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No-Fault Compensation for Victims of Road Accidents: Can it be Justified?

RICHARD LEWIS*

ABSTRACT

This article considers the reasons given for the creation of a no-fault compensation scheme for victims of road accidents. In particular the article examines the work of the Royal Commission on Civil Liability and Compensation for Personal Injury¹ and evaluates its proposals by reference to its analysis of whether preferential treatment for road accidents can be justified. The policy options for the future development of welfare provision for the disabled are thereby thrown into sharp relief: each justification given is of relevance to other accident victims; the political nature of the reform is exposed when considering why one particular group is to be preferred to another; and the rationale supporting the existence of the many regimes of compensation in tort and social security is called into question. The role of Commissions in policy making and the structural limitations upon their deliberations are also discussed. In sum the article provides a case study of what has been called 'the strain of seeking to justify the different treatment for various categories of misfortune'.²

This article does not set out in any detail the Pearson Commission's no-fault scheme for road accidents,³ nor does it attempt comparison with schemes already in existence, such as those in North America.⁴ There is considerable

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¹ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Pearson Report), Vol. I, *Report*; Vol. II, *Statistics and Costings*; Vol. III, *Overseas Systems of Compensation*, Cmnd. 7054-I, 7054-II, 7054-III, HMSO, London, 1978. In this article all references are to Vol. I unless otherwise stated.

² T. G. Ison, *The Forensic Lottery*, Staples Press, London, 1967, p. 35.

³ See F. A. Trindale, 'A No-Fault Scheme for Road Accident Victims in the United Kingdom' *Law Quarterly Review* 96 (1980), 581.

⁴ See the *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Vol. III. Chapter 3 deals with the U.S.A. and Annex 2 gives a summary of the provisions of the no-fault laws in those States which have adopted them. For an earlier review see A. Tunc, 'Traffic Accident Compensation: Law and Proposals', *International Encyclopaedia of Comparative Law*, Vol. XI, Ch. 14, Oceana Publications Inc., New York, 1970. The most recent European book to review traffic accident compensation is D. Simeons, *Vergoerding Voor Verkeusslachteroffers*, Antwerp, 1979.

literature describing the substantive merits of individual schemes but few commentators have concerned themselves with the fundamental question of why road accidents should be singled out for reform.⁶ The implicit assumptions may be that reform must start somewhere and that traffic victims are in the greatest need of changes in our compensation system. With regard to North America these attitudes are reinforced by a reluctance either to antagonize the private insurance lobby or to further 'socialise' the welfare system. This article does not attempt to criticize foreign schemes, nor does it evaluate their particular reasons, if stated, for treating road accidents differently from others. Only British proposals for reform are examined and attention is focused almost exclusively upon the justifications they give for separate treatment.

Before looking at these justifications, it is necessary to consider the broader background to compensation for all kinds of accidents so that road accidents can then be placed in their context. In particular, objections to the varying bases of the many regimes of compensation should be noted. The differing schemes are the product of the gradual development of the welfare system, but a strong case now can be made against needless addition to this complex pattern of compensation.

The various groups of disabled have benefitted unequally and some would say unfairly from the welfare system. Because of the lack of any general strategy statutory reform has created many anomalies and it is only in recent years that welfare legislation has attracted the study it deserves. The disabled have suffered further from the vicissitudes of the common law in its ad hoc dealings with compensation cases. Although more attention has been paid to the common law rather than statute, exposition of legal principle has not been made any the easier: compensation from the law of tort may nominally be based upon the simple principle of proving the fault of another, but in practice a case can prove far from easy and may reveal a myriad of detailed sub-rules and principles. The 'when, where and how' of an accident still determine which of the many formulae for liability will be applied. Examining both statute and common law in the fields of tort and social security one writer recently found that for disabilities caused by accidents alone there are seventeen different categories of financial support, each dependent upon proving a precise cause of injury (examples being a criminal attack, a dangerous animal, a falling building, a plane crash, etc.).⁶

⁶ See, for example, T. G. Ison bemoaning the failure of the British Columbia Royal Commission on Automobile Insurance to even raise this 'fundamental question, going to the root of the inquiry' in 'Highway Accidents and the Demise of Tort Liability', *Canadian Bar Review*, 47 (1969), 304, 309.

⁶ D. M. Harris, 'An appraisal of the Pearson strategy' in D. K. Allen, C. J. Bourn, J. H. Holyoak (eds), *Accident Compensation After Pearson*, Sweet & Maxwell, London,

The needs of the victim are ignored, the cause of the injury is all important.

This diversity is the product of a piecemeal approach to compensation and results in anomalies in the treatment of one group of disabled as opposed to another. The headline-catching successes of the system in awarding more than a quarter of a million pounds to the individual severely injured through the fault of another can be matched by failure to cope with the person injured in perhaps less dramatic but equally painful and needy circumstances. The alternative to this disjointed process is for there to be a comprehensive review of the principles upon which compensation is based. To remove what the severest critics consider needless complexity and inconsistency they have demanded that the problems of the disabled be viewed as a whole. A uniform disability benefit has been proposed.⁷ Whatever the arguments in favour of radical change, it is sufficient here to note that the present structure attracts considerable criticism and any proposals for reform must be viewed with this in mind. What reasons can be adduced for making further subdivisions to fragment the position of the disabled? In particular, what reason can there be for isolating road accidents and establishing another preferred class of beneficiaries?

