 18 years of age. An assessment may be made earlier than on the dates noted above if the injury has substantially — or totally — stabilized. Such an impairment assessment is required by that individual in order to pursue his or her common law claim for damages.

The lump sum

Except in cases where the applicant asks that the payment be made periodically, the impairment benefit in this section is paid as a lump sum. Because this lump sum bears no relationship to earnings, it will not be taxable as income. The amount forthcoming is based on a percentage of the maximum sum payable to a totally incapacitated individual, $44,730, which incorporates the assessment of impairment level contained in the regulations to the statute (not yet published). For example, a 'diet limited to liquid foods' may be assessed at a level ranging from 20 *per centum* - 30 *per centum*. The following calculation would be made:

$$\frac{20 - 10}{90} \times \$44{,}730 = \$4{,}970$$

The annuity

With respect to those individuals for whom an impairment benefit is assessed, an additional annuity is payable, based on a formula incorporating the individual's degree of impairment and age.[62] To qualify for this periodical payment the individual must, once again, have an impairment level assessed at greater than 10 *per centum*. The largest annuity is payable to younger, more seriously disabled individuals. For example, utilizing the formula prescribed in the legislation, the maximum amount payable is that which a totally incapacitated individual 25 years of age or younger would receive, that is,

$$\frac{100 - 10}{90} \times \$104{,}350 \times \frac{75 - 25}{50} = \$104{,}350$$

Where an individual aged 45 suffers a degree of impairment assessed at a level of 20 *per centum*, the annuity payable over many years would be

$$\frac{20 - 10}{90} \times \$104{,}350 \times \frac{75 - 45}{50} = \$6{,}261$$

[61] Transport Accident Act s. 47.
[62] Transport Accident Act s. 48.

This annuity is deducted from any loss of earning capacity benefit that may be forthcoming.

A minor who is injured as a result of a transport accident, suffering a degree of impairment greater than 10 *per centum*, will receive a weekly payment, after the initial 18 month period following the accident, until age 18, or the impairment ceases, whichever occurs first. The payments are a percentage of the maximum weekly amount of $63, incorporating the minor's assessed level of impairment.[63]

The assessment of impairment table, as noted earlier, has not yet been published. The now-defunct Transport Accident Bill of May 1986 largely utilized the American Medical Association's *Guide to the Evaluation of Permanent Impairment*. This guide, which will likely be the one incorporated within the present scheme, was strongly criticized by the Law Institute of Victoria. In an address to the Melbourne legal community, Dr. T. Buzzard said:

> the medical and paramedical profession disagree with the concept that all people are identical. Under the Table of Maims . . . there appears to be an assumption that all people are identical. For example, the loss of a left little finger to a manual labourer may not be of much significance yet the loss of a left little finger to a concert pianist will deprive him of his income earning capacity. Percentage disability under the Table of Maims will be the same for each person. The medical profession appreciates the need to attempt to quantify injury or damage and has reluctantly 'gone along' with percentage disability in workers' compensation matters in the past. The Transport Accident legislation will embrace a far greater range of injured people than has the workers' compensation legislation. I believe that there will be a substantial reluctance by the medical profession to accept this Table.
>
> I acknowledge that the Table of Maims is based on an American table which is probably the best of the various such Tables in existence. This does not justify its use.[64]

This comment is typical of the criticism levelled against the implementation of any administrative scheme where respect for individualistic characteristics is sacrificed in an attempt to accommodate a greater number of people in as efficient a way as possible. Essentially, there is a concern as to whether a satisfactory, workable, and viable alternative to court awards for non-pecuniary loss can be achieved. Another criticism is that Tables of Maims are inherently unfair and unjust.

(iv) *Loss of earning capacity — total, partial, and non-earners*

An earner who is injured as a result of a transport accident, and suffers *total* loss of earning capacity,[65] is to be paid a weekly sum with respect to that loss in the period *after* the first 18 months immediately following the accident, or when loss of earnings payments cease, whichever is the later; the loss must continue.[66] With cases of total incapacity, the Commission pays 80 *per centum* of the earner's after tax pre-accident earning capacity, to a maximum of $372 weekly. The minimum amount payable for an earner without dependants is $200, with a

63 Transport Accident Act s. 54.

64 Buzzard, T., 'Transport Accident Compensation — A Medical Point of View', in *Motor Car Injuries — Transport Accident Act* (1987).

65 Note the fact that it is loss of earning *capacity* that is being compensated; this is an attempt to circumvent the possibility that the payments would otherwise be taxable in the hands of injured recipients.

66 Transport Accident Act s. 49.

further sum of $57 for one, and $18 for each additional dependant. These payments are, in each respective case, to be reduced by the impairment annuity which may be forthcoming.

Payments directed at total loss of earning capacity are derived from a statutory formula utilizing a number of complex calculations, such as the latest average weekly earnings of all employees in Victoria in the financial year prior to 15 June, as well as the figure for the average weekly earnings of all employees in Victoria published prior to June 15 last preceding the accident. The Commission also determines the amount it believes the earner would have had the capacity to earn before the accident, in employment that is reasonably available. Consideration is given to the earner's skills, training, and experience, less the amount of tax likely to have been payable. With respect to 'loss of earning capacity', there must be regard to the nature of the injury incurred, the degree of impairment, the potential for and ability of the person to undertake rehabilitation, and the individual's training, skills, experience, and age.[67]

The special position of apprentices and minors is recognized by making reference to the person's earning capacity on the assumption the age of majority would have been reached, with a salary adjustment commensurate with the attainment of majority reflected in the calculation of earning capacity. The same consideration is given to apprentices; however, that term is defined narrowly.[68]

An earner injured as the result of a transport accident who suffers *partial* loss of earning capacity will be given weekly payments equal to 85 *per centum* of the difference between the earner's post-accident earning capacity and pre-accident earning capacity.[69] The stipulations that applied in the case of total loss of earning capacity, concerning maximum and minimum amounts payable, the period during which such payments are to commence, and the reduction of the payment by the amount of any available impairment annuity also apply in situations of partial loss of earning capacity. No payment need be made if the difference between the earner's pre-accident and post-accident earning capacity is less that 10 *per centum* of the pre-accident earning capacity.

The Commission is liable to make payments to an injured individual who is a non-earner (and non-minor) at the time of the accident, and suffers loss of earning capacity.[70] The amount payable is calculated by means of a formula which includes a determination of the person's earning capacity, age, the number of years prior to retirement age during which the person is reasonably likely *not* to be employed, and the person's retirement age.

(v) *Cessation of payments*

A number of payments which are otherwise available under the statute may be restricted. For example, loss of earnings and loss of earning capacity benefits

67 Transport Accident Act s. 7.
68 Transport Accident Act s. 49(6). See s. 3(1) for a definition of an 'apprentice'.
69 Transport Accident Act s. 50.
70 Transport Accident Act s. 51.

cease when the individual reaches an age where that person is eligible to receive an age pension under the Social Security Act 1947 (Cth), or reaches the normal retiring age of his or her industry or occupation, whichever is the later. They also cease at any time the earner is imprisoned.[71]

Significantly, the Commission need not compensate an injured individual for loss of earning capacity where that person has settled or been awarded common law pecuniary loss damages in respect of the injury; parallel to this provision, the Commission need not make lump sum and annuity impairment payments where the injured individual has settled or been awarded pain and suffering damages at common law.[72]

Also of fundamental importance is the stipulation that the Transport Accident Commission does not have to continue to pay for *any* loss of earning capacity, and impairment annuity benefits as soon as either one of two circumstances exists: (i) a period of three years following the manifestation of the injury caused by the transport accident has expired (with qualifications for minors); (ii) the sum of the amounts received from the Commission under the categories of loss of earnings, impairment annuity, and loss of earning capacity totals $71,640.[73] Impairment lump sum benefits do not figure into the calculations made under these 'expiration' provisions. These restrictions do not apply in cases where payments are made to an injured individual who has had her or his impairment assessed at a level of 50 *per centum* or more. In such cases, benefits continue until retirement age. This 'saving provision' in the case of severely incapacitated individuals is a realistic, welcome recognition of the extreme hardship experienced by such persons.

