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BLOOD-FEUDS, WRITS AND RIFLES* — A REPLY TO PROFESSOR LINDEN

By R. A. HASSON**

A. INTRODUCTION

Professor Linden's aggressive attack on the Ontario Law Reform Commission's report on automobile accident compensation in the pages of this journal¹ invites a response. It is the purpose of this brief note first, to reply to some of Professor Linden's comments on the O.L.R.C. proposals and second, to offer my own criticisms of the O.L.R.C. report.

B. REPLY TO LINDEN'S CRITICISMS

1. *Criticism 1: The O.L.R.C. did not consult adequately*

Unfortunately the O.L.R.C. report is written in such a way as to lend weight to Linden's criticism that it did not consult a sufficiently wide range of people in preparing its reports. The Commission must, in the nature of things, have talked to lawyers and to insurance executives, if to no one else. A statement to this effect, either in the introduction or conclusion of the report would have been beneficial.²

2. *Criticism 2: The O.L.R.C. has relied upon stale and inapplicable statistics*

Professor Linden's next criticism is that the O.L.R.C. has relied heavily upon the Osgoode Hall study for statistical support and that such reliance on that Report is dangerous because the compensation picture has changed radically in the last fifteen years.³ Linden might have added that this study covered only 1,174 cases in the County of York. It might be that if one had carried out a province-wide survey in 1961, the figures for the province would be slightly different from the York figures. But no one has made the argument

* "It should be remembered that the tort suit was invented in order to try to assuage the thirst for vengeance in society by furnishing a peaceful substitute to the blood feud. If the right to sue were eliminated altogether, I would worry about people once again resorting to private vengeance upon those who do them wrong. In my view, it is preferable to pursue a wrong-doer with a writ rather than with a rifle." See, *infra*, note 1.

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¹ See, *Faulty No Fault: A Critique of the Ontario Law Reform Commission Report on Motor Vehicle Accident Compensation* (1975), 13 O.H.L.J. 449, (hereafter referred to as Linden). I am aware that I am making some of the same points as made by Professor Bruce Dunlop in his valuable comment, *No-Fault Automobile Insurance and the Negligence Action: An Expensive Anomaly* (1975), 13 O.H.L.J. 439, but I believe that my comment is justified if only because the conclusions I reach are different from those of Professor Dunlop.

² Compare the statement in the O.L.R.C.'s report on Consumer Warranties and Guarantees in the Sale of Goods (1972) at 10: "The research team spent most of the summer months in 1971 interviewing a wide variety of government officials and corporate executives."

³ See, Linden, at 452.

that the York figures are not valid because the position outside York might reveal a slightly different picture from that revealed by the Osgoode Hall study. Similarly, the Harris study of the disposition of 90 accident victims in the City of Oxford in 1965 might intelligently be used to describe the pattern of accident compensation throughout the United Kingdom.⁴ In the Osgoode Hall study, it was shown that a majority of 57.1 per cent of those injured received nothing by way of tort recovery.⁵ Let us suppose that, as a result of changes in Legal Aid and the guest passenger law, the number of persons who now receive nothing from the negligence system has dropped to 46.3 per cent.⁶ It is a serious indictment of a system whose main aim is allegedly to compensate that it misses out on as many people as those to whom it provides benefits. Nor can there be any guarantee that the figure will be substantially reduced in the future. It may well be that, even with changes in the guest passenger law, we will not be able to have a negligence system that does not have a 'failure' rate of at least, say, 40 per cent.⁷

The Osgoode Hall study (in common with every other known empirical study on the subject) shows that those with minor injuries are over-compensated and that those with serious injuries are under-compensated. The reason for this disparity is clear. In the minor cases, the insurance company will very often pay out applying rules of thumb which have no relation to the rules of negligence as applied by our appellate courts.⁸ The minor cases are disposed of by insurance companies so that they can fight the big cases, this time invoking the negligence rules. The process of disputing the facts as well as the process of trying to ascertain for-once-and-for-all the state of the victim's medical condition means delay. This delay generally works to the advantage of the insurance company and to the disadvantage of the

⁴ The study is, unfortunately, unpublished. A summary of the main findings of the survey is to be found in Harris, *Analysis of the British Auto Accident Compensation Scheme* published in *Comparative Studies in Automobile Accident Compensation* (U.S. Department of Transportation, Automobile Insurance and Compensation Study, 1970).