The Pearson Commission had five years to consider this major problem, but it eventually devoted little space to the difficulties involved. It recognized that criticism of the present provision for road accident victims could be applied equally to compensation awarded for other kinds of injuries.⁸ But in a few short paragraphs⁹ it dismissed objections to the preferment of road casualties and established a case for the introduction of a no-fault scheme along the lines of that for industrial injuries. By contrast much more space was devoted to the financing of the scheme. Indeed according to the headline writers of the national newspapers, the keynote of Lord

1979, pp. 86–8. For those disabled irrespective of cause it has been estimated that there are 54 different forms of financial assistance – see The Consumers Association, *Managing at Home – A Which? Campaign Report*, London, 1978. Lord Plowden therefore refers to ‘the Kafka-like world in which the disabled and handicapped have to exist’, in J. Simkins and V. Tickner, *Whose Benefit? An Examination of The Existing System of Cash Benefits and Related Provision for Intrinsically Handicapped Adults and Their Families*, Economist Intelligence Unit Report, London, 1978, p. 11.

⁷ See, for example, V. George, *Social Security: Beveridge and After*, Routledge and Kegan Paul, London, 1968, p. 186; The Disablement Income Group, *Creating a National Disability Income*, Occasional Paper No. 12, London, 1972; The Disability Alliance, *Poverty and Disability: the Case for a Comprehensive Income Scheme for all Disabled People*, London, 1975; one of the ‘three schools of thought’ within the Pearson Commission believed that a single disability allowance was a ‘socially desirable objective’ but was prevented by its terms of reference from considering any details. See the *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, paras. 264 and 1713.

⁸ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 995.

⁹ *Ibid.* paras. 996–8.

Pearson's proposals was the levy of a penny on a gallon of petrol in order to pay for the road accident scheme.¹⁰

This lack of discussion of the fundamental issues combined with an over-concentration upon the details of the scheme reveals, according to Atiyah, the Commission's failure to come to terms with an overall strategy:

For road accident victims do not form a coherent class of victims defined by any social welfare policy, and their selection as a group for this favoured treatment is purely a pragmatic and totally unprincipled proposal for the extension of the welfare system.¹¹

A member of the Commission, Lord Allen, finds such comments hard to accept:

I do not think it presumptuous to claim that we did indeed work out a coherent pattern and that we explained with some care just why we concluded, for example, that in some areas an extension of 'no fault' was appropriate and that, in others, strict liability was the right course. . .¹²

This article will examine seven justifications given by the Pearson Commission and others for the extension of no-fault compensation to road accidents alone. The reasons are:

- (1) Preferences favouring other groups of disabled exist elsewhere.
- (2) A road accident scheme would have maximum effect upon the number of people to be compensated, whilst
- (3) it would only involve minimum disturbance of existing principles.
- (4) Reform is required because of the essentially dangerous nature of motor vehicles, and
- (5) because of the importance of road transport to society.
- (6) The scheme would satisfy demand for an equitable selection of beneficiaries, and

¹⁰ See *The Times* and the *Guardian*, 17 March 1978.

¹¹ P. S. Atiyah, 'What Now?', in Allen *et al.*, *op. cit.* p. 230. Similarly H. L. Weyers, 'The Economic Treatment of Traffic Accident Facts and Perspectives in the Federal Republic of Germany', *Aktuele Problemen van verzekeringsrecht*, Ghent, 1974, p. 81, complains that German reforms have given too little consideration to the goals of the social security system as a whole. 'There is no reason whatever to give traffic accidents special treatment. Such a move might be justified by technical reasons, in a long term strategy of social security. If you cannot get wholesale social security, it seems rational to start where grievances are deepest and success seems politically attainable. But even then the details of planning for traffic accidents have to be subordinated to this overall concept and they cannot be justified, at least in an academic discussion – things may be different in day to day politics –, on grounds deriving from the situation of the traffic victim alone'.

¹² Introduction to Allen *et al.*, *op. cit.* p. 8. Another Commissioner has written in a similar vein suggesting that lack of principle is 'said with greater propriety about the views of its critics' rather than the views of the Commission itself. See N. S. Marsh, 'The Pearson Report', *Law Quarterly Review*, 95 (1979), 514. But the author goes on to admit that the Commission's justification for separate treatment of road accidents was 'not in itself. . .entirely adequate'.

(7) would be consonant with public attitudes to suffering and compensation.

(1) PREFERENCES EXIST IN OTHER AREAS

The first argument in favour of a special scheme for road accidents points to the existence of other disabled groups already enjoying higher benefits and asks if these are to benefit, why not others?¹³ The advantaged group often referred to in this context is the industrially injured for accident compensation has proceeded upon the basis that the employee injured whilst doing his job is to be given preferential treatment. Workmen's compensation has been awarded irrespective of the fault of the employer or his capacity to pay. The workmen's compensation scheme and the later industrial injuries scheme ensured that the employee received benefits over and above those made available to the sick or otherwise disabled. Although this preference formed the cornerstone upon which the welfare state was built, it nevertheless has attracted much criticism. Why should an employee at work be considered more valuable to society than when he is on the way to work or at home? If the employee at home should be able to claim equal treatment, why not the unemployed spouse injured whilst cleaning the house? In such attacks upon the industrial preference a case is made for extending the range of accidents deserving of compensation: ultimately it may then be argued that a uniform approach should be adopted and the disabled should be treated according to their need and not the cause of their impairment.