(vi) *Fatality benefits*

In cases where an earner dies as a result of a transport accident and leaves a surviving spouse, a lump sum payment is made by the Commission to the spouse. A 'surviving spouse' is defined in relation to a person who dies as a result of a transport accident as a dependent spouse of the person. However, both 'spouse' and the degree of dependence required are not defined with any precision.[74]

The size of the available benefits is dependent on the age of the deceased earner at the time of death: the younger she or he may have been, the greater the lump sum payment. The maximum benefit of $74,540 would be payable if the deceased was 25 years of age or younger.[75] Any lump sum payment is reduced by the value of the lump sum impairment benefit that may have been paid to the deceased prior to his or her death. The statute prescribes a formula which takes into account situations where more than one surviving spouse exists, with regard given to the number of years during which each respective surviving spouse was

71 Transport Accident Act s. 53(1).
72 Transport Accident Act s. 53(2).
73 Transport Accident Act s. 53(3).
74 Transport Accident Act s. 3(1).
75 Transport Accident Act s. 57.

a dependent spouse of the earner.[76] Account is also taken of dependent children of the earner, who share in the maximum lump sum payment of $74,540.

No lump sum death benefits are liable to be paid if the surviving spouse or dependent child receives an award of damages or settles a claim in respect of the earner's death, by means of litigation. The Transport Accident Act 1986 (Vic.) prescribes that an award granted in a fatal accident claim under the Wrongs Act 1958 (Vic.) may not exceed $500,000.[77] There is no restriction on the ability to bring such an action.

Periodical payments are also available to a deceased earner's surviving spouse.[78] The amount of the weekly payment is 80 *per centum* of the deceased earner's earnings; the maximum amount payable is $457 weekly. The minimum payment is $224, with an additional $63 for one dependent child and $20 for each other dependent child. Once again, provision is made for the existence of more than one surviving spouse. These periodical payments cease after the expiration of a five year period after the death of the earner, or once the surviving spouse is eligible to receive an age pension under the Social Security Act 1947 (Cth). If the surviving spouse has a dependent child, the payments will continue. As is the case with the lump sum death benefits, these periodical payments are not paid in respect of any period after an award of damages or a settlement has been made in respect of the death.

Benefits are also ear-marked for dependent children of a person who has died as a result of a transport accident, whose other parent is not a dependent spouse, or does not wholly, mainly, or in part provide economic support for the dependent child, or is dead or dies as a result of the same accident.[79] Included are a lump sum of $74,540, to be divided by the number of dependent children, periodic payments of $63 for each dependent child, and an education allowance of $1190 per year for each dependent child, with age restrictions imposed with respect to the latter two benefits. Once again, no payment need to be made to or for a dependent child if an award or settlement of damages had been made in respect of the death of the person on whom the child was dependent. If the dependent child is successful in a fatal accident claim under the Wrongs Act 1958 (Vic.), the Transport Accident Act 1986 (Vic.) prescribes that the Commission be given an amount equal to the sum of payments that had been paid by the Commission in respect of that death. This also applies with respect to damages awarded in fatal accident claims brought by dependent spouses.[80]

(vii) *Miscellaneous 'no-fault' provisions*

For the sake of completeness, certain miscellaneous provisions under the no-fault benefits division of the scheme should be considered. Various reviews may

[76] Dunn, *op. cit.* 32, comments: 'I predict difficulties in the interpretation of this section. This section will likely provide a great deal of problems for the Commission in trying to assess *who* is a dependant, since that word is defined in section 3 as 'a person who would, but for the injury or death of the (deceased) be wholly, mainly or in part dependent on that person for economic support'.

[77] Transport Accident Act s. 57(5).

[78] Transport Accident Act s. 58.

[79] Transport Accident Act s. 59.

[80] Transport Accident Act s. 93(11).

be made of certain benefits to which individuals are entitled.[81] For example, the provision of the impairment annuity may be reviewed once in every five year period, and must be reviewed if so desired by the person receiving the annuity. An individual's entitlement to loss of earning capacity payments must be reviewed once in each five year period. Payments may be increased, decreased, or terminated, as appropriate, having regard to the determination of the individual's degree of impairment, earning capacity and other factors.

If the total payment by way of impairment annuity and loss of earning capacity is less than 5 *per centum* of average weekly earnings of all Victorian workers, the Commission must redeem those sums and pay an amount determined by the regulations. If that occurs, then impairment annuity and loss of earning capacity benefits cease.[82]

All the payments and sums referred to under the no-fault benefits component of the scheme are to be indexed, in accordance with formulae contained in the statute. Consideration is given to the 'all groups consumer price index' in Melbourne, and its annual changes.[83]

Also noteworthy is the stipulation that in calculating the amount of compensation payable by the Commission, it shall not have regard to any sum the individual may receive under an insurance or assurance contract, nor to any superannuation or pension fund benefits that may accrue.[84] This is reflective of the position at common law, where these types of collateral benefits are not offset in damages awards. The sums paid or payable to the injured individual by virtue of insurance contracts and the like are said to be the product of the individual's prudent conduct; benefits such as these are the consequence of what the person has paid for under her or his contract prior to the occurrence of the loss. The character of the benefit must be considered.[85]

4. *The common law*

One of the most significant features of the newly-enacted scheme is the fact that it has retained the right to sue at common law in order to recover damages for personal injuries incurred in transport accidents. However, such causes of action have been severely restricted. It is the retention of the availability of the right to be able to institute such proceedings, albeit in very limited circumstances, that is the crux of the political compromise reached by the Government and Opposition.

81 Transport Accident Act s. 55.
82 Transport Accident Act s. 56.
83 Transport Accident Act s. 61.
84 Transport Accident Act s. 62.
85 In *Redding v. Lee* and *Evans v. Muller* (1983) 47 A.L.R. 241, Mason and Dawson JJ. state at 255:

> It would be unjust and unreasonable to reduce the damages of the prudent plaintiff who insures himself against accident by allowing the premiums which he paid and the proceeds of the policy to enure for the benefit of the tortfeasor and make the existence of the insurance the occasion for giving the plaintiff a lesser award of damages than he would have obtained had he not been insured.

Where the purpose of the benefits is to ameliorate the plaintiff's position regardless of that person's right to recover damages from the tortfeasor, such benefits are disregarded: namely, pension and superannuation benefits (*per* Mason and Dawson at 255).

Section 93, within Part 6 of the Act, entitled 'Legal Rights Outside This Act', is an exhaustive prescription of the situations where, since 1 January 1987, the recovery of damages in any court proceedings may be sought. An impairment assessment must have been made, and the injury must be 'serious' if an action at common law is to be permitted.[86]

If an impairment assessment has been made and it is at a level of 30 *per centum* or more, this carries with it the presumption that the injury is 'serious', and entitles the injured individual to bring a common law action for damages.[87] If the level of impairment is assessed at a level less than 30 *per centum*, the injured individual may still be able to bring common law proceedings in either one of two ways: first, if the Commission is satisfied that the injury is a 'serious' one, and issues to the person a written certificate consenting to the institution of proceedings, or, secondly, if a court gives leave to bring proceedings upon an application to the court to do so. The Act stipulates that a court must not allow an individual to bring proceedings unless it is satisfied the injury is 'serious'.[88]

Of obvious practical importance is the question of what constitutes a 'serious injury'. It is defined as follows:

Serious injury means —

(a) serious long-term impairment or loss of a body function; or
(b) permanent serious disfigurement; or
(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or
(d) loss of a foetus.[89]

Thus, an injury assessed at a level of less than 30 *per centum* impairment, which does not automatically come within the 'serious injury' presumption, may be included as such if the individual has suffered a serious disfigurement, or loss of a body function. Should a court or the Commission allow the individual to bring a common law negligence action, the injury *must* fit within one of the descriptions noted above. In this way, notwithstanding the fact that the assessment of impairment may be at a level below 30 *per centum*, this definition of serious injury will still allow common law claims.[90] It is hard to imagine what kind of case would qualify under this provision but would not have been included as a 'serious injury' pursuant to the 30 *per centum* presumption in sub-section 93(3).[91]

86 Transport Accident Act s. 93(2).
87 Transport Accident Act s. 93(3).
88 Transport Accident Act ss 93(4), (5), (6).
89 Transport Accident Act s. 93(17).
90 Miles, D., 'Motor Accident Compensation — The Transport Accident Act Common Law Entitlement After 31/12/86', in *Motor Car Injuries — Transport Accident Act* (1987) 5. With respect to the likelihood of the Commission granting an individual the chance to bring a common law action, David Miles of the Law Institute of Victoria, notes:

> It is difficult to comment as to what the attitude of the Commission might be to an application for a certificate of consent where the Commission has already determined that the degree of impairment is not 30 per centum or greater. One can only surmise at this early stage that it would be unlikely that the Commission would grant such a certificate unless the impairment assessment procedure and the table prescribed for the carrying out of that impairment assesment revealed some particular anomaly in relation to the percentage ascribed to a particular injury or injuries.

