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J. C. McRuer

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THE MOTOR CAR AND THE LAW

THE HONOURABLE J. C. McRuer, Q.C., LL.D.

I

Throughout known legal history there has been an evolving concept of justice, largely moulded by a combination of moral theory and felt necessity. This has been particularly true of the development of the common law. Lord Macmillan once said,

... the common law is a practical code adapted to deal with the manifold diversities of human life...

The rapid advance of science during the past century and particularly during the last half of that century has created new social conditions demanding new processes of government to meet those social conditions which have created grave problems not only in the administration of justice but in the development of just laws. In many areas the conventional judicial process has proved to be quite inadequate to provide rules by which men should be governed and it has fallen to the Legislature and to the Executive not only to determine the rules but the processes by which they are to be applied.

In large measure the right to compensation implies a wrong-doer and liability implies a failure in a duty owed, but this is not always true.

Earliest legal history shows a development of a concept of liability even where the concept of wrong or a wrong-doer was obscure or entirely absent. In primitive times the event determined the liability simply because a process or means of determining or measuring the wrongfulness of the act did not exist. It took at least 1,000 years to develop a doctrine of fault and it was not until the 19th century that any clear doctrine evolved.

The Sumerian, Hammurabian and Mosaic laws all provided for compensation but it was in the nature of a penalty on the happening of the event.

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* The Honourable J. C. McRuer, Q.C., LL.D., sometime Justice of Appeal in the Supreme Court of Ontario and Chief Justice of the High Court of Justice for Ontario, is presently Chairman of the Ontario Law Reform Commission and is conducting the Ontario Royal Commission Inquiry into Civil Rights. This article is the text of a paper delivered at the Third Commonwealth and Empire Law Conference held in Sydney, Australia, August 25-September 1, 1965.

If a man cut off the foot of another with an... instrument "10 silver shekels he shall pay"—liability but not compensation.

"If a physician operate on a slave of a freeman for a severe wound with a bronze lancet and cause his death, he shall restore a slave of equal value"—a concept of compensation only.

"When men strive together, and hurt a woman with child, so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine,"—compensation by judicial assessment.

In none of these cases is there any concept of fault. In the Mosaic law there was a curious mixture of vengeance, punishment and some idea of compensation. If in the illustration I have just given harm should come to the unfortunate woman "then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe,"—punishment but no compensation, and "When an ox gores a man or a woman to death, the ox shall be stoned... but the owner of the ox shall be clear"—the punishment fell on the ox only—"But if the ox has been accustomed to gore in the past, ... the ox shall be stoned, and its owner also shall be put to death"—the punishment fell on the ox and the owner. However, the unfortunate owner was given a right to ransom his life: "If ransom is laid on him, then he shall give for the redemption of his life whatever is laid upon him." "When one man's ox hurts another's, so that it dies, then they shall sell the live ox and divide the price of it; and the dead beast also they shall divide. Or if it is known that the ox has been accustomed to gore in the past, and its owner has not kept it in, he shall pay ox for ox, and the dead beast shall be his,"—absolute liability in certain cases with one scale of compensation and in others liability with a principle of scienter and with another scale of compensation. These and many other principles of the Mosaic law have been reflected in the Roman law, the Teutonic law and in the English law.

In the early English law, as in the early laws of the Middle East, the concepts of punishment and compensation were ill defined. Criminal law and what was to become tort law were for centuries scarcely distinguishable. In the laws of Aethelbriht promulgated in the 6th century, a specific code of payments for named injuries was set out, e.g.:

38. If a shoulder be lamed, let 'bot' be made with 30 shillings.
39. If there be an injury of the bone, let 'bot' be made with 4 shillings.
40. If an eye be (struck) out, let 'bot' be made with 100 shillings.

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2 Samuel Noah Kramer, History Begins at Sumer, p. 53. See also Wigmore, Panorama of the World Legal Systems, Vol. 1, p. 84.
4 Exodus, 21: 22.
5 Ibid., 21: 23-25.
6 Ibid., 21: 28.
7 Ibid., 21: 29.
8 Ibid., 21: 30.
9 Ibid., 21: 35.
10 Holmes, The Common Law, p. 15 et seq.
12 Ibid., p. 13.
13 Ibid., p. 15.
But laws were one thing, administration was another. Before organized political order took form, redress for injury was in the hands of the injured man and his relatives. The blood feud was the administrative process. At first, voluntary compensation might be accepted, as in the Hebrew law and the Roman law.\textsuperscript{14} If the compensation offered was not accepted the blood feud followed. Later, social pressure demanded "that an act causing physical damage must, in the interests of peace, be paid for" in all but a few exceptional cases. Even where the act was accidental or in self-defence compensation must be paid.\textsuperscript{15}

Until comparatively recent years law was concerned only with the act not with the state of mind of one who had injured another. Up to 1828 even the man who committed homicide by misadventure or in self-defence did not in theory escape punishment.\textsuperscript{16}

The form of the early oath that the defendant was required to take to escape liability delineated the law. He was required to swear that he had done nothing whereby the person slain was "nearer to death or further from life".\textsuperscript{17} The defendant was liable, upon it being shown that he voluntarily did the act from which the damage flowed as an immediate consequence. Proof of trespass \textit{vi et armis} was what was required. Proof of fault was immaterial.\textsuperscript{18} This doctrine of absolute liability for all one's voluntary acts was somewhat modified in 1616 by the decision in \textit{Weaver v. Ward},\textsuperscript{19} which is one of the milestones marking progress in English law. In a case of personal trespass the court held that the defendant could escape liability if he showed that he was utterly without fault.

