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# NO-FAULT AUTOMOBILE INSURANCE AND THE NEGLIGENCE ACTION: AN EXPENSIVE ANOMALY

By BRUCE DUNLOP\*

The objective of improved compensation for the victims of motor vehicle accidents has had its champions for many years.<sup>1</sup> They have not, of course, all pulled together. Some have functioned entirely within the context of the tort liability system under which, ostensibly at least, the person suffering loss is compensated by the person whose activity brought about the loss in accordance with the prevailing theory of liability, negligence.

Laws requiring motorists to insure against liability and schemes such as unsatisfied judgment funds or the Motor Vehicle Accident Claims Fund,<sup>2</sup> accept the propriety of liability based on fault and merely try to ensure that whenever there is liability there will also be resources to meet it. Provisions such as the reversed onus of proof on the negligence issue aim at making it easier for some victims, at least,<sup>3</sup> to establish entitlement to compensation. One could say that although this legislative amendment appears to accept fault as the appropriate theory for determining liability, a form of strict liability is actually established; a motorist *not* at fault may be held liable for damages because he or she fails to persuade a judge or jury that the damages did not arise through his or her negligence. The fault principle is, to an extent, eroded.

The courts, too, the very founders of the tort liability system, have improved the lot of the victim over the years and have moved the tort regime away from reliance on fault, at least in the traditional sense, as the basis for determining entitlement to compensation. Aware that liability insurance absorbs the blow a judgment would otherwise represent to a defendant, judges

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<sup>1</sup> One of the earliest articles on the subject is Rollins, *Proposal to Extend the Compensation Principle to Accidents in the Streets* (1919), 4 Mass. L.Q. 392. A comprehensive "no-fault" plan was proposed in 1932: Columbia U. Council for Research in the Social Sciences, *Report of the Commission to Study Compensation for Automobile Accidents* (Philadelphia: Press of International Printing Co., 1932).

<sup>2</sup> *The Motor Vehicle Accident Claims Act*, R.S.O. 1970, c. 281.

<sup>3</sup> A typical provision is s. 133 of *The Highway Traffic Act*, R.S.O. 1970, c. 202 which provides as follows:

- (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle is upon the owner or driver.
- (2) This section does not apply in case of a collision between motor vehicles or between motor vehicles and cars of electric or steam railways or other motor vehicles running only on stationary rails on the highway nor to an action brought by a passenger in a motor vehicle in respect of any injuries sustained by him while a passenger. R.S.O. 1960, c. 172, s. 106.

and juries are in a position to take a more sympathetic approach to the position of the plaintiff. Lord Denning expresses this view in a characteristically blunt way in *Nettleship v. Weston*:<sup>4</sup>

The high standard thus imposed by the judges is, I believe, largely the results of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third-party risks. The reason is so that a person injured by a motor-car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard: see *The Merchant Prince* and *Henderson v. Henry E. Jenkins & Sons Ltd.* Thus we are, in this branch of the law, moving away from the concept: 'No liability without fault'. We are beginning to apply the test: 'On whom should the risk fall?'

Not all judges would be willing to put it so strongly, but there can be little doubt that the concept of fault, though still with us, has been transformed from the notion of moral blameworthiness, which it may originally have been, to include all kinds of mistakes and errors of judgment which drivers make even though they try to avoid them.<sup>5</sup>

In some jurisdictions the courts have abandoned fault as the basis for determining entitlement to compensation on the part of victims of defective manufactured articles. Canadian courts have not gone as far; nor have courts in any jurisdiction openly espoused strict liability in the area of motor vehicle accident compensation. A "no-fault" approach to compensating victims of motor vehicles nevertheless exists in many jurisdictions and it involves a departure, to a greater or lesser degree, from the notion that compensation should be purely a matter of tort liability. Leaving aside the "no-fault" benefit that many people now obtain by virtue of membership in schemes of general application such as hospital and medical insurance, sick leave benefits, life insurance, and other social insurance and welfare programmes, in many provinces of Canada and states of the United States they are entitled to accident benefits as part of the motor vehicle insurance package.<sup>6</sup> Other provinces and states seem likely to develop this sort of approach as well.<sup>7</sup> The significance of the benefits varies markedly from one jurisdiction to another. For example, in Ontario the maximum "no-fault" income benefit is \$70 per week.<sup>8</sup> (In some provinces it is only \$50).<sup>9</sup> It is payable only for total disability and

<sup>4</sup> [1971] 3 All E.R. 581 at 586 (C.A.).