These arguments were well known to Lord Beveridge but with some reluctance he decided to retain the preference, albeit in a more limited form than eventually emerged.¹⁴ The reasons he gave seem weak nowadays¹⁵ and Lord Pearson recognized that Beveridge's arguments should carry 'a good deal less weight now'.¹⁶ Typical of modern comments on the preference is that of the International Labour Organization which concludes that the

¹³ See H. D. Orris, 'The Road Injuries No-fault Compensation Scheme', *Justice of the Peace*, 144 (1980), 24.

¹⁴ *Social Insurance and Allied Services* (Beveridge Report), Cmd. 6404, HMSO, London, 1942.

¹⁵ *Ibid.* paras. 81-5. The reasons have been criticized by A. F. Young, *Industrial Injuries Insurance*, Routledge and Kegan Paul, London, 1964, p. x and pp. 90-2, George, *op. cit.* p. 184; H. Calvert, *Social Security Law*, Sweet and Maxwell, London, 1978, pp. 311-12; A. I. Ogus and E. M. Barendt, *The Law of Social Security*, Butterworths, London, 1978, pp. 299-300; P. S. Atiyah, *Accidents, Compensation and the Law*, Weidenfeld and Nicolson, London, 1980, p. 368; T. Higuchi, 'The Special Treatment of Employment Injury in Social Security', *International Labour Review*, 102 (1970), 109; R. K. Lewis, 'Tort and Social Security: The Importance Attached to the Cause of Disability with Special Reference to the Industrial Injuries Scheme', *Modern Law Review*, 43 (1980), 514.

¹⁶ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 290.

distinction between work and other accidents is 'increasingly anomalous' and traditional practice is the main obstacle to change.¹⁷

What has been the effect upon road accident reform of these attacks upon the industrial preference? On the one hand it might be said that the same criticisms could be made of any new road accident preference. Moreover, there are no historical reasons to justify the difference in treatment between road accident victims and others. On the other hand it could be argued that rather than two preferences being created, one preference only is involved and even that is being diminished in importance as a result of the reform. Such a view would be taken by those who favour reform of the present system but who consider radical change to be too expensive or precipitate. Instead they favour a gradual withering away of the anomalies; if the status of road accident victims is raised to that of the industrially injured it may mark the beginning of the erosion of preferential benefits. This argument is half embraced by Lord Pearson: 'Identical rates of benefit would conform to our aim of reducing the anomalies between different groups of accident victims, and there would be one level less to administer'.¹⁸ This argument in favour of gradual change has been thought to be a strong one.¹⁹ It was the basis of Professor Atiyah's support for a road accident scheme in his evidence to the Pearson Commission. A framework of insurance already exists, the group of victims is limited and easily identifiable, and their needs apparent. As the Justice Report observed:

It is only in the case of road traffic accidents, therefore, that substantial new benefits can quickly be obtained at little cost. It is no answer to a proposal to put right a serious injustice that there are other injustices which should also be remedied, and that the proposed reform should not be implemented because it will not mitigate those other injustices also. . . Partial reform is better than no reform at all.²⁰

However, the Pearson Commission cannot rely upon these arguments for it

¹⁷ *Ibid.*, Vol. III, para. 1009. But see the preference reconsidered by the DHSS in *Industrial Injuries Compensation - A Discussion Document*, London, 1980, and see R. K. Lewis, 'Consultation and Cuts: The Review of Industrial Injury Benefit', *Journal of Social Welfare Law*, (1980), 330.

¹⁸ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 1014 and similarly see para. 1003.

¹⁹ But see T. G. Ison, 'The Politics of Reform of Personal Injury Compensation', *University of Toronto Law Review*, 27 (1977), 385, 398. 'Moreover because of the waste and anomalies that they perpetuate and increase, small steps in the direction of universal disability insurance may have the appearance of being steps in the wrong direction, while the truth is that the trouble is caused not by any error in direction but by the decision to proceed in small steps. The process also tends to expand the numbers of people with a vested interest in the conglomeration of categorized systems, and for that reason too many tend to delay rather than advance any more comprehensive reform.'

²⁰ Justice, *Report on Compensation for Victims of Road Traffic Accidents (No-Fault on the Roads)*, Stevens & Son, London, 1974, p. 51.

rejected the ultimate aim of uniform compensation for all accidents. It cannot defend its piecemeal approach on the basis of any long-term strategy.²¹ The preferences and anomalies it creates or continues to support would be here to stay.

In any event, what would be the effectiveness of a long-term strategy with road accident reform as its first base? A judgement may be made from the figures produced by the Pearson Commission itself. Obviously any road accident scheme will deal largely, if not entirely, with injuries and not diseases. But injury is the cause of incapacity amongst the disabled in only 10 per cent of cases. Of these a quarter of the injuries are inflicted at work, and only one in ten occur on the road, whilst the remaining two-thirds of injuries occur elsewhere and are thus excluded from these preferred groups.²² It can be seen that the erosion of the preference would indeed be gradual. Road accident reform affects but one in ten of the injured population, and only one in a hundred of those disabled from all causes.

(2) MAXIMUM EFFECT UPON THE COMPENSATION SYSTEM

The figures in the above paragraph can be used to evaluate the second reason for the separate treatment of road accidents. This argument is based upon sheer weight of numbers and implies that reform of road accidents would have a profound effect upon the overall compensation system. In Lord Pearson's words: '...motor vehicle injuries occur on a scale not matched by any other category of accidental injury within our terms of reference, except work injuries. . .'.²³ But it must be remembered that the Commission's terms of reference did not include investigation of all accidents let alone disabilities in general. This did not prevent consideration of matters falling outside of these terms when the Commission thought it necessary²⁴ (as in the recommendation for a disability benefit for all severely handicapped children²⁵). However, in justifying the separate treatment of road accidents the narrower perspective derived from a strict view of its terms of reference was taken. The road accident figures then assume all the more importance.