91 Miles, *op. cit.* 16-7.

The impairment assessment which is needed to satisfy the requirements of this provision is generally made 18 months after the accident, or when the injury stabilizes, whichever is later. An earlier assessment may be made if the condition has in fact substantially stabilized and the individual needs this assessment in order to be able to institute the action at common law, under section 93. The decision of the Commission with respect to the level of impairment assessment as well as its refusal of an individual's application to bring proceedings for a serious injury may be appealed to the Administrative Appeals Tribunal, with further appeals able to be taken to the Supreme Court on questions of law.

The Act not only restricts *who* may bring common law actions, that is, 'seriously injured' individuals, but also explicitly prescribes the kinds of damages that are available.[92] Further, it sets out the maximum and minimum amounts that may be forthcoming. If the total pecuniary loss damages that is assessed by a court is less than $22,040, before taking into account any contributory negligence, then such an award is not to be made. A similar provision exists with respect to total pain and suffering damages assessed at a level less than $22,040. In this way, the legislature has made it quite clear than an individual should be wary of bringing a common law claim even if that person is eligible to do so, unless she or he is quite certain that the damages expected to be awarded by the court will reach the level prescribed.

David Miles comments:

> the provisions of Section 93(7) will not come into operation until the case is over and a judgment made as to the award of damages. For the plaintiff there will be no turning back at that stage.
> . . .
> Quite clearly it is going to make for complex and for careful decisions to be made at early stages and during the conduct of litigation, for penalties may apply when the judgment threshold is not achieved.[93]

'Pain and suffering damages' are defined as damages for pain and suffering, loss of amenities of life or loss of enjoyment of life. 'Pecuniary loss damages' mean damages for loss of earnings, loss of earning capacity, loss of value of services or any other pecuniary loss or damage. No other kinds of damages are recoverable.[94]

In conjunction with the above noted threshold *minima*, or 'floors', the Act prescribes ceiling levels with respect to the awards that courts may make. No award may be made in excess of $495,970 for pecuniary loss, or in excess of $220,430 for pain and suffering.[95] If a fatality occurs as a result of a transport accident, a dependent person, as defined under the Wrongs Act 1958 (Vic.), may recover damages in respect of that death. The ceiling on such an award is $500,000.[96] By legislating ceilings on the amount of damages a Court may award, the Victorian Government has implemented a policy that has been considered recently in several North American jurisdictions as a means by which the 'liability insurance crisis' might be arrested.

92 Transport Accident Act s. 93(7).
93 Miles, *op. cit.* 20.
94 Transport Accident Act s. 93(17).
95 Transport Accident Act s. 93(7).
96 Transport Accident Act ss 93(8), (9). This maximum level prescribed with respect to a Wrongs Act action is the only sum not subject to automatic indexing under s. 61.

The statute contains additional restrictions on the amount of common law damages awarded.[97] For example, losses which relate to costs or expenses incurred as medical and like benefits are not be provided for as common law damages. Similarly, the value of domestic services — or those of a similar kind — relating to nursing and attendance which are provided by another person to the injured individual, and are not liable to be paid by the accident victim, shall not be included within a damages award.

Certain sums must be repaid to the Commission, in accordance with provisions which address the inter-relationship of common law damages awarded and the no-fault benefits available under the Act.[98] If a court orders an award for pecuniary and non-pecuniary damages, the recipient is to pay the Commission the amount equal to some of the sums that she or he had already received as 'no-fault' benefits, that is, the amounts paid as impairment lump sum and annuity benefits, and for loss of earning capacity. The same principle applies with respect to moneys that may have been paid in respect of an individual's death as a result of a transport accident. While these payments will affect the amount of damages received by the successful plaintiff, they will *not* be taken into account in determining the minimum threshold levels of $22,040 for pecuniary loss and $22,040 for pain and suffering. The costs incurred for medical rehabilitation and similar services will continue to be paid by the Commission, as long as they are necessary.

The question of costs is also addressed.[99] Essentially, the Act stipulates that a party who loses an application to a court to bring a common law claim by unsuccessfully arguing that a 'serious injury' has been suffered, will be penalized in terms of costs. The same penalty will be incurred if an action fails, with no liability found against the defendant. If damages are assessed but cannot be awarded because they do not reach either of the $22,040 minimum thresholds, each party is to bear its own costs.

The legislature has seen fit to prescribe a discount rate of 6 *per centum*[1] instead of the 3 *per centum* rate established by the High Court in *Todorovic v. Waller*[2] This applies to an award of damages assessed as a lump sum in respect of future loss, that is, impairment of earning capacity, loss of the expectation of financial support, or a liability to incur expenditure in the future. The statute also stipulates that no payment of interest is to be ordered in an award of damages other than for damages actually suffered prior to the date of the award.[3]

The restricted right to common law damages under the Transport Accident Act does *not* affect the right to compensation under various other statutes wherein payments may be forthcoming, including the Police Assistance Compensation Act 1968 (Vic.), the Compensation (Commonwealth Employees Act) 1971 (Cth) and the Accident Compensation Act 1985 (Vic.). Further, an individual is not

97 Transport Accident Act s. 93(10).
98 Transport Accident Act s. 93(11).
99 Transport Accident Act s. 93(12).
1 Transport Accident Act s. 93(13).
2 *Todorovic v. Waller* (1981) 150 C.L.R. 402.
3 Transport Accident Act s. 93(15).

precluded from claiming common law damages in respect of a transport accident involving a speed trial or test, or organized motor car race, even though that person is not entitled to benefits under the no-fault component of the scheme.[4]

Section 93 is a remarkable provision. While it preserves the right to sue at common law, it does so in a way that will surely compel the vast majority of potential claimants to think long and hard before instituting a claim. The first hurdle — having to incur a 'serious injury' in order to be eligible to sue — will not be easily surmounted. Aside from this initial problem is the question as to whether or not it will in fact be *worthwhile* for an individual to bring a lawsuit, with all the well-known risks that are inherent in the litigation process at the best of times. These problems and risks have been substantially increased with the incorporation of threshold minimum judgment levels and ceiling recovery sums within the legislation. It is likely that the restrictive nature of section 93 will have a particularly significant impact on all cases which appear to be marginally successful.

5. *Interrelationship with the Accident Compensation Act 1985 (Vic.)*

In a case where an individual is injured in a work-related transport accident, suffering injuries that have arisen out of or in the course of employment, whereby he or she is eligible for coverage under both the Transport Accident Act 1986 (Vic.) and the Accident Compensation Act 1985 (Vic.) ('Workcare'), the source of benefits is the Accident Compensation Commission. If the Accident Compensation Commission denies making an order in favour of an applicant, the Transport Accident Commission may nevertheless make weekly payments to that individual.[5] The payments provided during the first 18 months immediately following the accident are similar in amount under both statutes; however, after that initial period has elapsed, the injured person would be in a worse position financially under the Transport Accident Act 1986 (Vic.) than under the Accident Compensation Act 1985 (Vic.).

In most of the cases where the Accident Compensation Commission (or self-insurer) pays an injured worker compensation under 'Workcare', the Transport Accident Commission has the obligation of reimbursing the Accident Compensation Commission for the moneys it has paid. The Transport Accident Act 1986 (Vic.) does not set a limit on the level of the reimbursement that must be made to the Accident Compensation Commission, despite the fact that on a long term basis the level of benefits under the transport scheme is not as great as under 'Workcare'. In this way, problems may arise after the new scheme has been in operation 18 months, because that is when the variations in benefits provided under the two statutes will become evident. The Transport Accident Commission may seek to have this 'reimbursement' provision interpreted narrowly, in order that the Commission be required to reimburse the Accident Compensation Commission only for those sums that would have been payable under the Transport Accident Act 1986 (Vic.).

4 Transport Accident Act s. 93(18).
5 Transport Accident Act s. 38.

6. *Accidents occurring prior to 1 January 1987*

The statute includes a number of provisions relating to accidents which occurred prior to 1 January 1987.[6] With respect to injuries arising in such cases, the scheme, which was operative under the otherwise repealed Motor Accidents Act 1973 (Vic.), survives.[7]

Although the former scheme has, generally, been preserved *vis-à-vis* pre-1 January 1987 motor accidents, certain provisions in the new plan have been given retrospective operation. For example, the statutorily prescribed discount rate of 6 *per centum* is to apply to accidents occurring prior to that date.[8] Further, in cases where the damages awarded at common law include compensation for the value of services of a domestic nature or services relating to nursing and attendance, and are provided to the injured person by another individual and are not paid for by the injured person, the amount of compensation payable must not exceed the average weekly earnings of all Victorian employees.[9] The provision concerning the payment of interest under the new scheme also applies retrospectively. Thus, no interest is to be payable on an amount of damages other than special damages from the date of the injury or death until the date of the damages award.[10]

E. *OTHER JURISDICTIONS*

To properly assess the significance of Victoria's new legislation, a brief description of certain important features in other jurisdictions' schemes is warranted, including a discussion of the plans set up in the Northern Territory and Tasmania, as well as the recent changes in New South Wales. The features of New Zealand's unique comprehensive accident compensation scheme and the modified no-fault plan existing in Manitoba, Canada also provide a useful comparison.