<sup>5</sup> For a discussion of driver error, see Klein and Waller, *Causation, Culpability and Deterrence in Highway Crashes*, U.S. Dept. of Transportation, *Automobile Insurance and Compensation Study*, Section 3, "Characteristics of Individuals Involved in Crashes and Violations" (Washington, 1970). And see Fleming, *The Law of Torts* (4th ed. Sydney: Law Book Co., 1971), ch. 6; Millner, *Negligence in Modern Law* (London: Butterworths, 1967) at 231-32.

<sup>6</sup> The Ontario provisions are contained in Schedule "E" of *The Insurance Act*, R.S.O. 1970, c. 224 as amended by 1971, c. 84.

<sup>7</sup> For example, the Government of Quebec is considering the *Report of the Special Committee on Automobile Insurance* (Quebec, 1974) which recommends a "no-fault" plan for that province.

<sup>8</sup> *The Insurance Act*, *supra*, note 6.

<sup>9</sup> *The Alberta Insurance Act*, R.S.A. 1970, c. 187 as amended by 1971, c. 53; *The Manitoba Automobile Insurance Act*, 1970, c. 102.

it lasts up to two years if the victim cannot perform his or her job. It may continue beyond the two years if the individual is unable to do any job for which he or she may be suited by education or experience. The medical, hospital and rehabilitation benefits go to \$5,000 but only pay on a second-loss basis; that is, if the Ontario Health Insurance Plan (OHIP) or some other source does not cover the loss. The death benefits for a head of household survived by a spouse and two children are \$7,000. This is a "no-fault" plan that provides a little something to tide the accident victim over until he or she can assert a tort claim. It does not provide much comfort for the victim who is unable to establish a tort claim.

On the other hand, in the Michigan plan,<sup>10</sup> although the medical, hospital and rehabilitation expenses are also covered on a second-loss basis, the income protection limit is \$1,000 per month for three years and the death benefits in the example already used could be \$1,000 a month over the same period. The Michigan plan has a million dollar property protection feature as well.

The development of plans of this sort has not been without its opponents, even among those who favour improving the lot of the accident victims. "No-fault" has been regarded as a retrograde step rather than as an advance by some.<sup>11</sup> Now, however, it would not be much of an exaggeration to say that most modern champions of improved compensation favour or at least accept the "no-fault" approach. But this does not mean they have begun to pull together. Perhaps the most fundamental issue dividing them is the respective roles of the negligence action and two-party "no-fault" insurance.

In Ontario, for example, three views as to how the lot of the motor vehicle accident victim should be improved have recently been expressed by the insurance industry, a lawyers' group and the Ontario Law Reform Commission. All favour "no-fault" benefits but the Insurance Bureau of Canada's Variplan<sup>12</sup> and the Advocates' Society's submission to the Ontario Minister of Consumer and Commercial Relations<sup>13</sup> both envisage continued reliance on the negligence action as well, to different degrees. The Law Reform Commission, on the other hand, recommends complete reliance on accident insurance and the abolition of the motor vehicle negligence action.<sup>14</sup>

#### IF "NO-FAULT", WHY NEGLIGENCE?

If the fundamental difference between proponents of "no-fault" lies in their attitude towards the role of the negligence action, then the most funda-

<sup>10</sup> Michigan Compiled Laws Annotated s. 500, 3101 *et seq.*

<sup>11</sup> E.g. Blum and Kalven, *Public Law Perspectives on a Private Law Problem — Auto Compensation Plans* (1964), 31 U. Ch. L. Rev. 641; Spangenberg, *No-Fault Fact, Fiction, Fallacy* (1973), 44 Miss. L.J. 15.