⁵ See, Linden, *Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents* (Toronto: 1965), Chapter IX, at 3. (Hereafter cited as Osgoode Hall Study.)

⁶ This figure represents the number of pedestrians who were found by the Osgoode Hall Study to get nothing from tort sources. (See Osgoode Hall Study, Chapter IX, at 3.) I have selected the figure for pedestrians because they find it easier to prove negligence than other categories of auto accident victims. See, *The Highway Traffic Act*, R.S.O. 1970, c. 202, s. 133, (the reverse onus section).

⁷ It is significant that in 1961 the failure rate for guest passengers was not much different from the failure rate for drivers. Thus, while 66.3 per cent of gratuitous passengers failed to get any negligence compensation, the figure for drivers is 61.2 per cent. (See Osgoode Hall Study, Chapter IX, at 3.)

⁸ The process is brilliantly described by Professor H. L. Ross in his book, *Settled Out of Court — The Social Process of Insurance Claims Adjustment* (Chicago: Aldine Pub. Co., 1970). To quote only one passage from the book instance the following: "... if car A strikes car B from the rear, the driver is assumed to be liable and B is not. In the ordinary course of events, particularly where damages are routine, the adjuster is not concerned with *why* A struck B, or with whether A violated a duty of care to B, or whether A was unreasonable or not. These questions are avoided, not only because they may be impossible to answer, but also because the fact that A struck B from the rear will satisfy all supervisory levels that a payment is in order without further explanation." [at 99. Emphasis in original]

victim. The victim's need, as has frequently been pointed out, is likely to be acute and when the technicalities of the law of negligence and the technicalities of the law of insurance⁹ threaten total defeat for him, he (or his legal adviser) is likely to settle for an amount which will, in the course of time, be shown to be inadequate to cover even economic losses. In short, the O.L.R.C. decided not to "rediscover the wheel" on the question of negligence. In my view, they were right not to do so.

3. *Criticism 3: The O.L.R.C. did not adequately take into account the many changes in the law and practice of distributing auto accident losses in Ontario*

Professor Linden criticises the O.L.R.C. for failing to take account of changes in social welfare legislation, but he shows no understanding in his article of how social welfare benefits intermesh with tort damages. A person who is injured in a road accident in Ontario and is unable to work for more than 15 weeks will have to deal with no less than *three* bureaucracies in order to get his benefits. At no point, will the accident victim be able to recover from a combination of social insurance and motor vehicle insurance benefits a sum in excess of \$205 a week.¹⁰ Further, the amount will decrease over time. To illustrate: if we take a single person earning \$200 a week in clerical employment, who has lost an arm in a road accident, the progression will be something like this:

- 1) For 15 weeks, the victim will get about \$203 a week (\$133.00 unemployment benefit plus \$70 road accident benefits).
- 2) After 15 weeks the benefits will go down to about \$110 a week (\$40 welfare benefit¹¹ plus \$70 road accident benefits).
- 3) After 104 weeks, the benefits may be reduced further so that the victim can now only rely on welfare benefit. This will happen because the victim may be unable to show that he has been "permanently and totally disabled . . . from engaging in any occupation or employment for which he is reasonably suited by education, training or experience."¹²

It is impossible to say for certain what welfare benefits the victim will be getting in two years' time but, even if we assume that he will be getting welfare benefits of say, \$90 a week, it is clear that the legal system is treating victims brutally.

⁹ The question of what defences are available to an insurer in a "direct action" proceeding against the insurer under the provincial Insurance Acts is perhaps the most vexed question in the law of insurance. For attempts to try to bring some order to the chaos, see, the judgment of the Ontario Court of Appeal in *Lepp v. Dominion of Canada General Insurance* (1969), 6 D.L.R. (3d) 365.

