The Woodhouse Report on Compensation for Personal injury in New Zealand

BY S. L. ANDERSON

In December 1967 the Commission of Inquiry into Compensation for Personal Injury,[1] chaired by Mr Justice Woodhouse, reported to the Government. Specifically required by its terms of reference to report on the methods of compensation for accidents "suffered by persons in employment" the Commission implemented a general authority to investigate any relevant associated matters to examine the operation of all forms of compensation in New Zealand for any accident whether occurring in the course of employment or otherwise.

The general conclusion of the Commission, after examining in turn the present operation of the common law damages action, the Workers' Compensation Legislation and relevant provisions of the Social Security Act was that these methods were an inadequate, capricious and fragmented response[2] to the ever-increasing problem of personal injury resulting from accidents which are largely an unavoidable incident of a modern industrialised and technological society.

To replace the present system the Commission proposed a scheme of comprehensive compensation for all accidents irrespective of fault in the legal sense and regardless of cause, paid for by the community as a whole and administered by an independent authority.

This radical proposal was justified on the general principle that in a modern state compensating the accident victim should be a community responsibility aimed at rehabilitating[3] the victim as far as is physically

[1] Printed by the New Zealand Government Printer, December 1967 referred to in the footnotes as Report.—the figure following is a paragraph reference.

[2] Report 1.

[3] "rehabilitation" is defined in the Report, 354, as "The restoration of the handicapped to the fullest physical, mental, social, vocational and economic usefulness of which they are capable".

and economically possible so that he can once more work usefully within the community. As the Woodhouse Report puts it "the toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole."[4] Such is the fundamental premise upon which the recommendations in the Report are based.

At this juncture, however, it is proposed to examine the Report's objections to the present system and then to outline in more detail the proposals for a comprehensive compensation scheme.

The Operation of Existing Procedures for Compensating the Accident Victim

A. The Common Law

Under the common law the defendant is deemed to have been at fault and is thus liable to compensate the plaintiff for his injuries if the latter can establish a duty of care between the parties which requires proof of:

(i) a causal relationship between the defendant's act and his own injury;

(ii) the defendant's act is such as a reasonable man assessed by an objective standard would not be expected to have done in the circumstances.

In New Zealand, it is to be noted, where a defendant can prove contributory negligence on the part of the plaintiff, the damages awarded to the latter are reduced proportionately to the proven negligence on his part.[5]

The object of the damages thus awarded is to indemnify or compensate the plaintiff for the loss he has suffered, restoring him, as far as money can do that, to an equivalent or to the same relative position that he was in before the accident.[6]

Damages are awarded under two categories:

special damages i.e. damages for expenses incurred before the trial, ascertainable at the trial and specifically pleaded,

general damages i.e. an account of the damages as assessed under the following broad heads

(a) actual economic loss, including future losses by reason of diminished earning capacity

(b) personal loss including pain and suffering, loss of capacity to enjoy life.

[4] *ibid.*, 1.

[5] *Contributory Negligence Act*, 1947. s.3.

[6] See *Admiralty Commissioners* v. *S.S. Valeria* [1922]2 A.C 242, 248 per Viscount Dunedin; *British Transport Commission* v. *Gourley* [1956] A.C. 185, 208 per Lord Goddard.

(a) Problems in Principle

Put in a social context the development of the tort of negligence based on the principle of fault has been said to have represented an indirect value judgment on the part of the Courts, reflecting current social and economic theory that it was in the better interests of the advancing economy to subordinate the security of individuals who happened to be casualties of the machine age, than to fetter enterprise by burdening it with the cost of inevitable accidents.[7]

Establishment of fault in a moral sense of "blame worthiness" was considered the only justification for shifting the plaintiff's loss to the defendant, and as a result the primary function of the tort of negligence was seen as admonitory and deterrent.[8] As one writer puts it, tort law was seen as a regime of prevention designed to control the future conduct of the community in general. Salmond was of the opinion that "pecuniary compensation is not in itself the ultimate object or sufficient justification of legal liability. It is simply the instrument by which the law fulfils its purpose of penal coercion."[9]

The justification of the fault theory, therefore, was that one who was morally blameworthy should pay, irrespective of his intention in relation to the consequences of his act.

This approach however has been carried beyond its logical conclusion that damages should be awarded to the plaintiff according to the type of conduct which is said to justify them. Instead it is clear that under the fault system today the extent of liability is not measured by the quality of the defendant's conduct but by its results.[10] This apparent contradiction can be seen to be a compromise reached by the common law between the desire to protect the individual from unreasonable harm and the desire on the grounds of public policy to limit liability to the situation where a defendant can be said to be at fault.

Fault in the sense of moral wrongdoing in today's law, however, has faded into the background. This is the result of two main factors within the law namely the objectivization of fault in determining liability for damages, and liability insurance, both of which have had the cumulative result of widening the area within which a defendant is said to have been at fault.