<sup>12</sup> Fraser, *Tomorrow's Auto Insurance*, in *A Symposium on No-Fault Automobile Insurance* (1974), 8. L. Soc. Gazette 17.

<sup>13</sup> Reported in the *Globe and Mail*, Toronto, Feb. 19, 1975.

<sup>14</sup> Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (Toronto: Ministry of the Attorney-General, 1973). New Zealand, of course, has an accident compensation scheme that extends to all injuries, however caused, and replaces the tort action.

mental criticism that one hears of the Ontario Law Reform Commission proposal is that it recommends the abolition of the tort action. It is important, therefore, to consider the reasons for this recommendation and the reasons that have been advanced by its critics.

If one favours the institution of "no-fault" insurance and at the same time favours the retention of the tort action one is saying, in effect, that "no-fault" insurance provides a part of the answer, but not the whole answer, to the problem of compensating the motor vehicle accident victim. One is saying that accident insurance can benefit the victim in a way the tort action does not. At the same time, one is saying that the tort action achieves objectives impossible under "no-fault" insurance alone.

What is "no-fault" insurance? As established in many jurisdictions and as proposed by the Ontario Law Reform Commission, it is first-party, or two-party accident insurance. The owner of a vehicle, the driver of a vehicle, the passengers in a vehicle, pedestrians struck by the vehicle and persons (other than the owners or occupants of other vehicles) upon whom the vehicle inflicts property damage are insured under the policy applicable to that vehicle and would claim against the insurer of that vehicle for any loss suffered. Thus, for example, in a two-car collision involving damage to both vehicles and injury to occupants of both, the victims claim against their own vehicle's insurer rather than against the owner or driver of the other vehicle.

Comparing this type of insurance with third party liability insurance and the negligence action as sources of compensation one finds first, that "no-fault" insurance compensates all victims of motor vehicle injuries;<sup>15</sup> the tort regime does not and the greater the loss, the less adequate, on average, the compensation provided by the tort regime.<sup>16</sup> It is sometimes argued that the improvement in "collateral sources", by which are meant the programmes such as medical and hospital insurance, sick pay benefits, unemployment insurance benefits, and other schemes that are not expressly concerned with motor vehicle injuries but which nevertheless compensate for some of their losses, have made this problem less pressing. It would be sanguine, however, to believe that it has ceased to be a problem and that therefore the validity of this objective of universal compensation has been destroyed. Indeed, those who favour a "mixed" system see this objective as one justification of the "no-fault" element.

Second, "no-fault" insurance compensates quickly, providing periodic payments for loss of income or financial support, and dealing with medical, hospital, and other expenses as they arise. The tort regime compensates relatively slowly, although fairly rapid settlement of smaller claims is possible.

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<sup>15</sup> There are, of course, exceptions. The O.L.R.C. proposal would, for example, exclude loss deliberately inflicted on his or her own person or property by the claimant and loss suffered in the course of committing a criminal offence (other than a driving offence).

<sup>16</sup> Where amounts in excess of \$25,000 in pecuniary loss are involved, for example, recovery is in the vicinity of 20% on the average. That is, taking the total compensation paid, including non-pecuniary heads, only 20% of the aggregate pecuniary loss suffered is compensated. See O.L.R.C. *Report, supra*, note 14 at 50-51.

The important point, however, is that the greater and more debilitating the injury, and therefore the more urgent the need for compensation, the longer it takes. Delays of several years are the norm in serious accident cases.<sup>17</sup> One can explain why this is inevitable under the tort regime. For example, in a once-for-all system of compensation one must wait until the loss picture is as clear as possible before settling the matter. But this does not justify the delay in any absolute sense. Again, improved collateral sources have taken some of the burden off the victim in this regard, but earlier compensation remains a shared objective of those who favour retention of the negligence action and those who do not.

“No-fault” insurance, because it does not involve a once-for-all assessment of loss, permits accurate account to be taken of changes that may occur as time goes by. The tort regime cannot do this. If, for example, the accident victim at the date of an assessment of damages has, as far as the medical expert can foresee, a fifty-fifty chance of developing arthritis as a result of an injury, the allowance made for this in the lump-sum award is bound to be wrong. “Full” compensation will be determined but will then be reduced because of the uncertainty of the event occurring. If the victim does not develop arthritis, the compensation for this prospective problem will have been excessive. If the victim develops arthritis then less than full compensation will have been inadequate.