1. *The Northern Territory*

The Motor Accidents (Compensation) Act 1979 (N.T.) became operational on 1 July 1979. The Northern Territory has eliminated the right to bring an action at common law.[11] It had initially retained the right to bring a cause of action, but restricted the availability of such suits, as well as the amount of damages that could be awarded to recovery for pain and suffering and loss of enjoyment of life, with a statutorily-prescribed ceiling of $100,000. The scheme only applies to residents of the Northern Territory.

Permanent disabilities are compensable by virtue of a lump sum award, to a maximum of $50,000.[12] In addition to impairment benefits, loss of earning

6 Transport Accident Act, Part 10 ['Accidents Before Commencement of Section 34'].
7 Beazley, *op. cit.* 13. Beazley estimates that there are 75,000 claims pending that have to be processed under the pre-1 January 1987 scheme.
8 Transport Accident Act s. 173.
9 Transport Accident Act s. 174.
10 Transport Accident Act s. 175.
11 Motor Accidents (Compensation) Act s. 5 as amended in 1984.
12 Motor Accidents (Compensation) Act s. 17.

capacity benefits are available to employed and self-employed individuals.[13] Medical expenses and those costs incurred as a result of having to modify equipment are also covered, although limits are imposed in certain circumstances.[14] Death benefits are also payable to those dependent on the deceased 'bread-winner'.[15]

The most significant feature of the Northern Territory's scheme is its recent total abolition of the right to sue for negligence in a transport-related accident. M. A. Robinson comments:

> The Northern Territory is the first Australian jurisdiction to completely remove the requirement of fault from entitlement to, and levels of, benefits. The abolition of common-law rights is the most progressive aspect of the scheme and makes the transition to a 'pure' no-fault system of accident compensation in other States significantly easier to envisage.[16]

Unfortunately, this comment has been neither particularly accurate nor prophetic. The problems which the Victorian Government had in trying to enact a 'pure no-fault' transport accident scheme, and the nature of the plan being established in New South Wales, seem to belie Robinson's statement, or 'wishful thinking'. Although 'pure no-fault' schemes may be easier to 'envisage' as a result of what the Northern Territory was able to do, it may also be argued that the Cain Government's inability to implement its 'pure no-fault' compensation system will make it *more* difficult for other jurisdictions to legislate plans similar to that in the Northern Territory.

2. *Tasmania*

Since 1 December 1974, Tasmania has had a no-fault compensation scheme similar to that which existed in Victoria under the Motor Accidents Act; it was enacted under the Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.). It is a mixture of certain limited benefits which are available notwithstanding an individual's 'fault' with respect to an injury, or death, incurred as a result of an accident, and that person's right to maintain an unrestricted common law cause of action. The coverage is similar to that which was applicable to Victoria, as are the provisions relating to exclusion from eligibility.

The no-fault benefits available include the following: medical expenses to a statutory maximum, disability payments to a ceiling level payable to those wholly disabled as a result of a motor vehicle accident, and a housekeeping allowance tied to the cost of providing ordinary household duties that would otherwise be carried out by the injured person.[17] Death benefits are payable to surviving dependents, in the form of both a lump sum and a periodical allowance.[18] Funeral expenses are also compensable under the scheme, as a 'no-fault' benefit.[19] Unlike other no-fault plans, such as Victoria's, Tasmania's scheme is not indexed to automatically take inflation into account.

13 Motor Accidents (Compensation) Act ss 13, 14.
14 Motor Accidents (Compensation) Act ss 18, 19.
15 Motor Accidents (Compensation) Act ss 20-26.
16 Robinson, *op. cit.* 28.
17 Motor Accidents (Liabilities and Compensation) Act s. 23 (the First Schedule, Part V).
18 Motor Accidents (Liabilities and Compensation) Act s. 23 (the First Schedule, Part IV).
19 Motor Accidents (Liabilities and Compensation) Act s. 23 (the First Schedule, Part III).

For the purposes of this paper, it is important to recognize that the Tasmanian scheme is akin to that which *had operated* in Victoria, as an 'add-on plan'. The right to sue at common law is not restricted. Rather, this right operates in an unlimited manner, alongside the benefits ostensibly provided irrespective of the 'fault' of the injured individual.

3. *New South Wales: Law Reform Commission proposals*

Much has been written about the New South Wales Law Reform Commission's comprehensive Report and recommendations with respect to transport accident reforms, published in 1984.[20] The most important feature of the Report is its recommendation that the right to sue in negligence at common law be eliminated, and replaced by a 'pure no-fault' transport accident compensation scheme.

Loss of earning capacity benefits would be available to 'earners', payable periodically, and subject to a maximum amount. Rehabilitation, regarded as fundamentally important, would be available to earners and non-earners alike. The expenses associated with medical, hospital and similar services would also be paid; death benefits would be forthcoming to the dependants of a person who dies as a result of a transport accident. The reasonable costs of funeral expenses are also covered. Permanent disabilities would be compensated in accordance with a 'Table of Maims', similar to that utilized under the new Victorian scheme, in conjunction with a statutorily-prescribed maximum amount.

Aside from the specific recommendations made by the Law Reform Commission, what is remarkable about the Report is its detailed and painstaking analysis of the advantages and disadvantages of the ability to bring common law negligence actions in cases where an individual is injured in or dies as the result of a transport accident. The data compiled, and arguments raised in the Report will provide the basis for debate as society continues to grapple with questions of how, and in what ways, accident victims should be compensated.

The Commission's proposals have not been enacted. In light of Victoria's experience in attempting to legislate a scheme similar to that proposed in New South Wales, it became doubtful that there would be sufficient political impetus to bring into effect the Report's major proposals.

Robinson notes:

> At the time of writing [1987], the Commission's Report has not been implemented. It has been two years since the Report was submitted to the State Labor Government. There has been no official comment on the Report. The Hawke Labor Government in Canberra has also been silent on the Report. The lack of response has been disappointing considering the stated election policy of the Hawke Government that it would establish a national comprehensive scheme in stages.[21]

According to Robinson, the question of accident reform *did* receive attention from various quarters during 1986, including the New South Wales Law Society.[22] What is certain is that any major attempts at reform will be controversial, generating the same kind of hotly contested debate as that which existed in

[20] New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984).

[21] Robinson, *op. cit.* 47.

[22] Robinson, *op, cit.* 48.

Victoria in 1986, primarily directed at the proposed loss of the right to sue at common law.

4. *New South Wales: recent developments — Government proposals*

In June 1987 the New South Wales Government began to publicize its newly proposed transport accident scheme.[23] One of the most significant features of the plan is its retention of the concept of fault, and acceptance of fault as the only basis — other than Commonwealth Government benefits — on which transport accident victims may receive compensation. Notwithstanding the fact that fault has been retained, the Government maintains that in most other respects it is adopting the recommendations of the N.S.W. Law Reform Commission. One cannot help but query whether it can in fact be said that *any* elements of the Commission's proposals have been adhered to when compensation is only available upon a finding of fault, and there is *no* provision of no-fault benefits.

The scheme, referred to as 'Transcover', came into force on 1 July 1987, covering transport accidents occurring as of that date. Individuals eligible for coverage include N.S.W. residents involved in transport accidents in N.S.W., Australian residents involved in transport accidents in N.S.W. where the vehicle is registered in N.S.W. or is unable to be identified, and N.S.W. residents involved in such accidents in Australia where the vehicle is registered in N.S.W.

What is remarkable about the new scheme is the fact that it does not provide benefits unless the injured individual can establish that someone else was negligent. The Government notes that under the *previous* system in N.S.W., compensation was only available on a fault basis, and that this criterion is preserved under the new plan. Further, the plan retains the concept of contributory negligence in cases where the claimant's actions contribute to the injuries suffered; however, the presence of contributory negligence will not affect the payment of medical and like expenses.