It may be that, as Wigmore says, there were vague ideas in the early English law of "inevitable necessity", "unavoidable accident", "could not do otherwise"\textsuperscript{20} which, as the seeds of the doctrine of negligence, were planted in the judicial mind even a century before \textit{Weaver v. Ward}, nevertheless this case at any rate shows when they really began to germinate. The growth of the concept of liability due to fault was slow and even yet it cannot be said that there is any exhaustive or comprehensive definition of actionable negligence. Fleming says that it is misleading even today to speak of a tort of negligence.\textsuperscript{21} Until the 19th century "the history of negligence is a skein of threads, most of which are fairly distinct, and no matter where we cut the skein we shall get little more than a bundle of frayed ends."\textsuperscript{22}

\textsuperscript{14} Gaius Inst., iii, 189; Just. Instit. iv, 4, 7; Girard, \textit{Droit Romain}, p. 396.
\textsuperscript{16} \textit{Ibid.}, p. 52; see 9 Geo. IV, c. 31, s. 10.
\textsuperscript{17} \textit{Ibid.}.
\textsuperscript{18} Eldredge, \textit{Modern Tort Problems}, p. 29
\textsuperscript{19} (1616) Hobart 134; 80 E.R. 284.
\textsuperscript{21} See \textit{Vaughan v. Menlove}, (1837) 3 Bing. N.C. 467, 132 E.R. 490, for development of the standard of "the care which a prudent man would take ...".
\textsuperscript{22} P. H. Winfield, \textit{The History of Negligence in the Law of Torts} (1926), 42 L.Q.R. 184, at p. 185.
The idea of negligence mainly developed out of a duty based on some sort of contractual relationship: "... the duty of every artificer to exercise his art rightly and truly as he ought." The liability of the innkeeper and the common carrier was expanded to include the apothecary, and the surgeon, but in all these cases there was some contractual relationship. Negligence was not regarded as an independent tort. It was well into the 19th century before there was any great development in the growth of the idea of negligence as a right of action not based on some particular relationship. Winfield attributes the rapid growth of the idea after about 1825 chiefly to the use of industrial machinery and railway trains.

Any attempt to classify remedial actions now coming under the titular heading of torts is in fact very modern. The first book on the subject was produced by Addison in 1860. Mr. Justice Holmes said of it:

We are inclined to think that torts is not a proper subject for a law book.

When Addison wrote his book he was dealing with a subject which had very recently experienced a substantial metamorphosis. The primitive law which stressed security with fault as of no consequence was challenged by the philosophical emphasis on freedom of action and an ecclesiastical influence which pressed for the recognition of culpability as a basis for tort liability. Actually a dual basis of liability eventually evolved which recognized the need for security in certain cases and demanded proof of culpability in others. An answer to the demand for proof of culpability was made possible by the development of a more efficient judicial procedure and better means of proof but the demands for security continued to have a part in moulding the law. There still remained those cases where proof of fault according to recognized legal standards might either be impossible or so difficult as to destroy any right to relief. It is in these cases that the common law still acknowledges the principle of strict liability. The classes of the "strict liability" cases and "fault" cases have never remained constant. The courts and the legislatures have joined together to expand and contract these classes by requiring proof of culpability where liability was formerly strict or by imposing strict liability where proof of fault was formerly required. Besides the expansion and contraction of these classes, the Legislature has declared that in certain circumstances there is to be no liability no matter what the culpability may be. In addition, through the subtle doctrine of onus of proof developed either by judicial decision or legislative action, liability which in theory is founded on fault has in practice become strict liability.

It has not been legal scholarship nor legal philosophy that has dictated the swings of the pendulum toward and away from strict tort

23 F.N.B. 94, D; Winfield, supra, footnote 22, at p. 185.
24 Supra, footnote 22, at p. 195.
25 W. A. Seavey, Principles of Torts (1942), 56 Harv. L. Rev. 72.
liability but rather "the felt necessities of the time" brought about by changes in the social and industrial manner of living. The "code" has been "adapted to deal with the manifold diversities of human life..."

May I give a few illustrations:

Down to the end of the 17th century (1698) it was the law of England that the defendant was liable for damage caused by fire for which he was responsible whether the damage was caused by negligence or misfortune.27

Parliament abolished the responsibility for accidental fires in houses in 1711.28

The common law of England always had held and still holds the owner of animals that trespass on the property of others liable for property damage caused by them on the ground that "a man should so occupy his common that he does no wrong to another man." The defendant cannot escape liability by showing that he exercised all reasonable care to keep his livestock confined.29 This doctrine of the common law, so obviously unsuited for vast grazing areas of Canada and the United States of America, either has not been followed by the courts or it has been changed by legislation. In Nebraska, where grazing is a dominant factor in the economy of the State, the courts refused to apply it.30 In Pennsylvania, with changing conditions, the pendulum swung more than its full course. By an Act of the Commonwealth in 1700, the common law was reversed by putting the owner of land under obligation to fence his land to keep cattle out. In 1889 the Act of 1700 was repealed and the common law restored.31

The early law held the owner strictly liable for personal injuries caused by animals on proof of knowledge of the vice of the animal. The Hebraic law of the "ox accustomed to gore" was the one that applied, except in those cases where the vice could not be shown, but it could be shown that the owner incited the animal to trespass.32 There is, however, a class of animals that are "naturally mischievous in their kind" and for such their owners were strictly liable for injury done by them.33 Whether animals fall into the class requiring proof of scienter or into the class that are naturally mischievous in their kind is by a strange turn of the common law a question of law and not a question of fact.34

26 Holmes, opus cit., p. 1.
27 Tuberville v. Stamp, 1 Salk 13.
28 10 Anne, c. 14, para. 1.
29 Wigmore, supra, footnote 20, at p. 451.
30 Delaney v. Erickson (1880), 10 Neb. 492, 10 N.W. 600.
32 Wigmore, supra, footnote 20, at p. 450. See also Cox v. Burbridge (1863), 13 C.B.N.S. 430 at p. 438.
The practical effect of Donoghue v. Stevenson\textsuperscript{35} and Grant v. Australian Knitting Mills Limited\textsuperscript{36} was so to shift the onus of proof as to make manufacturers virtually insurers that their products will not do damage to consumers through defect in manufacturing. Fleming's comment on these cases appears to be warranted:

This accords with the modern policy of providing increased security to the individual against the ordinary or 'typical' hazards of life, and of furthering effective loss distribution among those sections of the public who benefit from the enterprise in question.\textsuperscript{37}

II

The drift from strict liability to liability dependent only on fault was accelerated by the abolition of forms of actions in 1852. To regulate this drift the court made exceptions by developing new rules and applying old principles. In 1866 such an exception was made in Rylands v. Fletcher.\textsuperscript{38} The doctrine of Rylands v. Fletcher was in its time considered revolutionary and it is not yet recognized in all common law countries. Whether it is followed or not, Mr. Justice Field was not warranted in the statement he made in The Nitroglycerine Case\textsuperscript{39} four years after the decision in the House of Lords. In quoting from Harvey v. Dunlap\textsuperscript{40} he said:

'No case or principle can be found', said Mr. Justice Nelson in denying a new trial, 'or if found can be maintained subjecting an individual to liability for an act done without fault on his part,' and in this conclusion we all agree.

Earl, C. expressed views not dissimilar to Mr. Justice Field in Losee v. Buchanan\textsuperscript{41} in repudiating the doctrine of Rylands v. Fletcher. These statements quite overlook the whole catalogue of actions where an action could be maintained in the past and can yet be maintained without proof of fault.