These are strong points in favour of “no-fault”, but what does the tort regime do that the “no-fault” approach does not? As already suggested, it provides damages for pain and suffering, loss of the amenities of life and shortened expectation of life, and it is the right to recover damages of this type that is often relied upon as a justification for retaining the negligence action in a mixed system.<sup>18</sup> There is a certain “best of both worlds” appeal to this approach. On the other hand, there are arguments, both philosophical and practical, against continuing the practice of awarding damages under these heads which persuaded the Law Reform Commission to recommend abolition of the motor vehicle negligence action.

#### MONEY AS ANALGESIC

Mr. Justice Windeyer has very aptly described damages for pain and suffering, loss of the amenities of life and shortened expectation of life as “solace for a condition created” rather than “payment for something taken away”.<sup>19</sup> Pursuing this analysis he observed, “It may be that giving damages for physical pain that is wholly past, not continuing and not expected to recur, is simply an anomaly, for there can be no solace for past pain”.<sup>20</sup> In the case of permanent injuries, which may involve continuing pain, physical handicap and shortened expectation of life, solace may be possible, but it does not follow that the most effective way of achieving it is through the payment of

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<sup>17</sup> *Id.* at p. 56 *et seq.*

<sup>18</sup> See, e.g., the Advocates’ Society’s submission, *supra*, note 13.

<sup>19</sup> *Skelton v. Collins* (1966), 39 A.L.J.R. 480 at 495 (Aust. H.C.).

<sup>20</sup> *Id.*

a sum of money which remains highly uncertain until determined by a judge or jury and which is paid long after the event.

Every statistical study has indicated that the greater and more debilitating the injury, the less likely it is that a tort claim will result in adequate compensation, even for the pecuniary losses suffered.<sup>21</sup> It therefore seems likely that the solace provided to the totality of accident victims through the knowledge that their medical, hospital, rehabilitation and income needs would be certain to be covered would outweigh the comfort provided by the tort regime to the small minority of serious injury victims who achieve eminent success on an assessment of damages. Especially is this so when it is realized that rehabilitation, which means "the restoration of the handicapped to the fullest physical, mental, social, vocational and economic usefulness of which they are capable"<sup>22</sup>, requires that every effort be made to develop in the victim an attitude which stresses the achievements that can be made rather than the tragedy that has occurred. Money spent immediately, not only on medical and hospital services but on psychological and rehabilitation services and in due course, if necessary, on socio-economic counselling, vocational evaluation and vocational training, with no need for the victim to be concerned about how he or she is to be supported or about who will pay the bills on behalf of his or her family, will achieve the most by way of rehabilitation, and therefore "solace", for most accident victims. On the other hand, the possibility of a very substantial lump sum award of non-pecuniary "losses" can be subversive of recovery because as Professors Keeton and O'Connell conclude:<sup>23</sup>

any victim will (rightfully) fear getting less if he appears before a jury fully healed or rehabilitated (with, for instance an artificial leg that he can expertly use), very often he will forego treatment or rehabilitation during the long delay between accident and trial in order to appear before a sympathetic jury as pathetically handicapped as possible . . .

and the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand observed in similar vein that<sup>24</sup>

injured persons have failed to accept the assistance of rehabilitation because of pending claims for damages or compensation. They have preferred to wait the outcome of contested proceedings lest the prospective capital award should be diminished by their own successful efforts to overcome the disability.

Contention, delay, expense, uncertainty — all features of the action for damages for non-pecuniary "losses" — also inhibit rehabilitation to the detriment both of the accident victim and of society.<sup>25</sup>

On the question of solace for pain that is past, one can make the argument that as a matter of priorities, the payment of pecuniary losses should come first. If that were all there was to it, one could perhaps say that, if we

<sup>21</sup> *Supra*, note 14 at 50, 56.

<sup>22</sup> *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Wellington, 1967).

<sup>23</sup> Keeton and O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (Boston: Little, Brown, 1965) at 31-32.