¹⁰ The exact figure is \$203.33 made up of the maximum benefit payable under unemployment benefit ($2/3 \times \$200$) = \$133.33 + \$70 road accident benefits.

¹¹ I have computed this figure very generously. My information is that a more realistic figure would be about \$30 a week.

¹² See, Schedule E of *The Insurance Act*, Part II, Total Disability, Section (c), R.S.O., c. 224, as amended by 1971, c. 84.

It is no answer to say that such a person should pursue a claim in negligence. Many persons of modest (and more than modest) means will deem the chances of failure to be too high; they will not wish to run the risk of incurring a massive bill for legal costs. The fact that many thousands of accident victims decide not to pursue their negligence claims means that costs which are attributable to motoring are borne by unemployment insurance and general welfare funds.¹³ It need hardly be said that these funds are in no position to subsidize private insurers.

It can be seen from the above that:

- 1) the compensation provided by social insurance and motor vehicle accident insurance payments leaves many victims under-compensated;
- 2) under-compensation becomes more serious with the passage of time as accident victims are forced to move to lower benefit levels and after two years are denied no-fault motor vehicle benefits, and
- 3) social insurance funds, in effect, pay out a massive subsidy to private insurers.

Professor Linden's other main point in this section is that "the law of torts has become more humane and readier to grant compensation that is adequate."¹⁴ Certainly, anyone reading the law reports in recent months will have noticed two cases where awards in excess of a million dollars have been made¹⁵ and a third case where damages of close to a million dollars were awarded.¹⁶

On the assumption that these three cases indicate a trend, it is not clear that this trend is a beneficial one. Professor Fleming has described the process of fixing damages on a once-for-all basis in these terms: "The short-comings of the process are lamentable beyond imagination."¹⁷ The guessing-game creates serious enough problems when one is awarding damages in, say, the \$5,000 - \$50,000 range. To multiply what is already an intolerable margin of error by a factor of twenty (or more) is something that any rational compensation system cannot condone.

4. *Criticism 4: The O.L.R.C. failed to evaluate the present Ontario no-fault scheme*

As I have shown in the previous section, I do not think the O.L.R.C.

¹³ This process is carried further by the process of deducting Schedule E benefits but not social welfare benefits from tort damages: compare, e.g., *Boarelli v. Flannigan*, [1973] 3 O.R. 69 (no deduction for unemployment benefit) with *Gorrie v. Gill* (1975), 59 D.L.R. (3d) 481 (deduction made for Schedule E benefits pursuant to s. 237 of *The Insurance Act*).

¹⁴ See, Linden, at 453.

¹⁵ *Andrews v. Grand & Toy Ltd.* (1974), 5 W.W.R. 675 (\$1,022,477.48) and *Thornton et al. v. Board of School Trustees of School District No. 57* (1975), 57 D.L.R. (3d) 438 (\$1,534,058.93).

¹⁶ See, *Teno v. Arnold* (1975), 55 D.L.R. (3d) 57 (\$950,000); (1976), 9 O.R. (2d) 28 (\$875,000).

¹⁷ See, Fleming, *Damages: Capital or Rent?* (1969), U. of T. L. J. 295 at 302.

was wrong in concluding that the present Ontario no-fault scheme provides inadequate benefits.

5. *Criticism 5: The O.L.R.C. has done no costing studies for its proposal*

Professor Linden accuses the O.L.R.C. of not costing its proposal. The O.L.R.C. did attempt to cost its proposal but concluded that it could not give a dollar and cents figure for the cost of the scheme.¹⁸ The Commission rightly said on this point:

Ontario residents spend well over a billion dollars a year owning and operating motor vehicles. Governments spend three quarters of a billion on roads, streets and other public works associated with the motor vehicle. In view of these expenditures it is difficult to argue that society cannot afford a no-fault insurance plan.¹⁹

Several other comments must be made about the cost of a no-fault plan. First, a no-fault plan is easier to cost than one based on negligence; no one can predict how much awards for damages will be increased in three years' time. Yet insurance companies have to fix premiums for liabilities which will come home to roost in three years' time. It is because no-fault is cheaper to cost that insurance organizations in North America have come to support no-fault plans over the negligence system.²⁰

Second, the Insurance Bureau of Canada, in its no-fault plan of March 28, 1974, recommended that identical benefits be paid to accident victims, *i.e.*, wage loss up to \$250 per week at least for a period of three years.²¹ If a hard-headed organization such as the I.B.C. is prepared to accept these liabilities, there is no reason to believe that it is taking on responsibilities it cannot meet.