To this catalogue may be added nuisance cases, actions based on trover, innkeepers' cases and the vicarious liability of the master.\textsuperscript{42}

\textsuperscript{35} [1932] A.C. 562.
\textsuperscript{36} [1936] A.C. 85.
\textsuperscript{38} (1866) L.R. 1 Ex. 265, (1868) L.R. 3 H.L. 330.
\textsuperscript{39} (1872) 15 Wall. 524 at p. 537.
\textsuperscript{40} Lalor's Reports, p. 193.
\textsuperscript{41} 51 N.Y. 476.
\textsuperscript{42} The principles of Rylands v. Fletcher involving liability without fault have been applied in many different circumstances in the courts of the United States of America: e.g., the defendant was held liable for damages caused by debris hurled on the plaintiff's lands without proof of fault or absence of due care: Mulchanock v. The Whitehall Cement Manufacturing Company, 253 Pa. 262. The defendant was held liable without proof of negligence where an oil well blew out causing damage to the plaintiff's lands: Green v. General Petroleum Corporation, 205 Calif. 328, 270 P. 952. The doctrine was applied in an explosion case in Bradford Glycerine Company v. St. Mary's Woollen Manufacturing Co., 60 Ohio 560. A court consisting of Judge Augustus N. Hand, Judge Learned Hand and Judge Swan, after elaborately digesting the American authorities, held that the absence of negligence was immaterial where a powder magazine exploded and caused damage to real property and personal injuries: Exner v. Sherman Power Construction Company (1931), 54 F. 2d 510.
I do not think it can be said that when the judges promulgated the doctrine of *Rylands v. Fletcher* they were making new law. I think it is more accurate to say they were developing principles of law to accommodate changing conditions. Blackburn J. in the Exchequer Court seemed to make this quite clear.43

In *Read v. J. Lyons and Company, Limited*44 the House of Lords refused to apply this line of cases to injuries sustained where there was no escape of any dangerous thing from the premises on which the defendant was injured. Lord Macmillan was of the opinion that the doctrine of *Rylands v. Fletcher* "is truly a case on the mutual obligations of the owners or occupiers of neighbouring closes . . .". He questioned whether the doctrine could be applied where the damages were for personal injuries as distinguished from property damage. Lord Porter, after pointing out that it had been held to apply to personal injury cases in *Shiffman v. Order of St. John of Jerusalem*,45 and *Wing v. London General Omnibus Co.*,46 left this matter for further examination. Lord Simonds did likewise. Lord Uthwatt did not discuss the extension of the doctrine of *Rylands v. Fletcher* to personal injury cases.

The Ontario courts have extended the application of the doctrine to personal injury cases, refusing to follow the dictum of Lord Macmillan in the *Read* case which would place a higher value on property than personal security.47

The development of the doctrine of *Rylands v. Fletcher* has been just one of the "necessities of the time". A requirement of proof of fault would in most cases of this nature deprive injured plaintiffs of any right to relief. On them would be placed an onus of proof that rarely could be discharged. Instead of the actor it would be the injured who would assume the risk. There is, however, a broader foundation for the doctrine than this. Otherwise an extension of the principle of *res ipsa loquitur* would have been sufficient but the courts have not been content merely to apply the doctrine of *res ipsa loquitur* to these cases.

Since *Rylands v. Fletcher* it has largely devolved on the legislatures to assume the active role in recognizing the necessity of formulating new tort laws to meet altered conditions of living. The course followed has been far from consistent but urgent necessities have been recognized.

In 1880 the British Parliament took the first major step to reverse the trend of the rules of the common law governing liability of employers for injuries sustained by their employees in the course of their employment when the Employers' Liability Act was passed.48

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43 Supra, footnote 38, at p. 279.
44 [1847] A.C. 156, at p. 158.
45 [1926] 1 All E.R. 557.
48 43-44 Vict., c. 42.
A limited class of employees was given a limited right to recover a limited amount of damages for injuries sustained through the negligence of their fellow servants. Although the Act took away the defence of common employment in certain cases it left untouched the defences of contributory negligence and *volenti non fit injuria*. This legislation broke new ground for the growth of the acceptance of the principle of compensation for workmen without proof of fault on the part of the employer, a principle which was to be rapidly developed and expanded throughout the western world, in different forms of workmen's compensation legislation. The first Workmen's Compensation Act imposing liability on employers without proof of fault, for injuries sustained by workmen in the course of their employment, was passed in Great Britain in 1897. This Act applied only to certain specified occupations. In 1906 the provisions of the earlier Act were given general application with few exceptions, and injuries to health from employment in noxious industries were included. It is unnecessary to trace in detail the legislative changes in Great Britain since 1906. It is sufficient to say that the law has changed little in principle and that for over half a century British employers, with few exceptions, have been insurers against accidental injuries to or death of their workmen. The obligation of compensation is quite independent of any negligence on the part of the employer or fellow servants. Liability may be concurrent with liability at common law or under the Employers' Liability Act (1880) and the servant may elect between the various remedies open to him.

Great Britain was not the first country to legislate in this field. Finland was the pioneer in 1895; in Germany and Austria provision was made for contributory employees' compensation funds as early as 1885 but in no sense could the legislation setting up these funds be regarded as legislation of the same character as the Finnish or British legislation. Between 1897 and 1912 the principle of liability without fault on the part of the employer for employees' injuries sustained in the course of their employment was adopted in Europe, South Africa, Australia, New Zealand, Canada and the United States of America.

The first Workmen's Compensation Acts brought forth a real torrent of criticism from legal writers. Such an eminent scholar as Jeremiah Smith said:

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49 Workmen's Compensation Act, 60-61 Vict., c. 37.
50 6 Edw. VII, c. 58.
52 Belgium, Denmark, France, Greece, Holland, Newfoundland, New Zealand, Norway, Queensland, Russia, South Australia, Spain, Sweden, Transvaal, Western Australia, the Provinces of Alberta, British Columbia, Manitoba, Nova Scotia and Quebec. The States of California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington and Wisconsin adopted workmen's compensation laws during the years 1911 and 1912, some of which involved liability without fault on the part of the employers and others provided for compensation plans. See Workmen's Compensation Report, Ontario, 1913, p. 12 et seq.
... two stubborn facts remain. First: the statute imposes upon an employer a duty of compensation, which did not exist under the modern common law of torts. Second: the theory underlying the statute, its basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts. The statute shows 'a distinct revulsion from the conception that fault is essential to liability'. It is 'a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good.'\footnote{Jeremiah Smith, Sequel to Workmen's Compensation Acts (1913-14), 27 Harv. L. Rev. M235, at p. 246.}