<sup>24</sup> *Supra*, note 22 at 77.

<sup>25</sup> See O.L.R.C. *Report*, *supra*, note 14, Ch. VI.

can afford to "compensate" for pain and suffering as well, let us do so. In the case of future pain and loss of amenities it goes beyond being a matter of priorities and becomes a case of avoiding conflicting pressures. Money should certainly be spent on the well-being of the personal injury accident victim. It is a question of the form in which such expenditures will be most likely to achieve the desired objective. Money spent on facilities and services to care for and rehabilitate the handicapped may achieve this objective.<sup>26</sup> Money spent on lump-sum awards may not.

#### THE TORT ACTION AS CORRECTIVE

It is sometimes argued that tort law requires wrong-doers to bear responsibility for their "innocent" victims.<sup>27</sup> A number of fallacies underlie this argument. The use of the expression "wrong-doer" to describe a negligent motorist, implies a kind of moral blame which, as already noted, is not always present. Granted that some negligent motorists are also morally blameworthy, and therefore should be called to account for their behaviour, is there any reason why criminal and regulatory sanctions cannot be relied upon to serve this purpose? In any case, the punitive objective which seems to underlie this argument for retaining the damage award seems to ignore the fact that in most cases the responsibility, at least in practical terms, is borne by the "wrong-doer's" insurance company. Furthermore, the vast majority of cases are settled without resort to trial, many of them without resort to legal advice,<sup>28</sup> and therefore without resort to an accurate definition of fault. Any notion of visiting responsibility on a wrong-doer may take second place to other considerations such as the duration, cost and uncertainty of litigation and the urgency of the accident victim's need for money.

In the small minority of cases that go to trial it can legitimately be questioned whether fault determines responsibility even then. In the words of the Honourable J. C. McRuer, former Chief Justice of the High Court of Ontario:<sup>29</sup>

Dean Wright has said: 'Lawyers supporting the trial jury are willing to admit that in the ordinary automobile accident the case that is actually tried by a jury is a case that never in fact took place, and is the result of conjectural recall, imagination, colourful dramatization, and pure inventiveness.' I do not think Dean Wright has overstated the case, but I would not restrict his comments to those cases tried by a jury.

Motor vehicle accidents are events which occur suddenly, taking the witnesses, including the participants, by surprise and resulting in imperfect perception. Months, even years, after the event, they are called upon to assess distances, relative speeds, time elapsed; all matters as to which they have little or no

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<sup>26</sup> *Id.* See, also, Ch. XI.

<sup>27</sup> See, e.g., Griffiths, *Don't Abolish Tort Law in Auto Accident Compensation* (1969), 12 Can. Bar J. 187 at 190.

<sup>28</sup> Linden, *Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents* (Toronto, 1965) at V-14 found that a lawyer was consulted in 37.3% of cases examined. It seems likely that legal aid, by improving access to legal services, may have increased the percentage of cases in which lawyers are involved. It is unlikely that legal aid has completely solved the problem.

<sup>29</sup> McRuer, "Liability Without Fault in the Law of Torts", in Macdonald, ed., *Changing Legal Objectives* (Toronto: U. of T. Press, 1963) at 63-64.

experience. It is expecting too much of the trial process, effective as it may be generally, to elicit from them the truth, no matter how sincere the witnesses may be.

A favourite example with which the tort "abolitionist" is faced is that of the drunken driver who crashes into the back of a motionless vehicle with the result that both drivers are seriously injured. The idea that both injury victims should be equally compensated tends to produce a sense of outrage against the whole notion of "no-fault" compensation.<sup>30</sup> It is important to remember that the vast majority of injury cases are not this case and should not be affected by it. At the same time, it must be admitted that this situation poses a difficult problem. If one wishes the drunk to be punished there is, of course, the criminal sanction. There remains, however, a reluctance on the part of some to allow the drunk to be compensated under "no-fault". The fact is, nevertheless, that a disabled person needs support and so do his or her dependants. However outraged one might be by this form of behaviour it hardly seems in the interest of society to exclude these people from the necessary compensation for their losses. If punishment, for whatever reason, be it deterrence or reformation or vengeance, is required to be rigorous, let it be through the criminal sanction.