Third, the complaint of cost has a strange ring when it comes from someone who believes in the most prodigal system of compensation yet devised, *i.e.*, the negligence system, which spends as much on administering the system as it spends on paying accident victims.²²

6. *Criticism 6: The O.L.R.C. is unfair to the innocent and the poor*

Professor Linden's next charge is that the O.L.R.C. plan is regressive and gives compensation to undeserving claimants. I shall deal with the regressive point first. It is true that the O.L.R.C. no-fault (like most genuine no-fault plans) is, to some extent, regressive. But the important point is that it is *less* regressive than the present negligence system. Under the negligence system both a rich man and a poor man pay the same premium but there is

¹⁸ See, Report on Motor Vehicle Accident Compensation (Toronto: Ministry of the Attorney-General 1973), Chapter XIV (hereafter referred to as O.L.R.C. Report).

¹⁹ See, O.L.R.C. Report, Chapter XIV, at 105.

²⁰ For a 'progress' report up to 1968, see King, *The Insurance Industry and Compensation Plans* (1968), 43 N.Y.U.L. Rev. 1137.

²¹ For a critical discussion of the I.B.C. proposals see the symposium in (1974), 8 Law Society Gazette, at 17-81.

²² See, O.L.R.C. report, Chapter II, at 15 and Chapter VII.

no limit as to how much the rich person can recover under the negligence system. Thus, should Elizabeth Taylor, for example, decide to come and live in Ontario, she would, if injured, be entitled to claim millions of dollars in damages — at least in the event of serious injury. By way of contrast, the \$1,000 a month ceiling proposed by the O.L.R.C. is comparatively modest and under the Commission's proposed scheme a rich person would have to pay more than a person with a modest income to obtain adequate protection against future loss of income.

Professor Linden is also troubled by the fact that the O.L.R.C. would give compensation to drinking drivers. The Commission itself would deny compensation to criminals who are injured while speeding away to avoid capture. Yet, as Professor Linden has suggested elsewhere,²³ an absolute rule of this kind is capable of working serious injustice. Undoubtedly, there is a small number of serious delinquents who should not receive compensation. The most intelligent way to deal with these cases is to give the relevant adjudicatory body discretion to deny compensation where the injury "is attributable solely to the serious and wilful misconduct"²⁴ of the claimant. To make victims wait for years and then deny a substantial number of them compensation altogether because of the existence of a small number of delinquents is more irrational than the classic exercise of attempting to roast a pig by burning down the house.

7. *Criticism 7: The O.L.R.C. disparages the role of lawyers in the resolution of accident claims*

The O.L.R.C. recommended no-fault not because they were prejudiced against lawyers but because they were concerned that lawyers would be blamed for faults which are inherent in the negligence system and which are not of the lawyers' making. Thus, the Osgoode Hall study showed that 22.9 per cent of accident victims were dissatisfied with the treatment provided by lawyers, whereas only 9.5 per cent were dissatisfied with the quality of their medical care.²⁵ It is probably true that some of the lawyers were incompetent by any standards, but it is equally likely that many of them were doing their best in trying to operate a system in which long delays and a substantial number of failures are inevitable.

Again, Professor Linden's own study shows that the number of people who are opposed to the negligence system increases with the severity of the injury suffered.²⁶ Since it is likely to be the seriously injured who are more likely to seek out legal advice, some of their dissatisfaction cannot but affect prejudicially the regard in which lawyers are held. High regard is a precious

²³ See, Linden, *Tort Law as Ombudsman* (1973), 51 C.B.R. 155 at 161, where the learned writer gives his blessing to the decision of the Supreme Court of Canada in *Beim v. Goyer* (1966), 57 D.L.R. (2d) 253 where the Court imposed liability on a policeman who "accidentally" shot an escaping thief.