In the light of the course of known history it is useful now to quote the views of other contemporary jurists referred to by Mr. Smith:\footnote{Ibid.}

The time-honoured principles of the law of torts have been cast aside, a wider rule of responsibility has been framed and no man can now say what will be the ultimate effects of the new doctrine.\footnote{P. B. Mignault, 44 Am. Law Rev. 719, at p. 735.}

The Workmen's Compensation Act of 1897 was based upon, and introduced a new and somewhat startling principle.\footnote{Ruegg, On Employers' Liability and Workmen's Compensation, (8th ed.), p. 263.}

... the law, lastly, secures for one class of the community an advantage, as regards insurance against accidents, which other classes can obtain only at their own expense. ... The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status.\footnote{Dicey, Law and Public Opinion in England, pp. 251-83.}

... There suddenly arises from all sides an apparently just claim that a common law system of rules, which has occupied more than three hundred years in building up, is ethically bad and economically unsound, should be thrown into the scrap-heap with other worn-out machinery, and there should be substituted a new system based on wholly different principles unknown to the common or any other law until about twenty-five years ago.\footnote{Frank Streeter of the New Hampshire Bar, Proceedings of the Maine State Bar Association, 1910-11, p. 33.}

It has been said of the Act that it has introduced a novel principle; but I consider that a misleading euphemism. So far from introducing a principle it has constituted a most unscientific departure from all the principles which make up and should make up the law of contract and tort.\footnote{Julius Herschfeld, (1912), 13 J. of the Soc. of Comp. Legis. 119.}

As so often happens with our profession which tends to look upon change with distaste and often with vigilant repugnance, time has proved all these forebodings to have been ill founded. The new order has proved to be better than the old.

III

The Province of Ontario claims that it was the first jurisdiction to develop a really comprehensive Workmen's Compensation scheme based on liability without fault. The administration is entirely removed from the courts and placed in the hands of an administrative tribunal. It is unnecessary to discuss in detail the provisions of the legislation. It is sufficient to say that the first Act passed in 1912 was the result of a Royal Commission presided over by Sir William Meredith, Chief Justice of Ontario. The Act when it was passed was endorsed by both employers and employees and continues to be en-
The Motor Car and the Law

dorsed by both bodies. It has been reinforced by the recommendations of two subsequent Royal Commissions.60

The Act is divided into two parts. Most employers and workmen come under Part I. Where a workman is injured in the course of employment to which Part I applies, the employer is liable to provide or pay compensation in the manner or to the extent provided in the Act. These payments are made from a fund provided by assessments made on employers. All right of action against the employer is taken away.61

The Act does not apply where the injury does not disable the workman from earning full wages at the work at which he is employed for three calendar days or where the injury is attributable solely to "serious and wilful misconduct of the workman unless the injury results in death or serious disablement."

Where the workman is not employed in an industry coming under Part I of the Act, liability without fault is imposed on the employer for defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer. The defences of common employment, volenti non fit injuria and contributory negligence are not available to employers coming under Part II of the Act but contributory negligence of the workman may be taken into account in assessing damages. The Act does not apply to farming operations nor to domestic or menial services. These employees are left to their common law rights.

Notwithstanding the legalistic attacks on the principle of liability without fault introduced by the Workmen's Compensation Acts of 50 years ago, every province in Canada has adopted legislation of this character. Likewise, every State in the United States of America and every industrial country in the Western world has workmen's compensation legislation of some sort. In many countries Workmen's Compensation has become part of a comprehensive social security scheme.

The inescapable fact is that with the Industrial Revolution and the mechanization of industry new conditions evolved at the beginning of the 20th century that made it imperative that other means be devised for determining compensation for injured workmen than through the prevailing doctrines of the common law and the prevailing judicial procedures. Experience made it clear that the law of torts as administered in the courts was inadequate to serve the purposes of the prevailing "necessities of the time". The means that have been devised may not be entirely satisfactory but after 50 years' experience little support could be gained today for any move to return

61 R.S.O. 1960, c. 437, s. 13.
to the principle of liability of employers dependent on proof of fault determined in the ordinary courts. The invention of the steam engine and the resultant mechanization of industry which had accelerated the expansion of the doctrine of no liability except on proof of fault by the mid-19th century were the very forces that, because of their rapid development, made it necessary to return to the doctrine of strict liability for industrial accidents by the end of that century.

Just as mechanization brought about a revolution in industry during the 19th century, the combustion engine and the mechanization of the means of transportation on the highways have brought about a revolution in the use of the highways during the first half of the 20th century. This revolution raises the same questions with respect to accidents caused in the operation of motor vehicles as were raised throughout the western world 60 years ago with respect to industrial injuries caused to workmen. Today we ask ourselves the same question as was asked then: Is the law of torts as it is administered in the courts adequate to do justice to those who suffer injuries by reason of motor vehicles on the highways? To this I would add another question and probably a more important one: Are we in fact really administering the law of torts at all in this field of accident liability?

The use of the motor vehicle as a popular means of transportation of goods and persons was quite unknown when the principles of the law of negligence were being developed. The high speed motor vehicle in general use, operating on hard surfaced highways as developed during the last 50 years, has introduced factors making former procedures and former principles extraordinarily difficult to apply. The common law doctrines as applied to horse-drawn vehicles or even to ox carts in use 100 years ago may have theoretical application to the operation of fast moving motor vehicles some of which in fact move at the legal rate of 60 miles per hour and in some places at an annual hourly average of 2,830 past a given point for every hour in the year, but actual precise application is not possible.

Recognizing the inadequacy of the common law, the legislature has made many changes in the law and it has defined many duties. Some of the changes have simplified the task of administering justice between man and man, some have made it more difficult, while others have denied justice to injured victims of motor vehicle accidents altogether. The legislators have gone to extremes by, in effect, acknowledging the principle of liability without proof of fault to be applicable to certain cases while in others all right to recover even where fault is either proved or admitted has been taken away.

The first legislation regulating motor vehicles in Ontario recognized the operation of a motor vehicle as something attended by extraordinary danger. It provided:

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63 Statutes of Ontario, 6 Edw. VII, c. 46, passed in 1906.
When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of such vehicle.

This shift of the onus of proof was for all practical purposes a reversion to the law of Weaver v. Ward. It was more than a halfway move toward liability without fault. The difficulties of applying such a statutory onus to cases where there were collisions between motor vehicles are quite apparent. By an amendment in 1923, collisions between motor vehicles were excluded from its application, and in 1926 actions brought by passengers in motor vehicles in respect of injuries sustained while a passenger were likewise excluded.