Two other values that are said to belong to the tort action and not to "no-fault" insurance are those of educating the public as to the expected standard of behaviour and deterring departure from it.<sup>31</sup> However, since only a small percentage of motor vehicle accident claims ever reaches the courts and only a tiny percentage of these gets significant publicity which, in any case, is more likely to educate as to the level of damage awards than as to the standard of care, it is an elaborate and expensive system to be maintained for such a dubious return. One would have thought that driver training, publicity campaigns and enforcement of *Criminal Code* and *The Highway Traffic Act* provisions would achieve this goal, if it is attainable. As for deterrence the New York State Insurance Department, in its report to the Governor, said this:<sup>32</sup>

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.

## CRYSTAL GAZING

It has been said that the statistical studies considered by the Ontario Law Reform Commission in assessing the existing compensation system are out of date.<sup>33</sup> But the only significant changes in recent years for which there

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<sup>30</sup> The writer has faced this argument from lawyers when participating in panel discussions on "no-fault".

<sup>31</sup> See Linden, *Canadian Negligence Law* (Toronto: Butterworths, 1972) at 474-86.

<sup>32</sup> New York (State) Insurance Department, *Automobile Insurance . . . For Whose Benefit?* (New York, 1970) at 12.

<sup>33</sup> This criticism has been expressed in panel discussions in which the writer has participated.

is any evidence lie in the area of collateral benefits, as the Commission noted in its report.<sup>34</sup> Apart from the fact that they still do not adequately close the gap between accident losses and accident reparation, they do not constitute an argument for the retention of the tort action. In itself, it remains as deficient as the studies showed it to be; too slow, too uncertain, not adequately productive of the objectives of a reparation system. Nor does the fact that legal aid may defray the individual's expense of litigating reduce the cost to society of a system that costs almost as much to administer as it returns to accident victims in benefits.<sup>35</sup> Improvement in the position of the accident victim through improved collateral benefits, points the direction to be taken. The view of the Law Reform Commission that adequate pecuniary compensation should be paid, and should be charged, to the extent that it is feasible, to the activity of motoring, leads to the ultimate conclusion that an accident insurance programme with the premiums paid by those who engage in motoring is the appropriate device.<sup>36</sup>

It is probably the case that concern over the level of premiums will lead to a gradual approach to such a change. But cost in the wider sense can hardly be an issue because the cost is being borne already: by those who pay premiums for medical and hospital insurance, accident insurance, disability insurance, unemployment insurance; by employers; by taxpayers; by accident victims who go uncompensated or inadequately compensated as well as by motorists who buy automobile insurance; in short, by society and the economy as a whole. The question is not, can we afford it, but how should we afford it? In other words, cost-benefit, rather than cost, is the issue. "No-fault" will produce the greatest benefit per dollar spent. If its premiums are higher it will be because some of the cost has been shifted to motoring from the sources that now bear it. This will be a good, not a bad thing. It will give a truer indication of the real cost of motoring. There is no reason, however, to believe that a "no-fault" compensation scheme would result in premium levels significantly different from those that will face the motorist under the existing system.<sup>37</sup>

The writer's view is that the biggest impediment in the way of abolishing the tort action is the emotional commitment to the notion of damages for pain and suffering and the other non-pecuniary heads. It would be possible to introduce this type of compensation into "no-fault" provided a formula for calculating it were established. This could even be made an optional extra to a basic, compulsory policy that compensated only for pecuniary loss. This solution seems unlikely to satisfy the "retentionist" however since the levels of such compensation would necessarily be conventional and moderate. The writer would predict, therefore, that the tort action will be retained but that "no-fault" benefits will continue to increase in importance. Ultimately, the cost of retaining the negligence action for the limited purpose and value it will serve will be seen as unjustified. The tort action may die hard but it will die.

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<sup>34</sup> *Supra*, note 14 at 52.

<sup>35</sup> *Id.* at 71-73.

<sup>36</sup> *Id.* at 101-05.

<sup>37</sup> *Id.*, chapt. 14.