²¹ A. I. Ogus, P. Corfield and D. R. Harris, 'Pearson: Principled Reform or Political Compromise?', *Industrial Law Journal*, 7 (1978), 143, 146-8. The analysis is repeated by D. R. Harris in 'An Appraisal of the Pearson Strategy', in Allen *et. al.*, *op. cit.* pp. 89-95.

²² *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Vol. II, tables 2 and 4.

²³ *Ibid.* Vol. I, para. 996. Similarly Marsh, *op. cit.* p. 552 stating that the road accident scheme is 'a significant step towards the elimination of anomalies'.

²⁴ For a criticism of the Commission's attitude to its terms of reference see Ogus, Corfield and Harris, *op. cit.* pp. 144-5.

²⁵ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 1531.

(3) MINIMUM DISTURBANCE OF EXISTING PRINCIPLES

The next argument concentrates not upon the impact of change in terms of the numbers of people affected, but instead it stresses that road accident reform would only cause minimum disturbance to present compensation principles.²⁶ Road accidents already have their own special rules and even now road casualties stand a better chance of obtaining monies than other accident victims. It is argued therefore, that reform would not create any new preference but only reinforce the status quo. According to Lord Pearson:

The unique factors of motor vehicle injury have long been recognised by Parliament. Insurance against third party risks has been compulsory for motor vehicle users for nearly half a century. In suggesting special compensation arrangements for motor vehicle injuries we feel we are to a large extent reflecting accepted priorities.²⁷

Any argument which implies maximum effect in one paragraph and claims minimum disturbance in the next, invites close scrutiny. It is indeed true that road accidents already are specially treated by the law of tort: one in four of those injured gain some compensation from tort, as compared with one in ten of the industrially injured and only one in sixty-seven of those injured elsewhere.²⁸ But even so, the introduction of a no-fault road accident scheme in addition to tort is more than a cosmetic change. As a result of the scheme the road accident preference will be extended so as to include an extra 185,000 beneficiaries who would not have been able to claim under the law of tort.²⁹ These people will not enjoy the lump sums awarded to tort claimants for they will be the second class social security group receiving periodic payments. Nevertheless, the position of road accident victims as a class will be substantially improved. This may be thought more than the 'reflection of accepted priorities', and could be viewed as the creation or enhancement of privilege. According to the Disablement Income Group it would make 'an elite group even more elite.'³⁰

Another argument based in part upon minimum disturbance of existing principle is that road accidents are easily distinguished from others that occur and new rules can be applied to them without interfering too much with the remaining areas of law. If the line of demarcation is a clear one there is less likelihood of schemes overlapping or disputes arising as to which set of principles are to apply. If road accidents form this 'self-

²⁶ See D. W. Elliott and H. Street, *Road Accidents*, Penguin Books, Harmondsworth, 1968, p. 250.

²⁷ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 997.

²⁸ *Ibid.* Vol. I, para. 78. Motor injuries account for 58 per cent of total tort payments - Vol. II, para. 675.

²⁹ *Ibid.* para. 1086.

³⁰ *The Times*, 25 July 1978.

contained "parcel"',³¹ they can be treated separately. Thus the Pearson Commission in limiting its no-fault scheme to road accidents, stated: 'We have drawn the boundary at a line we believe would be relatively easy to determine in practice.'³² However, as the Commission implied, the argument is subject to qualification for the boundary of any specific scheme will inevitably be the subject of occasional dispute. Although it may be that the definition of the road accident scheme will not give rise to the problems that the industrial injuries scheme has experienced with its formula involving the course of employment, nevertheless some grey areas are bound to exist. Would, for example, the scheme compensate on the facts of *Perry v. Kendrick's Transport*?³³ That was a case where two mischievous boys caused a petrol tank of an old abandoned bus to explode and this injured another boy innocently passing by on adjoining land to which the public had access. As recently noted in connection with the New Zealand no-fault scheme for all accidents, although 'primary concepts like that of fault liability, disappear, secondary principles, such as causation and natural justice, re-emerge'.³⁴ The extent to which cause will prove to be a problem for a British road accident scheme has yet to be determined.

On the whole, it is doubtful whether, for example, accidents in the home are any less 'self-contained' than road accidents. Already home accidents are surveyed and reported independently of others,³⁵ yet it is not suggested that this should lead to a separate compensation scheme for them. In other words, the justification of minimum disturbance of the existing principles of compensation might apply to accidents other than those on the road.

(4) THE ESSENTIALLY DANGEROUS NATURE OF MOTOR VEHICLES

There are several reasons for limiting no-fault insurance – at least at the outset – to auto accidents. Automobiles are clearly the most dangerous instrumentalities with which we deal on an everyday basis, and the damage they do to persons and property reflects this.³⁶

This comment from the leading supporter of road accident reform in the

³¹ Justice Report, *op. cit.* p. 2. See also the Law Society's evidence to the Commission, *Law Society Gazette*, 72 (22 January 1975).

³² *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 1009.

³³ [1956] 1 *All England Reports*, 154.

³⁴ A. Szakats, 'The Re-emergence of Common Law Principles in the New Zealand Compensation Scheme', *Industrial Law Journal*, 7 (1978), 216, 227. See also Trindade, *op. cit.*

³⁵ See the Department of Trade's, *The Home Accident Surveillance System: The Third Twelve Months Data*, London, 1980.