²⁴ See, s. 3(1)(b) of *The Workmen's Compensation Act*, R.S.O. 1970, c. 503.

²⁵ See, Osgoode Hall Study, Chapter VIII (Attitudes), at 18.

²⁶ *Id.* at 2.

asset and it ought not to be jeopardised, particularly since "Lawyers can make a decent living without this type of work."²⁷

Professor Linden makes a comparison between the Workmen's Compensation Board and private motor vehicle insurers which cannot go unchallenged.²⁸ On any standard of comparison, the Workmen's Compensation Scheme must emerge as a better system than the road accident compensation scheme. To list some of the advantages of the former:

1) The benefits under *The Workmen's Compensation Act* are more than three times as generous as those provided under the road accident scheme.²⁹

2) A workman who is receiving workmen's compensation benefits and who is still disabled will continue receiving benefits. Someone who is receiving road accident benefits will have those benefits cut off after two years unless he can show that he has been "totally and permanently disabled . . . from engaging in any employment for which he is reasonably suited by education, training or experience . . ."³⁰

3) Some attempt has now been made to increase workmen's compensation benefits so as to make at least some allowance for inflation.³¹ There is no similar inflation-proofing for road accident victims.

4) There is no evidence that Workmen's Compensation Board officials attempt to get accident victims to sign releases for ludicrously low amounts when they are still recovering from the accident.³² Unhappily, there are instances in the reported cases³³ of insurance adjusters trying to foist outrageous final settlements on accident victims who are still recovering from the trauma of the accident.

5) The Workmen's Compensation Board is financed by levies on employers. The scheme does not rely, as does the Motor Vehicle Accident Scheme, on massive subsidies from social insurance schemes.

²⁷ See, Linden, at 456.

²⁸ "Recently, we have seen demonstrations by injured workmen against the Board. I do not remember seeing any protests by injured auto accident victims," Linden, at 455. Clearly, the tenor of this passage is that motor vehicle insurers treat their clients better than the Workmen's Compensation Board treats their claimants.

²⁹ The maximum benefits under *The Workmen's Compensation Act* at the present time is \$216.36 (75 per cent of \$15,000). Schedule E benefits are, of course, \$70 a week.

³⁰ Schedule E of *The Insurance Act*, Part II, Total Disability, section (c), R.S.O. 1970, c. 224 as amended by 1971, c. 84.

³¹ See, the amendments to *The Workmen's Compensation Act* made in 1974; see now, s. 8, S.O. 1974, c. 70 and s. 8(2) and s. 8(b) added by S.O. 1975, c. 47. It should be noted that the inflation-proofing effected by these changes is very modest.

³² A committee set up in 1970 by the then Minister of Financial and Commercial Affairs recommended in 1973 that "no release for bodily injury shall be valid or enforceable if signed by the claimant in a hospital or other place where he is receiving medical treatment." (Recommendation 45(b), at 19.) To the best of my knowledge the report exists only in mimeograph form.

³³ See, *Towers v. Affleck*, [1974] 1 W.W.R. 714 and *Pridmore v. Calvert* (1975), 54 D.L.R. (3d) 133.

6) The Workmen's Compensation Board has facilities for rehabilitation, whereas there are no rehabilitation facilities provided for road accident victims.