Benefits with respect to loss of earnings will not be paid for the first five working days after the accident. After that period, if one is totally incapacitated, payments equivalent to 80 *per centum* of ordinary time gross earnings subject to a maximum of $500 per week will be made, to retirement age. Partial incapacity payments will amount to 80 *per centum* of the difference between pre-accident and post-accident earning capacity, with a ceiling level of $500 weekly. An 'earner' is defined broadly under the plan.

Non-earners will be able to receive loss of earning capacity benefits if they are assessed as having to support a long-term incapacity, that is, are disabled for a period of at least two years from the date of the accident. No payment is made during that two year period. The payments that *are* made are determined on the basis of 'notional' earning capacity, utilizing a formula which incorporates average weekly earnings.

[23] Much of this paper's discussion with respect to the New South Wales proposals is derived from the New South Wales Government publication, *Transcover — The N.S.W. Transport Accident Compensation Scheme*. See also Churchill, J., 'Trans Cover — Acting for the Claimant' (1987) 25 *New South Wales Law Society Journal* 45.

The scheme will pay earners and non-earners alike all reasonable costs of hospital, medical, rehabilitation and similar services. However, the initial $100 costs incurred in certain of these services will not be paid. Household assistance may be forthcoming; other arrangements will be made for modifications and equipment needed by injured claimants.

Payments will be given on a lump sum basis for permanent impairment assessed at levels over 4 *per centum*. The maximum amount payable is $120,000 for an individual who is totally impaired, with a reduction made in accordance with the person's age.

Death benefits are available, with a maximum lump sum of $80,000 to be shared among all dependants. Periodical payments for income support will also be provided to the deceased's dependants.

One of the primary goals of the scheme is the reduction of delays in the provision of compensation. The claim is to be made to a board, or commission, with appeals to the District Court on disputes with respect to liability, questions of law, and questions of administrative discretion. Appeals concerning the assessment of impairment may be made to the Medical Review Panel, comprised of three physicians. The Court of Appeal will entertain appeals solely on questions of law.

The scheme is extraordinary. It has restructured the kinds of benefits that a successful, 'innocent' claimant can expect to receive, and has changed the procedure within which such benefits can be claimed. As was noted earlier, the most striking feature of the scheme is the fact that it does not provide *any* benefits on a no-fault basis, as the establishment of liability for negligence is the only key to recovery. There is no provision for the payment of compensatory benefits irrespective of fault.

5. *Manitoba, Canada*

Manitoba patterned its mixed no-fault/fault compensation system on that existing in Saskatchewan, Canada, the first jurisdiction in the common law world to enact a scheme under which no-fault benefits were to be paid to victims of motor vehicle accidents. Saskatchewan's measures were enacted in 1946, approximately 25 to 30 years prior to the implementation of similar schemes in other Canadian and Australian jurisdictions.

Manitoba's system, like Saskatchewan's, and Victoria's former plan under the Motor Accidents Act 1973 (Vic.) is an 'add-on' scheme, with no-fault benefits paid in addition to the unrestricted right to sue at common law. The amount of damages awarded at common law are reduced by the no-fault benefits paid in respect of the same accident.

Manitoba's scheme — called 'Autopac' — was set up under The Manitoba Public Insurance Corporation Act,[24] and has been in operation since 1 November 1971. It is a Government-run, compulsory scheme, and provides basic automobile insurance coverage for all registered vehicles and drivers in the province.

[24] The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180.

Professor W. G. Gibson summarizes the way in which the plan operates, as follows:

> Under such a system the person suffering injury, death or property damage is entitled to certain specified benefits and insurance moneys to compensate him for his loss. These are paid on a direct basis from the insurer (in Manitoba, the Manitoba Public Insurance Corporation). The victim of the loss is then free, on his own initiative, to make a claim against anyone whom he believes he can prove to have been at fault, and negligently to have caused his loss. If he is successful in this claim, the amount of compensation to which he is entitled will be assessed in full according to the ordinary rules of negligence law, without regard to any no-fault benefits he has already received. He will then recover fully from the negligent party's third party liability insurance except that the amount he has already received under his own (no-fault) insurance will be deducted from the liability insurance payment. This reduction stipulation is a term of every modified no-fault automobile insurance scheme in Canada, inlcluding Autopac. It prevents the victim from recovering twice (once on a no-fault basis and again on the fault principle) for the amount of the no-fault benefits received.[25]

Coverage is extended to property damage arising from motor vehicle accidents (with a specified amount deducted by the Corporation where an individual's 'fault' has caused the property damage).

The no-fault component of the scheme rests upon the fundamental principle of universality of coverage, extending to Manitoba licensed vehicle owners, drivers, and their passengers who may incur accidents beyond the boundaries of Manitoba.[26] However, despite this purported universality of coverage, certain individuals will be denied these benefits as a result of the scheme's exclusionary provisions.

For example, benefits will be forfeited in cases where the injured/insured has misrepresented, or has not disclosed information to the Corporation.[27] Such forfeiture is not necessarily absolute, as the statute gives the Corporation the power to grant relief from such forfeiture.[28] Benefits may also be denied, as in Victoria, if the claimant is involved in a race or speed test, or is a spectator at such an event and is struck down.[29]

Of particular significance are the provisions relevant to insured individuals who drive while impaired. The Regulations stipulate that an insured is not to operate any vehicle while under the influence of intoxicating liquor or drugs to such an extent that she or he is incapable of proper control of the vehicle, or is in a condition for which that person is convicted under the Criminal Code of a breathalizer-related offence.[30] Prior to 1973, the insured individual who was intoxicated not only lost the otherwise available no-fault benefits but also his or her third party liability coverage. This has since been changed; that is, the benefits lost are only those relating to that individual's 'no-fault' and property damage benefits, with the individual's third party liability coverage now unaffected. Even the harshness of the present provisions which permit the denial of

25 Gibson, W. G., 'The Principles of Fault and No-fault in Automobile Accident Compensation in Manitoba' (1979) (Unpublished paper in University of Manitoba library) 6.

26 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74 s. 5. See Saranchuk, W., 'Presentation of a Personal Injury Claim: Role of the Manitoba Public Insurance Corporation' (1978-1979) 9 *Manitoba Law Journal* 171, 172.

27 The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180 s. 32.

28 The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180 ss 32, 17.

29 The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180 s. 19.

30 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c.A180, Man. Reg. 33/74 s. 22.

the insured's 'no fault' and property damage benefits may be alleviated by the statute's 'relief from forfeiture' provision.[31]

The criticism levelled against provisions which exclude individuals from no-fault benefits in Victoria apply with equal force to those enacted within Manitoba's scheme. If the benefits under consideration are ostensibly to be given irrespective of a person's fault, that should be the end of the matter. The punishment and deterrence of an individual from a particular activity perceived by society and identified by the legislature as anti-social should be a matter which is dealt with as a criminal offence. Such behaviour should not warrant the denial of compensatory benefits to injured individuals in need of such payments.

The benefits provided under the 'no-fault' component of Manitoba's automobile accident compensation plan are set out in regulations formulated under the statute.[32] The types of available payments include income replacement benefits,[33] impairment benefits for permanent injury or scarring,[34] and death benefits.[35] The costs of funeral, medical and rehabilitation expenses are also covered.[36]

If an individual is *totally* disabled as a result of an accident, that person will receive $150 (Canadian) each week, or 70 *per centum* of his or her gross weekly earnings to a maximum of $300 *per* week, for as long as the disability lasts. The $150 weekly indemnity does not require that person to be employed to be eligible for the payment. In this way, students, the unemployed, and pensioners may qualify for its receipt. A 'housewife' (defined to include either gender) who is confined to a wheelchair, bed, or hospital on a continuous basis will receive $150 weekly while incapacitated.

Insured individuals who are *partially* disabled received payments of $60 *per* week, under certain circumstances. These benefits continue for as long as the disability lasts, subject to a maximum period of 104 weeks. A partially disabled 'housewife' will receive $60 *per* week as long as the disability lasts, subject to a maximum period of 20 weeks.

Impairment sustained as a result of bodily injuries in an accident will also generate the payment of benefits. The maximum payment possible is $20,000 for total impairment. The amount payable is deemed to be a percentage of this amount, dependent on the level of the individual's dismemberment or impairment. A schedule to the statute's regulations specifies the degree of total impairment to be assigned to a particular loss. For example, the loss of a hand is deemed to be a 40 *per centum* degree of impairment, and therefore compensable at a level of $8,000.

31 The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180 s. 17.
32 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74.
33 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74 ss 4, 9.
34 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74 s. 10.
35 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74 s. 8.
36 A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74 ss 6, 7.