³⁶ J. O'Connell, *The Injury Industry*, University of Illinois Press, 1971, p. 144. See his urging of reform for this country in 'No-Fault Insurance for Great Britain', *Industrial Law Journal*, 2 (1973), 187.

USA has been repeated more than once in this country. Indeed Elliott and Street had written earlier on a more emotional level:

Mankind has devised a swift-moving machine which is killing and maiming in ever-increasing numbers every second of the day, and leaving its victims without necessary financial support. Citizens demand that the law shall not allow this to happen.³⁷

The Pearson Commission similarly had reference to the dangerous nature of motor vehicles as characterized by the number and type of injuries they inflict. The weight attached to the number of accident victims has been referred to above. But in addition to this the Pearson Commission thought that the effect of the accident was important in that a road accident was particularly likely to be the cause of serious injury.³⁸ As a justification for the separate treatment of road accidents several criticisms can be made.

Firstly the concept of danger is never adequately defined and the risk rate of one object to another is never properly examined. Is a house dangerous? Lord Pearson obviously thought not, but gave little indication of the criteria for such a decision.³⁹ This amateurism prevalent in the analysis of ultra-hazardous activities has been discussed elsewhere and need not be repeated here.⁴⁰

Secondly, Lord Pearson, having labelled something as dangerous, was unsure as to what was to be its effect. He accepted that a motor vehicle might be regarded as a dangerous thing in that technically it could fall within the category for which proof of fault would not be required to succeed in tort.⁴¹ But nevertheless he refused to place cars in this category because, he said, to impose this strict liability in tort in addition to a no-fault scheme outside of tort would place an unfair burden upon the motorist who would have to pay for both these changes.⁴² The reasoning here is weak and easily may be criticized on several grounds. It is sufficient to note that the existence of a no-fault scheme outside of tort is accepted without question. As a result Lord Pearson abjectly fails to consider whether the dangerous nature of motor vehicles really merits separate treatment from the other objects of danger he considered worthy of strict liability in tort, such as bridges or explosives. The argument of special danger, of itself, will not

³⁷ Elliott and Street, *op. cit.* p. 249.

³⁸ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 287 and similarly para. 959. Motor vehicle accidents account for 13 per cent of all injuries, but for 17 per cent of hospital in-patient treatment for injury and as much as 34 per cent of all accidental deaths – Vol. II, para. 188.

³⁹ But see the two categories described in para. 1643.

⁴⁰ See Atiyah, *Accidents, Compensation and the Law*, *op. cit.* n.10, pp. 253–8.

⁴¹ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 1067.

⁴² *Ibid.*

justify two distinct regimes of strict liability, the one based upon a tortious level of recovery the other upon social security.

The third point is that Lord Pearson fails to give the support he intended to the more seriously injured, and yet this was his objective in identifying road accidents as having a serious effect and being of greater danger to society and therefore worthy of separate treatment. It would be an important reform of the present system of compensation if it were to be restructured in favour of the seriously injured. But it is doubtful if the road accident scheme will go very far in this direction. Lord Pearson chose as a model for the new scheme the present regime for industrial injuries. Despite the many attractive features of the industrial injuries scheme, it is subject to the criticism that, like tort, it under compensates the seriously injured and focuses too much attention upon minor claims.⁴³ Finally, it may again be asked why Lord Pearson did not compensate for the effects of all serious accidents not just for those on the road whether serious or not. The absence, previously described, of any ultimate strategy makes it difficult to defend the piecemeal reforms proposed.

(5) THE IMPORTANCE OF ROAD TRANSPORT TO SOCIETY

The next argument concentrates upon the importance of road transport to everyone in the community. Even if an individual does not often travel by road himself, he lives in a world economically dependent upon such transport. Lord Pearson gave this as a reason for the separate treatment of road accidents without expanding upon it in any detail. The report states simply: '...road transport itself is an essential part of everyday life, of fundamental importance to the economy as a whole and to the mobility of individuals.'⁴⁴ What may be implied from this?

The suggestion cannot be that with the introduction of a no-fault scheme more people would use the roads and thus maximize the potential of the economy. No evidence for such a proposition is put forward. Nor can it be argued that road transport at present is not being employed in essential circumstances merely because of the absence of a no-fault scheme. Neither deterrence nor encouragement of use of the road can be the issue.

A stronger argument would be to place a moral construction upon Lord Pearson's words: if society takes the economic and social benefits of

⁴³ See Atiyah, *Accidents, Compensation and the Law*, *op. cit.* p. 243, and similarly in 'What Now?', *op. cit.* n.10, p. 239. The view is confirmed by the Personal Injury Survey carried out by the Pearson Commission. See the *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Vol. II, Chapter 25 and especially tables 149-50.

⁴⁴ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 996.

the method of transport it must also take the burden and accept responsibility for road casualties.⁴⁵ Already such is the case with road safety. Public bodies, including government itself, have acknowledged a responsibility to prevent accidents. As an extension of this the Justice Report argues for a similar communal involvement in compensation for road accidents as well:

We seem. . .to have tacitly accepted the annual toll of slaughter and maiming as the price we must pay for the advantages we obtain from the greater mobility of people and goods, and acceptance of this situation ought to be matched by correspondingly greater and more effective social concern for the needs of its victims.⁴⁶

A road accident scheme may then be the price demanded for the acceptance of the benefits of this form of transport together with its inevitable accident rate. However, this bargain can also be implied when other forms of accident are being considered. Such disparate events as a railway disaster, a dog bite⁴⁷ and an injury resulting from defective premises may be considered similarly inevitable as long as society continues to accept the benefit of running trains, keeping dogs or living in houses. Yet it is not suggested that such accidents also be the subject of a no-fault scheme.