The result of measuring the defendant's conduct against an objective reasonable standard of care, rather than being concerned with mental attitudes or even the defendant's ability to reach the required standard[11] is that the law has moved, albeit indirectly, from being concerned

7 Fleming, *The Law of Torts* (3rd edition), p. 8.
8 Williams, "The Aims of The Law of Tort" [1951] Current Legal Problems, 137.
9 Cited in Williams, *op. cit.*, 144.
10 Report, 85.
11 *ibid*, 87.

solely with the defendant's conduct to considering the result of that conduct upon the plaintiff's position as a factor in considering the defendant's liability.

A later development is liability insurance where a potential defendant can insure against the possibility of an adverse judgment in a damages claim and therefore protect himself against the burden of tortious liability. Originally introduced as compulsory under legislation in particular fields as a means of ensuring the financial protection of successful plaintiffs it has had the effect of distributing the loss from the immediate defendant to a group of similarly placed individuals who contribute to the fund from which the damage award is satisfied.

In these circumstances the fault principle can serve no ethical purpose.[12] While the principle purports merely to shift the loss between the plaintiff and the defendant it is in effect being used as a means of determining when funds compulsorily contributed by a specified class within the community will be paid out.

Furthermore the influence of the above two factors has meant that any deterrent quality found in the imposition of liability on the basis of fault has been rendered nugatory. It has been argued that under the present system the threat of a damages claim provides financial incentive to be careful and that there is a social stigma against negligent defendants which potential defendants are anxious to avoid.

The Woodhouse Report dismisses these arguments in peremptory fashion.[13] The second argument has no basis when the actual rather than the theoretical operation of the fault principle is considered; the first argument is inapplicable when in the industrial and motor accident field, compulsory insurance exists which serves to relieve the defendant of the actual burden of the loss.

(b) *Procedural Defects*

The common law procedure by which a plaintiff endeavours to prove fault on the part of the defendant can also be objected to, if one recalls that compensation of the plaintiff's injury is the purported aim of the law.

(i) *The Risks of Litigation*—The Woodhouse Report rejects as unrealistic the argument in favour of the common law damages action that "awards will reflect with reasonable accuracy the loss

12 See [1968] 3 Recent Law 14—"The ethical link between 'fault' and the payment of damages presupposes that both the fault and the payment are predicated of the same person."

13 Report, 90—Williams, *op. cit.*, 165, while admitting that the existence of liability insurance is consistent only with compensation, is of the opinion that the deterrent aim of tort is by no means absent in the insurance situation. The latter aim is indirectly applied by means of the no-claims bonus and the raising of premiums.

that they are intended to indemnify."[14] Three factors, however lead to a different conclusion. They are:

(a) *The operation of contributory negligence* which can mean that a plaintiff will receive far less than his assessed loss. Where insurance operates this reduction seems unjustifiable being of no advantage to the defendant personally. In fact questions of contribution usually result in restrictions of liability of the insurance company[15] which after all is only paying out of funds compulsorily paid to it by the general class of the public involved in the relevant activity.

(b) *Problems of proof* mean that there is much disparity in awards for similar injuries, e.g. fallibility of witnesses and inaccuracy of recollection of events, or the misfortune of having no witnesses at all, may result in the unacceptable situation of accident victims being "compensated" for similar injuries by widely varying sums.

(c) *Contentious attitudes of insurance companies* not unnaturally increase proportionately to the seriousness of the injury (the claim as a consequence being higher). Therefore it may be that an injured plaintiff in dire need of adequate compensation is inadequately provided for by his damages action.

(ii) *The Influence of Juries*—Though a trial judge may carefully explain to a Jury the legal basis upon which the allocation of responsibility and the assessment of damages are to be made, a verdict is more likely to be based "on the two plain and substantial facts that the plaintiff has been injured and that the defendant is insured."[16] Therefore, in cases which go to trial, the standard of care based upon the reasonable man may give way to a much higher standard which can not in any event be met. This is summed up by one writer in the following—"A supercritical standard is frequently applied to the driver's conduct in order to characterize it as negligent and therefore allow the victim to reach the insurance proceeds."[17]

(iii) *Delay*—Necessarily a time lapse exists between the injury and recovery of compensation in order to ascertain the nature and extent of the injury so that a proper claim may be formulated.[18] Particularly in total incapacity cases however this delay plus the fact that proving fault is a condition precedent to compensation

[14] Report, 92.
[15] Wright, "The Adequacy of the Law of Torts" (1961) C.L.J. 44, 58.
[16] H. R. C. Wild, Report of the New Zealand Committee on Absolute Liability (1963), 46.
[17] Keeton and O'Connell, "Basic Protection" (1965) 78 Harv. L. R.329, 340.
[18] The more serious the injury, usually the longer the delay because of the larger sums involved and the probability of court proceedings.

means that a disproportionate burden is placed on the injured plaintiff. Not only is this burden economic but it is also psychological, often resulting in a negative neurasthenic attitude developing on the part of the plaintiff towards his position.[19]