The standard of proof required to disprove negligence where the Act now applies, virtually amounts to a standard of proof beyond a reasonable doubt. The onus is not a shifting onus. It remains on the defendant to the end of the case. If at the end of the case the mind of the tribunal of fact is in a condition of doubt as to whether the defendant has proved that the injuries sustained by the plaintiff did not arise through negligence or improper conduct on the part of the defendant, the doubt must be resolved in favour of the plaintiff.

The jury is not required to find any particular negligence on the part of the defendant but it is only required to direct its mind to whether negligence or improper conduct has been disproved; each jurymen may have a different reason for coming to a conclusion that negligence has not been disproved and each may base his verdict on any arbitrary ground he wishes as long as there is any evidence to support the verdict of the jury. In effect, this section gives the jury a power to act arbitrarily and to virtually impose strict liability, although it is not so declared by statute.

With respect to owners of motor vehicles, liability is imposed without proof of either fault or the common law relationship of master and servant. The driver's negligence is imposed on the owner upon mere proof of possession unless the owner proves that possession is without his consent. Such legislation would have caused great distress to Dr. Baty who fifty years ago believed that the common law doctrine of the vicarious liability of the employer for the acts of his servant done in the course of his employment was all quite wrong.

On the other hand, all right of action based on negligence against the driver of a motor vehicle is taken away where the injured party is "being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle," except where the vehicle is operated in the business of carrying passengers for compensation. It is difficult to justify this legislation on any principle of law or justice. If my

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64 Statutes of Ontario, 1923, c. 48, s. 43(2).
65 Now R.S.O. 1960, c. 172, s. 105(2).
67 The Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(1).
69 The Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(2).
neighbour asks me to ride downtown with him in his motor car the common law imposes on him a duty to drive carefully but the law of Ontario says that I take the risk of his negligent driving. If I find that he is intoxicated and I attempt to leave his motor car while he is stopped at a traffic light and even if he recklessly moves the motor car while I am alighting and I am injured, I cannot recover, but if I succeed in alighting safely and he runs over me after I have alighted I can recover upon mere proof that the accident happened, unless he disproves his negligence.

This legislation cannot be supported on any theory of assumption of the risk. It applies equally to an adult, a child of tender years and an infant in arms. The legislation was a mere concession to expediency. History shows that when motor vehicle accident insurance became general, owners and drivers did not have the same urge to vigorously defend passenger accident cases as the loss was falling on the insurer. The ordinary law of torts was so difficult to apply and administer that it was felt necessary for the Legislature to intervene. It intervened in the simplest way and in a partisan way by destroying all right of action by the injured party. It is true that there may have been dishonest claims but the innocent were made to suffer with the guilty. The principle of absolute liability is applied in the reverse—there is absolutely no liability.

In 192470 the law of the Admiralty Courts, which has its origin in the civil law, was adopted in Ontario by providing for the apportionment of negligence where the court finds that both the plaintiff and the defendant are at fault. This relieved hardship on plaintiffs who would otherwise be deprived of all right to recover merely on the proof of some contributory negligence on their part, but as applied to motor vehicle cases it introduced a wide area for speculative guesswork on the part of judges and juries. For example, let us examine the standard questions submitted to a jury where there is trial by jury and by a judge to himself where the case is tried without a jury. In a simple case where an action is brought by a pedestrian for injuries sustained by reason of the operation of a motor vehicle on a highway, questions of the following type are submitted:

(1) Has the defendant satisfied you that there was no negligence or improper conduct on his part which caused or contributed to the injuries sustained by the plaintiff?
Answer yes or no.
(2) Do you find any negligence on the part of the plaintiff which caused or contributed to the injuries sustained by him?
Answer yes or no.
(3) If your answer to question 2 is 'yes' in what did such negligence consist? State fully.
(4) If your answer to question 1 is 'no' and question 2 is 'yes' how do you fix the respective degrees of fault?

<table>
<thead>
<tr>
<th></th>
<th>Defendant</th>
<th>Plaintiff</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td></td>
<td></td>
<td>100%</td>
</tr>
</tbody>
</table>

70 14 Geo. V, c. 32, now as amended, R.S.O. 1960, c. 261.
Irrespective of the answers to the foregoing questions, at what amount do you assess the total damages sustained by the plaintiff?

In putting the onus on the owner or driver of the motor vehicle the words in The Highway Traffic Act require the defendant to disprove “negligence or improper conduct”, while the words used in The Negligence Act requiring apportionment of fault are “fault or negligence”. I have never been quite able to understand what these alternatives mean. The words “improper conduct” are used in the one statute as an alternative to “negligence” and in the other the word “fault” is an alternative to “negligence”. Nevertheless, the court or the jury, as the case may be, is asked to apportion the degrees of fault as if the words all mean the same thing. But even if we assume that they do mean the same thing in the law of torts, the judge or the jury is asked to fix percentages with respect to two things that are quite different as if they were the same thing. As far as the defendant is concerned, no finding of fault or negligence is necessary. All that is required is a negative finding, that is a finding that the defendant has not proved that there was no “negligence or improper conduct” on his part. On the other hand, if negligence is found on the part of the plaintiff, that negligence must be specified. The problem is, how does one apportion the degrees of fault when one is merely required a make a negative finding with respect to the defendant’s “fault” but a positive finding with respect to the plaintiff’s “fault”? What the judge or jury must do is add a negative finding to a positive finding and divide the total into percentages as if both factors were positive. I am sure that is something that would confound the best efforts of the most skilled mathematicians.

When The Negligence Act is applied to the case where a gratuitous passenger has been injured in a collision between two motor vehicles, not only is the unfortunate passenger deprived of any cause of action against his driver, but in an action against the driver-owner of the vehicle in which he was not a passenger he must suffer an apportionment of the damages based on the fault of his driver. In these cases the common law liability of joint tort feasors has been quite destroyed and in no case can the gratuitous passenger recover his full loss if it has been shown that his own driver has been negligent. It is hard to disagree with Dean Wright when he says: “To me this is not merely nonsense but unnecessary and vicious nonsense.”

This provision in The Negligence Act is due to another provision providing for contribution between joint tort feasors which would leave a way open for the passenger to reach his negligent driver indirectly as a joint tort feasor. The end does not justify the means used. It is a case of one piece of bad legislation begetting another.