(6) THE EQUITY OF RANDOM SELECTION OF VICTIMS

The next argument is essentially egalitarian and yet is used to claim preferment for road accident victims. It is based upon the justice of compensating those individuals unlucky enough to be struck down by the blind hand of fate. The argument applies when there is random selection of those to be affected; the pool of potential victims (the beneficiaries of the compensation) must be as wide as society itself and then there is no preferment of any particular class. As interpreted by supporters of road accident reform, this argument refuses to identify road casualties as fitting within any particular group within society, and this ensures that such victims are more deserving than those whose injuries occur elsewhere, for the latter may be drawn from but a limited section of society.

Lord Pearson explicitly accepted this justification. He noted that road accidents are an unavoidable hazard for most of the population⁴⁸ and are

⁴⁵ This argument is adopted by Elliott and Street, *op. cit.* p. 250. It was made more explicitly by the Chairman in his dissent in the *Report of the New Zealand Committee on Absolute Liability*, 1963, which considered the introduction of absolute liability for motor vehicles. See *Ind. Views*, Wild, para. 15.

⁴⁶ Justice Report, *op. cit.* p. 2.

⁴⁷ According to the Post Office an average of 173 postmen were bitten each year between 1972-74. This represented an incidence of 1.6 per 1000 postmen. See the *Report of the Royal Commission on Civil Liability and Personal Injury*, Vol. II, para. 296.

⁴⁸ *Ibid.* Vol. I, para. 287, and similarly para. 959, 'we doubt whether any other type of accidental injury has a greater impact on everyday life'.

therefore to be distinguished from, for example, work accidents.⁴⁹ Victims of industrial injury are by and large male manual workers and thus fall within one section of society, whereas in road accidents the social class is more diverse and the distribution of injuries between the sexes more equal.⁵⁰

However, two points need to be made here. First, although it is more difficult to stereotype the road accident victim, it is still possible to paint a general picture of the overall incidence of road casualties within particular sections of society. It is well known, for example, that a teenage motor-cycle rider is much more likely to be involved in an accident than a car driver over the age of thirty. It would certainly be untrue to suggest that the incidence of injury caused by motor vehicles to any particular group of the population occurs in proportion to the numerical relationship of that group to the rest of society. In other words, although the picture may be less clear when considering victims of road accidents as opposed to industrial injuries, the difference is one of degree rather than kind. It is possible to say that road accidents are more likely to affect one group of the population rather than another.⁵¹ If this is so, then the justification for their separate treatment becomes much less convincing.

The second point to be made is that the justice of establishing a State scheme of compensation because of the random incidence of a particular disability has not been an argument which has led to special compensation, for example, to sufferers from indiscriminate forms of cancer. Nor has it been to the fore when existing compensation schemes are being reconsidered. The Criminal Injuries Compensation Board in distributing monies to victims of crime favour police officers in 17 per cent of its awards, a far higher percentage than the proportion of police to ordinary members of the public.⁵² Nevertheless, Lord Pearson accepted that the criminal injuries scheme has come to stay and made no serious attempt to review it on this or any other ground.⁵³ Again, the argument is that this justification has not been related to other forms of suffering for which the victims might claim compensation.

⁴⁹ *Ibid.* para. 996.

⁵⁰ *Ibid.* Vol. II, tables 1 and 2 reveal that in industry only 14 per cent of those injured and 2 per cent of those killed are women; on the roads 35 per cent of injuries involve women.

⁵¹ *Ibid.* para. 959 and Vol. II, Ch. 7, where Pearson acknowledges this. For detailed analysis of road accidents see J. Cohen and B. Preston, *Causes and Prevention of Road Accidents*, Faber and Faber, London, 1968; M. Austin, *Accident Black Spot*, Penguin Books, Harmondsworth, 1968; F. A. Whitlock, *Death on the Road: A Study in Social Violence*, Tavistock Publications, London, 1971; J. Macmillan, *Deviant Drivers*, Saxon House and Lexington Books, 1975; HMSO, *Transport Statistics Great Britain 1968-78*.

⁵² This is the average figure for the years 1976-8. See *The Fourteenth Report of the Criminal Injuries Compensation Board*, Cmnd. 7396, HMSO, London, 1978.

⁵³ See similarly Atiyah, *Accidents, Compensation and the Law*, *op. cit.* n.10, p. 240.

(7) PUBLIC ATTITUDES TO SUFFERING

The final argument is based upon the public reaction to road accident reform and whether such a change would be consonant with accepted views of morality and justice. On the one hand it has been said that the road accident figures have little impact on the ordinary citizen. 'Not until a friend or relation is killed on the road do we begin to be dismayed by this daily carnage'.⁵⁴ Reactions to other forms of disaster are in stark contrast to this.⁵⁵ On the other hand, Elliott and Street argue that traffic accident victims are seen in a different light from those who suffer an accident in their home or are plagued by some disease or other. With a cancer sufferer we are primarily concerned with the provision of medical treatment; with a road accident victim, it is argued, there is special pressure to settle his financial needs. 'With traffic victims, whatever the reasons or their intrinsic merit their claims are talked about and thought to be particularly in need of fair settlement.'⁵⁶ Is this in fact the popular response to these differing forms of suffering? If so, to what extent should the law take account of it and, in particular, is it sufficient to justify special treatment for road accident victims?