As in Victoria, the use of a standardized 'Table of Maims' to assess levels of impairment, has generated criticism. Professor Gibson comments,

> Every claimant gets the same amount under this coverage. There is no individualized, personalized assessment, as there is in tort law. Many types of 'physical impairment' are overlooked. There is a preoccupation here with loss of physical mobility, and the tables are very unsophisticated and crude.[37]

However, one fact cannot be ignored: the 'individualized, personalized assessment' in tort law is *not* always accomplished successfully. The way in which damages are awarded at common law has frequently been the subject of criticism, with attention focused on the method of calculation and the use of lump sum awards.[38]

Death benefits are available under Manitoba's scheme: $10,000 is paid to the primary dependant of the deceased insured, and $2,000 to each of the secondary dependants. Specific additional requirements are stipulated in the statute and regulations. Like most other no-fault compensation schemes, the Corporation reimburses the individual who bears the funeral and burial costs incurred with respect to a person who has died in a motor vehicle accident.

Medical, surgical, dental, ambulance, professional nursing, chiropractic and other related expenses, including those associated with furnishing orthopaedic and optical appliances are paid by the Corporation. However, the responsibility of the Corporation for such payments is to a maximum sum of $20,000, and is earmarked to expenses that are not already covered by the Manitoba Health Services Commission.

In cases where an individual suffers a partial or total disability as a result of an accident in the course of her or his employment such that the eligibility requirements of both the Manitoba Public Insurance Corporation Act and the Workers' Compensation Act are met, then that person will be compensated by the scheme implemented under the latter statute.[39]

As was noted at the outset, Manitoba's scheme is one which may be described as an 'add-on' no-fault plan. That is, the individual's right to sue in tort for injuries sustained by reason of an automobile accident has been neither eliminated nor restricted. In a situation where an insured is liable for the bodily injury, death, and/or loss or destruction of property suffered by the plaintiff, then the Corporation's total liability as third party insurer is a maximum of $200,000.

Manitoba's Autopac plan was opposed vehemently when it was introduced by the province's New Democratic Party in 1971. Since that time it has proved to be overwhelmingly supported by the community. The public is generally content with respect to the types of benefits it provides, as well as the fact that it actually makes money. The last available statistics indicate that the Corporation operated

[37] Gibson, W. G., 'Automobile Insurance Law in Manitoba' (1978) (Unpublished paper in University of Manitoba library) 96.

[38] See for example, *Thurston v. Todd* [1965] N.S.W.R. 1158, and, the comments made with respect to that decision by the plaintiff's mother, in Luntz, Hambly and Hayes, *Torts Cases and Materials* (2nd ed. 1985) 24.

[39] A regulation under The Manitoba Public Insurance Corporation Act, C.C.S.M. c. A180, Man. Reg. 333/74 s. 20.

with a total surplus of $18.8 million for the fiscal year ending 31 October 1984.[40]

The concept of no-fault automobile accident insurance schemes has been widely accepted in Canadian jurisdictions, with the primary differences among the provinces' plans centering on the amounts of benefits paid, as well as their organization. Most Canadian jurisdictions, like Manitoba, have preserved the 'innocent' victim's right to sue a wrongdoer in tort for her or his negligent actions. However, the province of Quebec abolished the ability of accident victims to maintain such lawsuits, establishing a 'pure no-fault' compensation scheme.

> The Quebec Automobile Insurance Act, enacted in December 1977, provides a no-fault compensation plan for all road users with an exclusion from tort remedies for those covered under the Act. The scheme provides ongoing benefits for lost income of 90 per cent of pre-injury net income subject to a ceiling. The maximum admissable gross income upon, [*sic*] which this income replacement benefit is based is indexed and adjusted annually in line with the cost of living index. Motorists are able to obtain 'top-up' insurance from private insurers. Whereas the current scheme offers almost complete coverage, at least 28 per cent of road victims under the old system did not qualify for benefits. The scheme is administered by the Regie de l'assurance automobile du Quebec which operates from 59 service centres throughout Quebec, including 10 rehabilitation centres for victims of road accidents.[41]

The following chart,[42] prepared by the Insurance Bureau of Canada, summarizes the types of provincial automobile accident benefits available in Canada, and the types of plans under which they are administered. An evaluation of the nature of the Canadian schemes will be made in the context of an assessment of Victoria's newly-enacted scheme. Many of the criticisms applicable to the 'add-on' plans implemented in Canadian jurisdictions are relevant to Victoria's 'modified no-fault' system.

6. *New Zealand*

New Zealand's comprehensive scheme is unique, in that it provides compensation to individuals who suffer personal injuries sustained in accidents, irrespective of fault, on a 24 hour-a-day basis.[43] As a response to the recommendations of the *Report on Compensation for Personal Injury in New Zealand*[44] the Accident Compensation Act 1972 (N.Z.) was enacted, and became operational on 1 April 1974. It was consolidated and amended in the Accident Compensation Act 1982 (N.Z.). The fundamental premise of the Report, reflected in the legislation, was community responsibility. The scheme not only abolished the individual's right to sue at common law for 'personal injury or death by accident', but

40 Manitoba Public Insurance Corporation, *Annual Report* (1984) 12.

41 Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 31.

42 See pp. 290-1. Insurance Bureau of Canada, *Facts of the General Insurance Industry in Canada* (13th ed. 1985) 30-1.

43 Accident Compensation Act 1972; replaced by the Accident Compensation Act 1982. Detailed analysis of New Zealand's scheme may be found in a number of sources, including the following:
Osborne, P., 'Accident Compensation in Manitoba: Reflections After a Decade of No-Fault in New Zealand' (1985) (Unpublished paper in University of Manitoba library).
Palmer, P., *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979). Vennell, M., 'Problems of New Zealand's No Fault Accident Compensation Scheme' [1984] *New South Wales Law Society Law Journal* 44.

44 Royal Commission of Inquiry, *Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand* (1967) (the 'Woodhouse Commission').

also eliminated the then-existing 'piecemeal' schemes, including workers' compensation.[45]

Of essential importance to the scheme is the fact that the injury complained of must have been sustained in an accident if an individual is to be eligible for coverage. Generally, injuries or disabilities arising from sickness or disease are not compensable. The exclusion of disabilities resulting from disease has been the subject of criticism, on both philosophical and pragmatic grounds. The core reason for the existence of no-fault accident compensation schemes is society's desire to make the availability of compensation dependent on the victim's needs rather than fault. Need should determine if, and in what amount, payment should be made. If need were, in all cases, the sole criterion on which compensation is payable, regard should not be given to *causal* connections of *any kind*, including the question of whether the disability is the result of an accident as opposed to sickness.

Incapacitated earners are paid 80 *per centum* of their earnings losses by the Accident Compensation Corporation, to a maximum level of $700 *per* week.[46] Special provisions exist with respect to the payment of earnings-related compensation to potential earners such as children, secondary school pupils and persons in training who have not yet entered the labour force.[47]

Available benefits include reasonable medical and dental costs not otherwise covered by the Social Security System, loss of services of a domestic nature, and rehabilitation costs.[48] Lump sum awards are also available in lieu of a court award for pain and suffering, loss of enjoyment of life, and loss of amenities to a maximum of $10,000.[49] A maximum lump sum of $17,000 is available for permanent incapacities.[50] Death benefits are payable in the form of lump sums and on an earnings-related basis.[51]

Those analysts arguing in favour of the implementation of 'pure no-fault' schemes criticize the fact that the New Zealand legislation is not as comprehensive as it should be, in that persons who are injured while committing criminal offences which have occasioned imprisonment as a penalty may be refused compensation. Another major problem with the scheme, according to the 'pure no-fault' proponents, was noted earlier: it does not compensate individuals who are disabled as a result of illness. Having regard to New Zealand's present economic situation, it is unlikely that there will be any major initiative to extend the scheme.

Professor Philip Osborne, having extensively studied the New Zealand plan, assesses its success, as follows:

> It works well for the great majority of accident victims. It provides adequate benefits, quickly and efficiently with minimal administrative problems. The New Zealand public appears to be happy with the way the scheme is running.[52]

45 Accident Compensation Act 1982 s. 27.
46 Accident Compensation Act 1982 ss 56, 57, 58.
47 Accident Compensation Act 1982 ss 61, 62, 63.
48 Accident Compensation Act 1982 s. 80.
49 Accident Compensation Act 1982 s. 79.
50 Accident Compensation Act 1982 s. 78.
51 Accident Compensation Act 1982 ss 65, 82.
52 Cramer, P., 'Professor Keen on Comprehensive Negligence Scheme' (1985) Vol. 5 No. 20 *Ontario Lawyers Weekly* 8.