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71 R.S.O. 1960, c. 172, s. 106.
The fact that all owners of motor vehicles either carry casualty insurance\textsuperscript{73} or come under the limited plan of state insurance\textsuperscript{74} has brought about great procedural changes in the application of the law of torts. In the first place, the contest in court is seldom between the injured party and the wrongdoer. It is either between the injured party and the wrongdoer's insurance company or the Government of Ontario, as represented by the Department of Transport. The conduct of the defence is taken out of the hands of the defendant. The concept of deterrence has almost entirely disappeared. The insurance company, if not defending in the name of the defendant, may be suing in the name of the insured under subrogation, or, it may be, defending in the name of the defendant and be plaintiff by counterclaim, or it may be only partly interested if the insurance is insufficient to cover the loss.

What concerns those engaged in the administration of justice most is whether the courts of justice are really exercising their true functions with respect to injuries arising out of motor vehicle accidents under the conditions that in fact exist. We ask ourselves three questions:

(1) Is the law of torts as we conceive it to be appropriate to meet the changed conditions of 1965?

(2) What is the real function that the courts are in fact performing in this field of tort law?

(3) Are the present processes of the courts the best method that can be devised to provide just compensation for injuries sustained through the operation of motor vehicles on the highways?

To answer the first question one must examine the process by which liability and compensation are determined in the motor vehicle cases that now come before the courts. In Ontario either party has a right to trial by jury in a motor vehicle accident case. This right is not always exercised but whether the case is tried by a judge sitting alone or by a judge and jury, the tribunal of fact has to determine liability arising out of conditions that were never dreamed of when the concepts of negligence were forged in the common law courts.

The court is asked to come to a conclusion on what the fictional reasonable and prudent man would have done in circumstances which more often than not required split second decisions. Witnesses are asked to tell, months or years after the event, with great accuracy, their observation of events prior to and leading up to an accident.

\textsuperscript{73} Motor vehicle insurance, although not explicitly required by the law of Ontario, is definitely recognized in meeting the proof of financial responsibility required upon the issue of a motor vehicle permit. The Highway Traffic Act, R.S.O. 1960, c. 172, s. 117.

\textsuperscript{74} If financial responsibility is not established the applicant for a motor vehicle permit must pay a premium of $20 per annum for the limited protection given to persons who may be injured through the negligence of the driver of the motor vehicle. See The Motor Vehicle Accident Claims Act, 1962, 10-11 Eliz. II, c. 84. This is a state insurance scheme for the protection of injured persons and it is not for the protection of owners or operators of motor vehicles. The injured persons may elect to claim either against the owner or driver or against the state fund, but not both.
when they had no occasion whatever to make any observations because no accident was anticipated. The evidence in the ordinary intersection case affords the best example of the unreality of evidence of this character. It would require several witnesses observing the accident armed with directors and stop watches to give the sort of evidence witnesses are continually asked to give in these cases. The witness is asked how far he was from the intersection when he looked to the right and where he was when he looked to the left, where he was when he sounded his horn and where he was when he applied the brakes. A great part of the evidence in actions arising out of motor vehicle accidents is in fact reconstruction and too often reconstruction with an eye on the result. 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.\(^75\)

I do not think Dean Wright has over-stated the case, but I would apply his comments with equal force to those cases tried by a judge without a jury.

The violence of motor vehicle accidents is such that in many cases the witnesses who might have some knowledge of how the accident happened are either killed or suffer from traumatic amnesia to such an extent that they are unable to relate any of the events leading up to or following the accident. In such cases the parties who are justly entitled to compensation may be entirely deprived of any relief because the evidence on their behalf has been extinguished by the force of the accident, or, on the other hand, liability may be imposed for the same reason where there is no fault.

The difficulties of the courts do not end with the uncertainties and imponderables in determining liability. A just and fair assessment of damages presents equal, if not greater, difficulties and equal speculation.

Many cases are comparatively simple but where there has been a serious injury or a fatal injury the judgment of the court, final as it is, must in respect of general damages be based largely on conjecture.

What is just compensation for a child that has lost an eye, or a young wife and family that have lost the breadwinner, or a farmer that has lost an arm, or a young mother that is paralyzed for life? Often the compensation is determined by the limitation of the defendant's insurance policy. In the case of the child who has lost an eye it may, through accident or disease, lose the other eye. The court is asked to take this into consideration. What does that mean in dollars and cents? The young wife may marry again or she may not. The court is asked to take that into consideration. What does that mean in dollars and cents? Likewise, the young farmer who has

lost his arm may be so handicapped that he has to give up his farm but he may become a drover and he may be much better off financially. How can a just result be arrived at by considering unknown and speculative factors? Although these difficulties arise in assessing damages in all personal injury cases, they are particularly emphasized in motor vehicle cases as they were emphasized in the common law employers' liability cases. In those cases the difficulties were resolved in Ontario by providing for disability allowances payable out of the compensation fund according to the continuance of the disability.

IV

All the hazards of proof of liability in motor vehicle accident cases and the difficulties in assessing damages have united with the growth of casualty insurance during the last fifty years to reduce the use of the processes of administering justice to little more than an instrument in the adjustment of claims, be the adjustment between individuals or between individuals and insurance companies or between individuals and the Department of Transport.

This is amply demonstrated by the experience in the County of York in the Province of Ontario, which is quite typical of that throughout the Province. In the year 1964, which was not an unusual year,

- 458 actions arising out of motor vehicle accidents were entered for trial for the Winter Assizes—of these 19 were tried and 128 were settled;
- 438 were entered for the Spring Assizes—of these 25 were tried and 116 were settled;
- 548 were entered for the Autumn Assizes—of these 26 were tried and 103 were settled.

Actions not disposed of at a particular Assize were either among those that were re-set down for trial at the next Assize or were disposed of without further reference to the court. The proportion re-set down cannot be readily ascertained. The experience of the year 1964 was quite similar to previous years. It is a fair estimate that less than 15% of actions commenced that arise out of motor vehicle accidents are ever tried.

These facts show that the normal processes of the courts really do not function in this field of law to serve the public according to their intended purposes.

In many jurisdictions in the United States of America procedures have been adopted whereby the judges preside over settlement conferences and hold pre-trial hearings which are intended to promote settlements. This is a procedure that is alien to a true process of administering justice according to law. The proper and primary function of a court of justice is not to provide a judicial conciliation but to try cases. It is normal and it is desirable that many cases be settled, even after an action has been commenced. But when only a small fraction of the cases that have gone the whole process of being prepared and set down for trial and are on the list for trial...
with the attendant cost to the litigants, actually go on for trial, the
court process is being used for other than judicial purposes. It is
not too strong to say that it is being used as a threat to bring about
an adjustment rather than a means of adjudication.