This is not the place to embark upon a detailed examination of the relationship between law and morality, but again several qualifications to the attempted justification need to be made. First, there has been little investigation of the popular sense of justice which is the foundation of the argument.⁵⁷ The Pearson Commission received 'no evidence of a strong public demand either for or against major changes over the whole area of our remit'.⁵⁸ Its road accident scheme was not based upon any empirical study of the views of the ordinary man as to what was right. If the Pearson Commission had carried out such an investigation it may have found, as recent work suggests, that several of the traditional beliefs as to the moral precepts underpinning our compensation system have little foundation in fact. For example, it has been shown that the traditional belief that a person who knows he has been injured through the fault of another will expect that other to compensate him, is by no means the view of all accident victims.⁵⁹ Nevertheless it may be that we do indeed look upon road accident

⁵⁴ Whitlock, *op. cit.* p. 7.

⁵⁵ *Ibid.* pp. 8-11.

⁵⁶ Elliott and Street, *op. cit.* p. 250.

⁵⁷ Atiyah, *Accidents, Compensation and the Law*, *op. cit.* pp. 520-31.

⁵⁸ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 241.

⁵⁹ The Centre for Socio-Legal Studies at Oxford mounted a national household survey of accident victims in 1976-77. Of 439 accident victims who blamed someone for their injury only 229 said that they thought that person should pay compensation. See S. Lloyd-Bostock, 'Commonsense Morality and Accident Compensation', in D. P. Farrington, K. Hawkins and S. Lloyd-Bostock (eds), *Psychology, Law and Legal Process*, Macmillan Press, London, 1979, pp. 99-100.

victims as especially worthy of support. After all, road accidents certainly receive a disproportionate amount of media coverage and are one of the most public and visible ways in which injury can be inflicted. If this does in fact result in a more sympathetic public response to road accidents, a second qualification to the argument justifying their separate treatment must be made.

This qualification is that although a difference in attitude may explain the preferential treatment of one group of disabled as opposed to another, it may not suffice as a justification to policy makers for the continuation of the disparity.⁶⁰ Thus Miers uses the social psychology literature to suggest an explanation for the creation of special schemes to compensate victims of crime, but he does not use the differing public perceptions of when compensation is deserved as a justification for separate treatment.⁶¹ To rely upon popular attitudes towards suffering in order to justify any particular compensation regime is fraught with difficulty. A person's view of whether compensation is deserved does not derive exclusively from some 'natural' sense of justice: it is influenced by the cultural conditioning inevitably produced by the society in which he lives. His statement as to what is right may be based more upon his knowledge of the law and what society presently does rather than upon any idealized intuitive notion of justice. Thus in examining the moral justification said to be the basis of the award of compensation from the law of tort Lloyd-Bostock states:

To draw on common sense morality thus seems to be at best a weak justification of the tort system as reinforcing or perpetuating norms on the grounds that they have come to be accepted, and perhaps that a change would not be well received. Questions about the origins and effects in practice of such norms would seem to be more relevant than the question of whether or not they are currently accepted.⁶²

Any attempt to justify the road accident scheme by reference to public attitudes therefore must be viewed with healthy scepticism.

CONCLUSION

This article has considered the major arguments put forward in support of a separate compensation scheme for the victims of road accidents. Supporters of reform have not explored in any detail the rationale for separate development. In so far as a no-fault road accident scheme is seen as a staging post on the way to reform of the social security system in general then less time

⁶⁰ 'Even if we are satisfied that the compensation systems existing at present conform to the popular sense of justice, we are still entitled to ask for rational justification of those systems.' Atiyah, *Accidents, Compensation and the Law*, *op. cit.* p. 477.

⁶¹ D. R. Miers, *Responses to Victimisation*, Professional Books, Abingdon, 1978, pp. 33-46.

⁶² Lloyd-Bostock, *op. cit.* p. 97.

need be spent on justifying piecemeal development. But where the piecemeal reform is seen as being the end in itself, then the reasons for preferment of one section of society over another must be examined in detail: this the Pearson Commission failed to do.

One headline writer's acceptance of the Pearson Report as 'a good British compromise'⁶³ has not been the universal view. In particular, academic lawyers, notable by their absence from the Commission, have made incisive criticisms of the proposals.⁶⁴ It has been accused of 'pragmatism without principle'⁶⁵ and the present study further illustrates the Commission's failure to come to terms with the fundamental questions in the compensation debate. Other Commissions have raised hopes of radical reform based upon a thorough reappraisal of existing principles only to produce a compromise document reaffirming the status quo: the Royal Commission on Legal Services is the most recent example in this regard.⁶⁶ Why do certain Commissions fail to examine in any depth the basic choices in principle placed before them? With the present concern about the role of Commissions in policy making,⁶⁷ several reasons for the inadequate discussion of basic issues by the Pearson Commission can be suggested.

The Commission's terms of reference were not designed to encourage an investigation of all accidents, let alone disablement however caused.⁶⁸ There are factors which militate against a Commission's request for revision of its terms of reference.⁶⁹ As soon as the guidelines for the work of the Pearson Commission were established a blue-print was formed for piecemeal reform without consideration of the wider background. It has been said that 'it is

⁶³ *Law Society Gazette*, 75 (22 March 1978), 289.