CANADIAN AUTOMOTIVE INSURANCE PLANS (as of July 1, 1985).

Nfld.	Que.	Ont./N.S./N.B./P.E.I.	Man.
Third Party Liability (Bodily Injury and Property Damage) Compulsory in all provinces			
Minimum $200,000	Minimum $50,000 No Exposure to Bodily Injury within Quebec	ON. Min. $200,000 N.S. Min $200,000 N.B. Min. $200,000 P.E.I. Min $200,000 Jan. 1, 1986	Minimum $200,000
Medical Payments			
$2000 per person excluding amounts under Government Medical & Hospital Plans Time Limit: 2 years	No time or amount limit; includes rehabilitation	$25,000 per person including rehabilitation excluding Government Health Insurance Plans Time Limit: 4 years	$20,000 per person excluding Compulsory Health Insurance Scheme
Funeral Expense Benefits			
$500 maximum	$2576.52 maximum	$1000 maximum	$1500 maximum
Disability Income Benefits			
$35.00 per week 104 weeks temporary + 104 weeks permanent 7 day deductible Contributory Housewife $12.50 per week Max. 12 weeks	Min. $151.12 per week or 90% of net wages Max. Income Gross $34,500 per year Temporary — 5 years Permanent — lifetime 7 day deductible Non-contributory	80% of Wages Max. $140.00 weekly 104 weeks temporary + Lifetime total & permanent Ont. first day cover Non contributory first 14 days N.S. & P.E.I. 7 day franchise Contributory Unpaid housekeeper $70.00 per week Max. 12 weeks	$150.00 per week or 70% of wages Max. $300.00 weekly 104 weeks partial @ $60.00 7 day deductible Contributory Housewife Lifetime Total $150.00 weekly Partial $60.00 weekly Max. 20 weeks
Death Benefits			
Death within 3 months after accident Married Male Age Limits: 10 59 - $5000 60 69 - 3000 70 + - 2000 Plus $1000 each dependent child No limit. Married Female Age Limit: 10 59 - $2500 60 69 - 1500 70 + - 1000 Unmarried Person with living parents Scale by age Maximum $2500	Death anytime after accident Pension to dependent survivors based on Disability Income Benefits of Deceased. Min. $151.12 Without dependent $7729.56 or $3864.78	Death within 2 years after accident Head of Household Age Limits: None $10,000 Plus $1000 each dependent beyond first No limit. Spouse: No age limit: $10,000 Dependent Child $2000	Death anytime after accident Head of Household Age Limits: None $10,000 Plus $2000 each secondary dependent Limit: $10,000 Spouse: No age limit $10,000 Dependent Child Maximum $2000
Dismemberment Benefits			
Schedule based on 50%-100% of Principal Sum	Scheduled up to $37,750.14	Not included. Becomes part of other recovery	Scheduled Benefits Maximum $20,000. Deducted from death benefits
Administration			
Private Insurers	Government — bodily injury Private insurers — property damage	Private insurers	Compulsory insurance Govt. monopoly Optional and Excess Govt. and private Insurers compete

- Alberta, Ontario and Manitoba residents involved in accidents in Quebec receive from their own insurer the equivalent to the benefits available to Quebec residents from the Régie.

Sask.	Alta./Yukon	B.C.	N.W.T.
Minimum $200,000	Alta. Min. $200,000 (Jan. 1, 1986) Yukon Min. $200,000	Minimum $200,000	Minimum $50,000
$4000 per person discretionary to meet expenses	$5000 per person including rehabilitation Excluding amounts under Government Medical & Hospital Plans	$200,000 per person subject to third party limit; includes rehabilitation, excludes Government Medical & Hospital Plan	$2000 per person excluding amounts under Government Medical & Hospital Plans
$300 maximum	$1000 maximum	$1000 maximum	$500 maximum
$150.00 per week Lifetime Total 104 weeks partial @ $75.00 7 day deductible Contributory Housewife $150.00 weekly Total $75.00 weekly Partial Max. 104 weeks	80% Gross Wages Max. $150.00 weekly Yukon — Min. $40.00 weekly 104 weeks temporary or total 7 day deductible Contributory Housewife $75.00 per week Max. 26 weeks	75% Gross Wages Max. $100.00 weekly 104 weeks temporary + Lifetime total & permanent 7 day deductible Contributory Housewife $100.00 per week As above	Employed Person 80% Gross Wages Max. $50.00 weekly Min. $40.00 weekly 104 weeks temporary or total 7 day deductible Contributory Housewife $50.00 per week Max. 26 weeks
Death within 2 years after accident Head of Household Age Limits: None $7500 Plus $1500 each secondary dependent Limit: $15,000 Spouse No age limit: $3000 Equal division to surviving dependents Dependent Child: Scale by age Maximum $1000	Death anytime after accident Head of Household $5000 plus $1000 for each dependent beyond first + 1% of Total Principal Sum for 104 weeks. No limit. Spouse $5000 Dependent Child Scale by age Maximum $1500	Death anytime after accident Head of Household $5000 + $100.00 Weekly for 104 weeks plus $1000 + $25.00 weekly for 104 weeks for each dependent beyond first. No limit. Spouse $2500 Dependent Child Scale by age Maximum $1500	Death any time after accident $5000 + 1% per week for 104 weeks Head of Household Age Limits: 10 64 - $5000 65 69 - 3000 70 + - 2000 Plus 20% of Principal Sum for each dependent beyond first No limit. Spouse Age Limit: 10 64 - $2500 65 69 - 1500 70 + - 1000 Dependent Child Scale by age Maximum $1500
Scheduled Benefits Maximum $10,000	Not included. Becomes part of other recovery.	Not included. Becomes part of other recovery.	Not included. Becomes part of other recovery.
	Private insurers	Same as Manitoba and Saskatchawan	Private insurers

- Accident Benefits Coverage is compulsory except in Newfoundland.
- Collision insurance is optional except in Manitoba ($200 deductible) and Saskatchewan ($500 deductible).

The unique comprehensive coverage provided under New Zealand's legislation does not seem destined to be dismantled.

F. *A NATIONAL COMPENSATION SCHEME*

With the apparent success of New Zealand's accident compensation scheme, there have been calls in various jurisdictions for the adoption of similar plans. Certain proposals recommend the establishment of programmes that would be all-encompassing, in that individuals disabled as a result of disease would be eligible for coverage. Such schemes have been recommended, and abandoned, in Saskatchewan,[53] Manitoba[54] and Australia.[55]

Manitoba's *White Paper*, like Saskatchewan's *Report*, was concerned with the irrationality of the many *ad hoc* schemes under which individuals could receive no-fault benefits, with the receipt of specific payments dependent on the cause of the injury. In Manitoba, these included 'Autopac' benefits, workers' compensation, social allowances, unemployment insurance, Canada Pension Plan disability payments, veterans benefits, and criminal injuries compensation. The *White Paper* was critical of the overlapping elements in existing schemes, and, more importantly, concern was voiced with respect to the huge gaps in coverage, where the required connections to particular causes of accidents were not able to be satisfied. Both the Manitoba Government *White Paper* and Saskatchewan's *Report* called for the eventual organisation of a comprehensive, universal scheme covering all disabled individuals.[56]

The *Australian Woodhouse Report* also recommended a number of radical proposals which were never implemented.

> The *Australian Woodhouse Report* proposed a national compensation and rehabilitation scheme for the injured and the sick. The scope of the scheme was enormous. It was to cover everyone in the country who became sick, had congenital disabilities or suffered an injury regardless of fault.[57]

Negligence actions involving personal injuries were to be abolished, with the implementation of a comprehensive, universal scheme based on concepts of community responsibility. Rehabilitation, and the prevention of disabilities were also seen to be fundamental to its success. Automatically indexed payments, linked to an individual's economic and social needs, were to be paid periodically. They were earnings-related, with minimum and maximum levels imposed statutorily. Non-earners were entitled to benefits assessed on a notional basis.

Many of the proposals proved to be problematic, including their constitutional validity. Criticism was generated in a number of quarters, each with its vested interests and desire not to alter the status quo. Insurance companies, lawyers, and trade unions were among those groups most united in opposition to the comprehensive proposals for reform.[58]

53 Saskatchewan Department of Labour, *Report of the Sickness and Accident Insurance Committee* (1976).

54 Manitoba Government White Paper, *Accident and Sickness Compensation in Manitoba* (1977).

55 National Committee of Inquiry into Compensation and Rehabilitation in Australia, *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (1974) (the 'Australian Woodhouse Report').