The language Mr. Young B. Smith used in commenting on the
Report made to the Columbia University Council for research in the
Social Sciences by the Committee to Study Compensation for Auto-
mobile Accidents, which studied and reported on the administration
of justice in relation to compensation for injuries sustained in motor
vehicle accidents is quite applicable to conditions in Ontario today.
He said:

To borrow the language of Dean Pound, the report may be aptly
described as a study of the law in action as distinguished from the law
in books. As such, it demonstrates convincingly that whatever may be
said in favour of a social policy which predicates liability upon fault
and contemplates adequate compensation for injuries thus caused, that
policy is not carried out under existing law.\textsuperscript{76}

Suggestions have been made from time to time that there should
be some form of pre-trial after actions have been entered for trial
to make sure that the action is ready for trial and to bring plaintiffs
and defendants together with a view to promoting a settlement.
The adoption of such a proposal, instead of expediting trials would
provide a means of delay, increase costs and give greater opportunity
to put pressure on one side or the other to bring about a settlement.
Such pre-trial procedure is just a further prostitution of the judicial
process. The judicial function is not to intimidate litigants into settle-
ment but to preside over trials and decide cases. It is quite true that
when the presiding judge has heard sufficient of the facts at the trial
he may sometimes by wise suggestion enable parties to adjust their
difficulties, but that is a usefulness that a judge should reserve for
exceptional cases. The problems arising out of motor vehicle accidents
cannot be solved by merely aggravating the misuse of the courts.

Motor vehicle accident facts demonstrate quite clearly the
pressure of the "felt necessities of the time" in this realm of tort
law. In Ontario, with a population of about 8,000,000, there is one
registered motor vehicle for every four of the population. In the
year 1964 there were 54,560 persons injured in motor vehicle accidents
and 1,424 persons were killed.\textsuperscript{77} The increase during the last ten
years in persons killed and injured has been over 100\%, and during
the last two years it has been 14\% annually.

In these circumstances the orderly judicial process of applying
the law of torts and the laws of evidence has proved quite inadequate
to provide prompt and just service to the public in determining
liability and just compensation. Since the processes of law have
not afforded injured persons effective means of relief they have been

\textsuperscript{76} Compensation for Automobile Accidents: A Symposium (1932), 32
Col. Law Rev. 785, at p. 786.

\textsuperscript{77} Accident Facts, published by the Ontario Department of Transport.
forced to resort to the well-known methods used in the Middle East in the retail trade—bargaining. The ordinary judicial procedure has become only a tool used in the bargaining procedure. One of the unfortunate things in this procedure is that the injured person arrives late and is seldom in an equal bargaining position. He has been recovering from his injuries and he has already been weighed down with anxiety through financial loss due to the accident. In addition, the facts as related may or may not be true. He is faced with all the uncertainties of a lawsuit, a split verdict and a very considerable risk as to costs—a risk that can be greatly increased by the defendant paying money into court. In addition, the accident may have destroyed his best evidence. In the result, in considerably over 90% of the cases liability is not determined and compensation is not fixed by any legal procedure but by a mere process of negotiation.

These facts demonstrate that in the field of personal injuries through the operation of motor vehicles on the highways the ordinary courts have been proved to be incapable of administering justice in its traditional and accepted sense. That being true, the question is, what is the alternative? Canadian experience supports three alternatives:

1. The scheme that has been in effect in the Province of Saskatchewan since 1946.78

2. The recommendation of the Joint Committee of the Ontario Legislature made in 1963.

3. A plan based on The Workmen's Compensation Act of Ontario and similar acts in force in all the Provinces of Canada.

The Saskatchewan plan provides for a state-operated insurance scheme providing limited compensation based on liability without fault with the right to sue in the courts in an action based on fault where the state compensation is deemed insufficient. In such cases the amount paid by the state is credited on any judgment obtained. This in effect is a state group accident insurance policy with benefits within certain prescribed limits. All persons are insured to the extent of the policy against injury arising out of an accident within the Province caused by reason of the operation of a motor vehicle on the highway. For the insurance, operators of motor vehicles pay a very reasonable premium. The fact that the scheme has been in effect in Saskatchewan for almost 19 years is some proof that the people of that Province are satisfied with its operation. It is quite safe to say that there has been no responsible suggestion in the Province to return to the common law procedure in effect in other Provinces in Canada.

In 1963 an all-party Select Committee of the Ontario Legislature recommended the adoption of a plan involving limited liability without fault based on the Saskatchewan plan through insurance carried in private insurance companies. Under the plan the owners of motor vehicles would pay an increased premium to give an all-inclusive limited protection. The benefits suggested are as follows:

**Subsection 1—Death Benefits**

<table>
<thead>
<tr>
<th>Principal Sum</th>
<th>Additional</th>
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</thead>
<tbody>
<tr>
<td>Married Male</td>
<td></td>
</tr>
<tr>
<td>18 years to 59 years</td>
<td>$5,000</td>
</tr>
<tr>
<td>60 years to 70 years</td>
<td>3,000</td>
</tr>
<tr>
<td>70 years and over</td>
<td>2,000</td>
</tr>
<tr>
<td>Married Female</td>
<td></td>
</tr>
<tr>
<td>18 years to 59 years</td>
<td>2,500</td>
</tr>
<tr>
<td>60 years to 69 years</td>
<td>1,500</td>
</tr>
<tr>
<td>70 years and over</td>
<td>1,000</td>
</tr>
</tbody>
</table>

(if deceased is a widower or widow, the appropriate principal sum for first dependent plus $1,000 for each additional dependent. If deceased is an unmarried person 18 years or over with dependent(s) the appropriate principal sum with $1,000 for each additional dependent.)

Child With Parent Living

<table>
<thead>
<tr>
<th>Principal Sum</th>
<th>Additional</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 years and under</td>
<td>$250</td>
</tr>
<tr>
<td>5 to 17 years inclusive</td>
<td>500</td>
</tr>
</tbody>
</table>

**Subsection 2—Dismemberment and loss of sight**

- Loss of two hands or feet $5,000
- Loss of entire sight of both eyes 5,000
- Loss of one hand and one foot 5,000
- Loss of one arm above elbow 3,750
- Loss of one leg above knee 3,750
- Loss of one hand or foot 2,500
- Loss of entire sight of one eye 2,500

**Subsection 3—Medical payments**

Indemnity to the extent of $2,000 for reasonable expenses incurred for necessary medical, surgical, dental, ambulance, hospital (excess of payments under Ontario Hospital Service Commission payments) and professional nursing.