⁶⁴ See Ogus, Corfield and Harris, *op. cit.*; Atiyah, *Accidents, Compensation and the Law*, *op. cit.* n.10, p. 240; J. W. Fleming, 'The Pearson Report: Its Strategy', *Modern Law Review*, 42 (1979), 249; R. A. Hasson, 'The Pearson Report - Something for Everyone', *British Journal of Law and Society*, 6 (1979), 119; see A. Tunc, *Revue Internationale de Droit Compare* (1978), 507.

⁶⁵ Ogus, Corfield and Harris, *op. cit.*; Atiyah, *Accidents, Compensation and the Law*, *op. cit.* n.10, p. 240.

⁶⁶ *Report of the Royal Commission on Legal Services* (Benson Report), Cmnd. 7648, HMSO, London, 1979.

⁶⁷ See the newsletter of the Royal Institute of Public Affairs, No. 1 (1980), which calls for a re-examination of the effectiveness of Royal Commissions, and reported in *The Times*, 10 April 1980. The concern was prompted by an article in *The Times*, 5 December 1979, written by the Chairman of the Royal Commission on Gambling, Lord Rothschild. See also M. Bulmer (ed.), *Social Research and Royal Commissions*, Allen & Unwin, London, 1980.

⁶⁸ But the Commission's attitude to its terms of reference has been much criticized. See especially Ogus, Harris and Corfield, *op. cit.* pp. 144-5. A. R. Prest (a member of the Commission) has said that the terms were drafted 'with obvious and demonstrable lacunae'. See 'Royal Commission Reporting', *Three Banks Review*, 119 (1978), 3, n.5.

⁶⁹ R. A. Chapman, *The Role of Commissions in Policy Making*, Allen & Unwin, Royal Institute of Public Administration Studies, London, 1973, pp. 176-7. T. J. Cartwright, *Royal Commissions and Departmental Committees in Britain*, Hodder & Stoughton, London, 1975. G. Rhodes, *Committees of Inquiry*, Allen & Unwin, London, 1975.

hardly surprising that Commissions sometimes draw attention in their final reports to the constraints imposed by their terms of reference',⁷⁰ and the Pearson Commission often had resort to this excuse for its failure to consider any long-term strategy for the provision of social security.

The seventeen members of the Commission included representatives of the Law Society and the insurance world as well as directors of industry, trade unionists and academics. The Commission was seriously divided on many issues and it admitted eventually that there were three 'schools of thought' as to the ultimate objectives to be attained.⁷¹ Some of the causes of such division were referred to as long ago as 1910 in the report of the Departmental Committee on the Procedure of Royal Commissions.⁷² 'A Commission selected on the principle of representing various interests starts with a serious handicap against the probability of harmony in its work, and perhaps even of practical result from its labours. . . there has been a recent tendency to make the membership of Commissions too large.' These difficulties were not to be overcome by authoritarian chairmanship: Lord Pearson⁷³ was not the sort of dominant character to ride roughshod over the views of dissentient members (as appears to have happened in the Royal Commission for Legal Services).

In such a context it may be appreciated that rather than discuss whether road accidents deserve a special compensation scheme, it is easier to point to several possible alternative methods of funding the scheme, and debate which of them would be the most efficient. Those within the particular school of thought which saw one compensation scheme for all forms of disablement as 'a socially desirable objective'⁷⁴ tempered their views in the light of what they believed could be achieved in the short term. As a result, it is said that the Commission 'loses its *raison d'être* when it abandons the search for statements of principle and tries to act as a broker between various competing groups. The task of making political compromises is best left to politicians'.⁷⁵

For all its compromises the report has not gained the political acceptance

⁷⁰ Chapman, *op. cit.*

⁷¹ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, paras. 1713-18.

⁷² *Report of the Departmental Committee on the Procedure of Royal Commissions* chaired by Lord Balfour), Cd. 5235, 1910, para. 15. Similarly Chapman, *op. cit.* p. 187 arguing that there is now 'a need for inquiries undertaken by much smaller committees of experts and for advisory bodies constituted on entirely different bases'.

⁷³ In the addendum to Lord Pearson's obituary notice in *The Times*, 7 February 1980, Lord Allen (a member of the Commission) paid tribute to Lord Pearson's patience, courtesy and openmindedness, and to 'his gentle but effective chairmanship of a large Commission which included members with widely differing backgrounds'.

⁷⁴ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, para. 1714.

⁷⁵ Hasson, *op. cit.* pp. 125-6.

for which its authors may have hoped. A Commissioner has referred to 'the fairly tepid reaction of Parliament and Government even to the limited proposals of the Commission.'⁷⁶ Very few of its suggestions have been taken up and it now bears the hallmark of yet another pigeonholed Royal Commission report. To explain why the report has not been effective and has lacked 'political sex appeal'⁷⁷ would be to go beyond the scope of this article, but one of the reasons may have been its failure to embrace any broad plan of social policy which attempted to justify the detailed proposals it made.

It may be that in future years the newsworthy road accident scheme will re-emerge as a likely candidate for approval in extending the boundaries of social security. If so, the reasons given for its implementation must be closely examined. Why this particular preferential benefit is created may reveal strategies fundamental to the future development of the welfare state. The new scheme may be based upon clearly articulated aims as to how disablement is to be compensated, or alternatively, it may emerge from the continued absence of any overall framework of social policy. If from the latter, this article has attempted to show that such a piecemeal reform would be akin to that proposed by the Pearson Commission: it would be a cause of dissatisfaction not only for the various groups of disabled, but also for all serious students of the welfare state.

⁷⁶ Marsh, *op. cit.*

⁷⁷ See Lord Rothschild, *op. cit.* 'The trouble about royal commissions is that they rarely, if ever, have any political sex appeal.'