56 Manitoba Government White Paper, *Accident and Sickness Compensation in Manitoba Vol. 1* (1977) 10.

57 Robinson, *op. cit.* 18.

58 Robinson, *op. cit.* 19-21.

The proposals were eventually lost in the midst of the political upheaval of 1975. However, they do represent a bold attempt at implementation of the philosophical theories and recommendations of many leading academics, and Law Reform Commission, Royal Commission, and Government inquiries, all of whom call for the abolition of the need to prove fault in order to best serve society's collective interests.

Notwithstanding the continual push for the implementation of such schemes, history has repeatedly shown that the political realities existing in a particular jurisdiction outweigh what may in fact be persuasive arguments. The Victorian Government's experience in 1986 — concerning the comparatively limited sphere of transport accident reform, as opposed to a call for comprehensive changes *vis-à-vis* compensation for all disabilities regardless of fault — is illustrative of this fact. The nature of New South Wales' new scheme also highlights the fact that there is not yet *any inclination* to introduce a no-fault transport accident scheme in that jurisdiction. It would appear that the calls for a national comprehensive no-fault compensation scheme may simply be unrealistic, although some individuals may argue that such recommendations are merely premature.

G. *TRANSPORT ACCIDENT ACT, 1986 (VIC.): ASSESSMENT*

Not surprisingly, Victoria's new scheme has been criticized as going too far, and not far enough, at one and the same time. Proponents of 'pure no-fault' transport accident schemes, and comprehensive no-fault schemes, criticize the retention of the concept of fault and ability for certain individuals to sue at common law as both philosophically and pragmatically wrong. Litigation is criticized as risky, unpredictable and costly. Damages are said to be speculative and subject to inaccurate assessments. The system suffers from inherent delay and is wasteful. However, to its credit, the Government did all it could, politically, to implement a scheme that does severely restrict an individual's right to bring such actions. Ian Dunn comments, without chastizing or commending the government for its having limited the individual's ability to bring negligence claims, as follows:

> Actuaries and others have advised the government, the opposition parties, and the Law Institute as to the number of common law actions which can be expected to survive the legislative changes. It is not my role to comment on any of these projections, but on any view there will be a huge reduction in common law actions and most injured persons will be totally dependent upon the no-fault benefits.[59]

Nevertheless, retention of fault, in conjunction with no-fault benefits is criticized as being without any philosophical justification.

> The point of the *no-fault* scheme is to ensure that compensation will be available to all victims of car accidents. In addition, the tort system is supposed to continue to flourish. It is hard to perceive the logic of this kind of arrangement unless it is in terms of a tacit admission of the intellectual bankruptcy by the proponents of *fault* doctrine.[60]

Glasbeek and Hasson not only criticize the theoretical basis on which such plans exist, but also the level of benefits paid in typical no-fault schemes.

[59] Dunn, *op. cit.* 2.

[60] Galsbeek, H., and Hasson, R., 'Fault — The Great Hoax', in Klar, H. (ed.), *Studies in Canadian Tort Law* (1977) 395, 419.

> It is our suggestion that the prevailing concept of *fault* — that no one should be compensated unless somebody has been found to be culpable in some way — is so deeply ingrained that it is very hard for people who set up new schemes to get rid of the *idee fixe* that compensation has to be tied to some kind of *fault*-finding. That, at least in part, must explain why *no-fault* schemes are so niggardly. Society has recognized that victims of motor car accidents should be compensated without having to prove any kind of wrongdoing by anyone, yet, having gone that far, society has kept the benefits available at an absurdly low level.[61]

They continue, stating:

> It is true that the *no-fault* schemes come in and give accident victims an absolute pittance. This apparently satisfies the *fault* proponents' conscience. We believe this kind of scheme to be totally irrational.[62]

The level of benefits provided under the no-fault component of the Victorian scheme has been criticized as being unsatisfactory, in a manner similar to comments with respect to Canadian jurisdictions' plans. Such criticism seems to be made with respect to both 'modified no-fault' plans, as well as those of an 'add-on' variety.

One further criticism of Victoria's legislation, noted a number of times throughout this article, is the fact that many individuals may be excluded from the no-fault component of the scheme in certain circumstances. Proponents of 'pure no-fault' plans argue that this is at odds with the philosophy of being able to be compensated for an injury without regard to elements of blameworthiness, such as drinking and driving; others see these exclusions as wrong in that many anomalous situations can be envisaged, wherein one individual may be able to receive benefits whilst another person may not be compensated, despite what appear to be relatively similar degrees of 'need'.

Another concern raised by critics of the new statute is directed to the 'Table of Maims' expected to be utilized by the Transport Accident Commission. It is seen to be unsatisfactory, in that it treats a welder, who has lost three fingers, in the same manner as an accountant similarly afflicted, despite the vastly different consequences which will ensue from impairments of that sort. Further, the definition of 'serious injury' is said to be pitched at an inordinately high threshold level, frequently excluding individuals suffering from non-demonstrable injuries from being able to bring suits at common law.[63]

Most proponents of the fault doctrine do recognize the need to at least have no-fault schemes operating in conjunction with common law causes of action. Mr Justice Linden states:

> I would not want a society where every compensation problem had to be decided by a court of law on tort principles. But neither would I want to lose tort, because it says something about our civilization and its view of individual responsibility and human dignity that I prize.[64]

Elsewhere, Mr Justice Linden sums up a commonly-held view of mixed fault and no-fault schemes, stating:

> The peaceful co-existence plan that has been devised in Canada is now being adopted in several American jurisdictions and elsewhere. The Canadian scheme is marketable because it gives us the best of both worlds — tort and non-tort — while at the same time it avoids the shortcomings of both. Everyone is compensated to a degree without regard to fault, but this is not accomplished at

61 *Ibid.* 420.
62 *Ibid.* 422.
63 Miles, *op. cit.* 9.
64 Linden, A. M., 'Compensation Systems — The Track Record' in Saunders, I. (ed.), *The Future of Personal Injury Compensation* (1979) 159.

> the expense of those with meritorious tort claims. All of this has been accomplished without abolishing tort suits, without discarding jury trial [where available, e.g. Victoria, Ontario], and without creating any new boards. It can also be done through private insurance, if that is deemed desirable, or through public insurance if that is preferred.[65]

T. Rachlin agrees, stating:

> The best system is one which preserves damage awards in the form of lump sums, has accommodation for provisional awards or periodic payment or pensions in the rare cases where they are advantageous, and has a generous no-fault system which looks after most of the economic loss of those who do not qualify for recovery under the tort system.[66]

H. *CONCLUSION*

The debate over fault-based, and no-fault compensation rages on, with one jurisdiction after another making attempts at changing their systems. Some such changes are rather bold, whereas others amount to timid tinkering with the *status quo*. Certain 'reforms', that is, those of New South Wales, are extraordinary in that they involve radical changes with respect to the structure of the sums payable and the manner of claiming such payments; however they do *not* make any attempt to come to terms with the moral and philosophical questions concerning the need to prove fault to be able to reap the only available benefits.

The Victorian Government's May 1986 proposals were a radical attempt to rationalize the basis on which individuals injured in transport accidents were to be compensated. Any attempt to discern the fundamental basis of these recommendations — either as a result of the government's supposedly strongly-held philosophical commitment to the elimination of fault, or as a pragmatic, economically and financially based belief that reform was necessary — is illusory, and unnecessary, in light of the end result. The attempt at such widespread reform failed.

Notwithstanding this initial failure, the Government was able to enact a compromise scheme which, to a large extent, accomplishes what it had intended to do in its earlier proposals. Whilst the right to sue at common law has not been abolished, it has been restricted in a number of ways. Relatively minor claims will not be able to be the subject of litigation. Further, in those cases where damages are awarded, the levels of such awards have been restricted by the imposition of statutorily-prescribed ceilings.

In this way, the Government has implemented a far-reaching scheme that attempts to come to grips with the needs of individuals injured as a result of transport accidents; however, no one could argue that the final product is not without its flaws. Nevertheless it is an experiment which bears close observation: other jurisdictions can learn from the Victorian experience, and emulate what prove to be the scheme's successful components. Close scrutiny of the New South Wales 'reforms' is also essential, as it is a transport accident scheme which appears to be unlike any other.

[65] Linden, A. M., 'Automobile Insurance — Canadian Style' (1972) 21 *Cath. University Law Review* 369, 376.

[66] Rachlin, T., 'Pensions or Damages' in Saunders, I. (ed.), *The Future in Personal Injury Compensation* (1979) 57.