**Subsection 4—Funeral Expenses**

$350 for each person.

**Subsection 5—Weekly Benefits**

- $35 per week payable to an employed person when totally disabled from work subject to a limit of 104 weeks.
  (If at the expiry of the said 104 weeks such person establishes a total and permanent disability, $35 per week will be paid for an additional 104 weeks).
- $25 per week payable to a housewife when totally disabled from work subject to a limit of 12 weeks.
  In both cases there would be no payment for the first seven days’ disability.

The Committee recommended:

(1) That coverages along the foregoing lines be made an integral and mandatory part of the standard automobile policy sold in the Province of Ontario.

(2) That any payment of a benefit under the foregoing coverages be offset against damages recoverable under any third party liability coverage.
This plan has not yet been adopted by the Legislature.

The third suggestion, based on the experience in Ontario for 50 years in the operation of The Workmen's Compensation Act, is the most comprehensive alternative to the common law procedure.

The philosophy adopted by the Board operating under the Act is that the injured workman ceases to be a social asset and becomes a social liability. To that end the Act and its administration are designed to accomplish two purposes:

(1) To restore the workman to society as a social asset.
(2) To provide means to assist him and his dependents during his disability.

To accomplish these purposes workmen's compensation is removed from the private insurance field, through the employers' paying an annual assessment into an exclusive non-profit fund provided through compulsory collective liability. This is not the place to enter on a discussion of the details of the Act or its administration. It is sufficient to say that after 50 years' experience there is no body of public opinion that would support any other system for providing compensation for injured workmen. With the emphasis on rehabilitation the Board operates its own hospital and its own rehabilitation centre. The best medical service is freely provided and paid for. The workman may select his own doctor and in addition the Board will provide the services of specialists wherever required. Patients are sent for hundreds of miles to receive special treatment that would never be available to them under any system of pecuniary compensation based on fault. The rehabilitation ratio has been most satisfactory. Ontario has the lowest percentage of permanent disability of any workmen's compensation authority on the American continent reporting to the United States Bureau of Standards. The following is a comparative table of permanent disability cases:

<table>
<thead>
<tr>
<th>State</th>
<th>Permanent Disability Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>30.59</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>29.62</td>
</tr>
<tr>
<td>Texas</td>
<td>24.02</td>
</tr>
<tr>
<td>Missouri</td>
<td>19.02</td>
</tr>
<tr>
<td>Connecticut</td>
<td>17.89</td>
</tr>
<tr>
<td>Indiana</td>
<td>17.80</td>
</tr>
<tr>
<td>Kansas</td>
<td>17.59</td>
</tr>
<tr>
<td>Minnesota</td>
<td>16.63</td>
</tr>
<tr>
<td>British Columbia</td>
<td>5.12</td>
</tr>
<tr>
<td>Alberta</td>
<td>4.67</td>
</tr>
<tr>
<td>Ontario</td>
<td>3.77</td>
</tr>
</tbody>
</table>

This table emphasizes the economical importance of well supervised medical treatment and rehabilitation.

During the period of rehabilitation the workman is paid compensation for loss of wages at the rate of 75% of his average earnings, limited to $6,000 per year. In the case of permanent disability, pensions are fixed according to the degree of this disability.
Pensions are also provided for dependents of workmen who die from industrial injuries or certain industrial diseases.

Approximately 65,000 compensatable claims are disposed of annually. In the year 1963, the total benefits paid amounted to $60,260,000.79

Of the total assessments 89.5% is paid out to injured workmen or their dependents, 3.5% is paid for accident prevention and 7.2% for the costs of administration.

A fair estimate, derived from reliable sources, of the amount paid annually for compensation for personal injuries sustained arising out of the operation of motor vehicles in Ontario is now approximately $35,000,000.

No rash conclusions should be drawn from a comparison of the amount paid for compensation for workmen's injuries and the amount paid out to compensate those who have sustained injury in motor vehicle accidents as other factors must be taken into consideration, for example: the costs of litigation and the portion of the insurance premium that is allotted to administration and the number of injured who receive no compensation. Nevertheless, the comparison does demonstrate that the experience of the Workmen's Compensation Board proves that the problem of compensating for injuries sustained through the operation of motor vehicles is capable of being solved on the same principles as the problem of compensating for injuries sustained in industrial accidents has been solved. This is particularly true in the Province of Ontario which now provides province-wide hospitalization and is moving toward a complete medical care plan.

In an impressive address delivered before the Southern Tasmanian Bar Association in October 1963, Sir John Barry discussed many aspects of the problem of compensation without liability. In that address he referred to the Saskatchewan Act as embodying the scheme most valuable for consideration. Of all schemes in effect I think this is true but in the words of Sir William Meredith, the father of all Workmen's Compensation law in Canada, I would say,

Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided.80

I think the Saskatchewan scheme and the scheme proposed by the Ontario Select Committee may rightfully be termed “half measures” that do not remove injustice and they fail to apply the most efficient means of restoring injured persons as social assets.

Modern social and industrial conditions have imposed on every member of society the risk of using the highways as they are today. Compensation for injuries sustained by reason of motor vehicles irrespective of fault is a burden that can well be distributed among

all those for whose benefit the highways have been developed. Momentary inattention or error in judgment are faults common to everyone, but under the law as it is these may mean the difference between compensation or no compensation. On the other hand, any solution of this problem should not provide compensation for anyone who has been injured through a reckless disregard for his own safety.

Since the theory of deterrence in this branch of tort law has become archaic a different approach to the problem may be taken. The solution need not and in my view should not deprive injured persons of all access to the courts nor should it deprive the courts of their supervisory powers.

The difficulties that arise in administering the law of torts as it relates to personal injuries sustained in motor vehicle accidents can neither be resolved by disregarding them nor by building bigger court houses and appointing more judges. They are far too fundamental for that. These difficulties involve the basic question of administering justice according to law.

Lawyers and those who will be lawyers must realize that when the public is confronted with problems of this character solutions are found and it is much better that the solutions be arrived at with the co-operation of the legal profession than without it. The sole objective should be to find by what means the public can best be served, always remembering the words of Sir James Stephen, one of the great lawyers and judges of all time, quoted by Sir Frederick Pollock, another of the greatest English lawyers, in writing to an equally great American lawyer and judge, Mr. Justice Holmes:

... laws exist not for the scientific satisfaction of the legal mind, but for the convenience of the lay people...\(^{81}\)

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