8. *Criticism 8: The O.L.R.C. has too limited a view of the functions of tort law*

Professor Linden argues that the law of negligence is concerned with more than "mere compensation."³⁴ He believes that the civil action is necessary as a deterrent against careless and reckless driving. On this point, I can do no better than to quote the well-known passage in the New York State Insurance Department Report:

Individual, last-moment driver mistakes — undeterred by fear of death, injury, imprisonment, fine or loss of licence — surely cannot be deterred by fear of civil liability against which one is insured. Indeed, as a matter of logic, the contrary is true. The careless driver is protected by insurance, while his victim can be left with much of the cost that originally fell upon him. We confront the bizarre conclusion that if the fault insurance system is a deterrent to anything, it is more of a 'deterrent' to becoming a victim than to driving carelessly.³⁵

Second, before we impose civil penalties such as not allowing an offending driver to be indemnified by insurance or else holding the driver liable for the excess on the limits of his policy, we must make sure that the 'penalty fits the crime.' If we do not do this, we are in danger of imposing massive 'fines' on people who are not guilty of any morally reprehensible act. Take, for example, the case of a man who takes out auto liability insurance coverage for \$100,000. Assume that during the currency of the policy, he changes cars without notifying the insurer. He then negligently injures someone and is held liable for \$100,000 in damages. It is likely that it will be held that he is not entitled to be indemnified³⁶ and the insured is now liable to pay the accident victim \$100,000. Surely, it cannot be just to impose a \$100,000 fine for what is, by any standards, a 'trivial' offence?

The argument that negligence actions are necessary to prevent resort to private vengeance must be considered extravagant nonsense, even allowing for the use of hyperbole. The fact is that thousands of accident victims are at present denied compensation and no one anticipates the use of private vengeance. It is, indeed, strange that when proposals are made to compensate everyone instead of compensating on a selective basis, arguments about the fear of shoot-outs should be trotted out.

9. *Criticism 9: The O.L.R.C. wrongly believes that no-fault benefits can be supplied only if tort law is abolished*

Professor Linden believes that the present compromise represents the best of both worlds and both fault and no-fault regimes can co-exist. The fact is, however, that no society can, or will ever be able to, afford both negligence and adequate no-fault benefits. The most generous no-fault plans in a 'mixed'

³⁴ See, Linden, at 457.

³⁵ New York Insurance Department, *Automobile Insurance . . . For Whose Benefit?* (New York: 1970) at 12.

³⁶ See, the *dicta* in *Bourbonnie v. Union Insurance Society of Canton Ltd.* (1959), 22 D.L.R. (2d) 419.

(no-fault and negligence) system pay up to \$1,000 a month for three years and then pay no more.³⁷

It is, of course, not true that "pure no-fault has been adopted nowhere."³⁸ New Zealand has had a no-fault scheme in existence for well over two years.³⁹ That scheme covers all accidents and it has not been modified despite the coming to power of a Conservative Government in the last year. As for the failure of a complete no-fault scheme to be enacted in New York, this is to be explained not on the merits of the scheme itself, but by the tremendous political influence of the trial bar.

10. *Criticism 10: The O.L.R.C. has failed to consider fully the inter-relation of auto insurance with other social welfare schemes*

Professor Linden's final argument is that a road accident victim scheme would treat motor victims differently from, say, malpractice victims. It would, of course, be a good idea if all accident victims were given no-fault benefits and it would be an even better idea if accident and sickness victims were to be treated in the same way. The question is, however, should we reject a good idea because it does not go far enough?

There would appear to me to be advantages in dealing with road accident victims separately from other accident victims. In the first place, if there were a proper no-fault plan for road accident victims, this would mean that the overwhelming majority of accident victims, *i.e.*, those injured at work and those injured on the roads would, be getting compensation at a reasonable level. The benefits provided by the two schemes would be approximately the same⁴⁰ and there would be no incentive for plaintiffs to go 'forum-shopping' as there is, unfortunately, at present.⁴¹

Second, the advantage of limiting the compensation scheme to road accident victims means that we can allay the fears of some people and we can also allow lawyers who have specialized in the personal injury field an opportunity to diversify their work.

Third, there is the danger that if there were a scheme which covered all accident victims, benefits for those victims would be fixed at a very low level. The fact is that, although we can project and forecast the number of automobile accidents in the next few years, we have no knowledge of the approximate number of accidents which are neither work-related nor caused by automobile accidents. One of the things we can do while the motor vehicle accident compensation scheme is operating, is to try to ascertain the approximate

³⁷ The New York and Michigan No-Fault Insurance Plans are briefly described in the O.L.R.C. report in Chapter III at 29-30.

³⁸ See, Linden, at 458.

³⁹ The *New Zealand Accident Compensation Act 1972*, came into force on April 1, 1974. For a survey of the main provisions see Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance Scheme* (1974), 37 Mod. L. Rev. 361.

⁴⁰ The present maximum available under Workmen's Compensation legislation is \$216.36 a week. Road accident victims would get just under \$250 a week if the O.L.R.C.'s proposals were to be implemented.

⁴¹ See, *e.g.*, *Chu v. Madill* (1974), 51 D.L.R. (3d) 481.

number of such accidents. We can also debate whether compensation for these accidents should be paid for out of general revenues or whether, for example, manufacturers should be required to contribute to the compensation fund for such accidents.

C. THE DEFECTS OF THE O.L.R.C. PROPOSALS

The O.L.R.C. proposals, although they point in the right directions, have very grave flaws which require serious consideration. First, for the O.L.R.C. to write a report on accident compensation in 1974 without seriously considering the question of inflation-proofing the benefits is something that defies comprehension. At present, four provincial Workmen's Compensation benefit schemes provide for inflation-proofing⁴² and Ontario allows for some limited inflation-proofing.⁴³ Under the Commission's proposals someone who was seriously injured in 1976 would be getting the same benefits in 1996 or 2006 as he was today. By 1996 accident victims might find they were better off claiming under the provincial welfare laws than under a no-fault scheme which was originally set up to provide more generous compensation than the present welfare benefits!

Second, the O.L.R.C. does not deal with the question of revising the ceiling on benefits. In a very short time indeed, whatever the success of anti-inflation programmes, \$1,000 a month is going to appear a very modest amount. Unless provision is made to increase the ceiling say, annually, the scheme is going to provide very inadequate benefits.

Third, the Commission deals very vaguely with the question of rehabilitation facilities. There is no indication in the Report as to who is to provide these facilities. Presumably, it is to be the provincial government. But this does not seem to be fair or feasible. It is not fair because the premium income from motorists will be going, not to the provincial government, but to private insurers who will certainly not invest those monies in providing rehabilitation services. Deprived of this source of income, it is difficult (if not impossible) to see where the provincial government will obtain sufficient funds to provide adequate rehabilitation facilities.⁴⁴

In short, as I have argued elsewhere,⁴⁵ I think that an attempt to run a compensation scheme which provides decent benefits through private insurance is doomed to failure.

⁴² The four provinces are: British Columbia, Nova Scotia, Quebec and Saskatchewan. In all these the benefits are indexed to the Consumer Price Index or some variation thereof.

⁴³ *Supra*, note 31.

⁴⁴ There are other problems with which the O.L.R.C. does not deal. To mention only one of these, what happens to the no-fault liabilities incurred by an insurer which decides that it no longer wishes to carry on business in Ontario or which is unable to carry on business because of insolvency? Although insurance insolvencies are very rare in Canada, they are not unknown: see, e.g., *A.-G. for Ontario v. Policy-Holders of Wentworth Insurance Co.* (1969), 6 D.L.R. (3d) 545.

⁴⁵ Hasson and Mesher, *No-Fault, Private or Social Insurance?* (1975), 4 *Industrial L.J.* 168.

D. CONCLUSION

Professor Linden has arrived at the right conclusion for the wrong reasons. The O.L.R.C. proposals should not be enacted into legislation as they now stand. The reason for this has nothing to do with deterrence, fear of private vengeance and other like phantoms. The reasons for rejecting the O.L.R.C. proposals as they stand lie in the fact that provision has not been made for inflation-proofing the benefits, let alone for periodic review of the awards, nor has any attempt been made to automatically increase the income ceiling at which no-fault benefits will be provided. Finally, airy and vague statements about rehabilitation services are of little value, unless it is clear that monies will be available for the provision of such services. The above standards seem, to me, to be the absolute minimum for setting up a reasonable accident compensation scheme. If we waive these minimum standards, we are in danger of finding that we have travelled a long way only to arrive back at our point of departure.