The Woodhouse Report also criticises the system of awarding lump sum payments to successful plaintiffs. While recognising the arguments advanced in favour of lump sum awards,[20] namely the administrative convenience of bringing a claim to finality and the advantage to the plaintiff of having capital in hand with which to organise his affairs, because of the conjectural nature of damage awards for future loss and the impossibility of subsequent review, it has happened that a number of plaintiffs are left inadequately compensated because of underestimation.[21]

The result of the foregoing difficulties, which can be seen to revolve around the practical application of the fault principle, is that under the common law only a small proportion of claimants receive any benefit at all and of those the great majority receive less than a complete indemnity. The Woodhouse Report concludes that the common law action is "ill suited to the reasonable expectations of men and women who become the fortuitous victims of accident in a complex and fast-moving society."[22]

B. Statutory Compensation for Industrial Injury

In the field of Workers' Compensation New Zealand has adopted in statutory form the concept of distributing rather than shifting the loss. An employer is required by statute[23] to insure against his potential liability without fault, the liability being based on the fact of his employee's injury arising out of or in the course of his employment.

While this form of social insurance, first introduced in 1900, has been accepted as an incidental cost of industrial development, and has operated over a wide area, it has two important limitations. These relating to amounts available for compensation are:

(i) The maximum weekly payment is $25.00.[24]

(ii) There is a maximum period of six years during which maximum payment can be made.[25]

19 Logically, compensation in order to achieve its purpose and to facilitate rehabilitation of the accident victim should be as rapid as possible—the litigious nature of proceedings only accentuates a plaintiff's burden.

20 Report, 117, 118.

21 There is also the social problem of the successful plaintiff who makes misguided use of what is, in effect, future income in advance, with the result that he may be compelled to fall back on social security payments.

22 Report, 170.

23 *Workers' Compensation Act* 1956.

24 S.R. 1968/177

25 *Workers' Compensation Act* 1956. s.14(5).

As a consequence, any worker who considers that he may have a common law action for negligence against his employer may proceed on that basis provided that he offsets any award he receives under the statute against any damages he is awarded.

Apart from emphasising demarcation problems,[26] the Woodhouse Report criticises the operation of Workers' Compensation legislation mainly on the following grounds:

Schedule disabilities—Where specified, disabilities are proportioned on a percentage basis to total incapacity. While approving in principle a schedule method of assessment the Woodhouse Report adopts the New Zealand Law Society criticism of the present schedule[27] that it involves an attempt to lay down a scheme for payment of lump compensations "depending upon the severity of various injuries" without any reference to whether or not there is associated with any such injury any loss in earning capacity. The fact that percentages in the schedule are related to restricted amounts of compensation only exaggerates this anomaly.

Insurers—The Woodhouse Report criticizes private enterprise operating in the field of compulsory insurance, both in Workers' Compensation and in third party liability insurance. The argument is that:[28]

(i) The insurance companies can have no claim to administer a scheme given to them by government legislation, rather than obtained by successfully competing for clients.

(ii) Any such scheme is not really insurance when one considers that it is a compulsory and universal method of sharing one of the costs of a social activity.

(iii) It is unjustifiably expensive to administer any compulsory insurance scheme through private enterprise where the ratio of administration costs to compensation paid is something like 2:3.

(iv) Private enterprise can offer no central impetus in the important areas of accident prevention and rehabilitation.

Benefits under the Act—While accepting that a compensation scheme should never attempt to replace all the loss of an injured person,[29] the Woodhouse Report severely criticises the two limitations on amounts

[26] i.e. the problem of whether or not an injured plaintiff was injured in the course of, or in circumstances arising out of, this employment.

[27] Report, 197—because of the limitations mentioned any attempt to relate benefits to income becomes futile.

[28] *Ibid.*, 207–217.

[29] The three following reasons are accepted by the Report, 218
(i) certainty of compensation once injury established
(ii) provided the compensation is on a suitably generous basis it seems fair to leave part of the loss with the man himself
(iii) public opinion requires that some margin of effort should be left to the injured person as an incentive to get well and return to productive work.

payable under the Workers' Compensation Legislation mentioned above.[30]

The first, the maximum weekly payment, has the effect of bringing compensation far below the accepted level of 80% of normal earnings.

The second, the time limit upon payment, is unjustified in principle because it affects only those whose need is greatest and because it is contrary to the theory that compensation should provide some adjustment for the whole of a man's losses. In practice also it is wrong because the saving it achieves is illusory when compared with the total amount of compensation expended annually.

In the final analysis what is required is a compensation scheme which contains inherent within it the recognition that meaningful compensation increases to the extent that incapacity is severe or is protracted.[31] The priorities in any scheme, therefore, should be centred around the principle that adequate provision should be made for the larger losses in preference to the lighter injuries, the burden of which, both economic and psychological, can be borne more easily by the injured person.

In New Zealand however the trend has been for the minor injuries to be treated generously at the expense of the serious injuries. The Woodhouse Report seeks to remedy this situation with a system of wage-related payments kept to a fair but sensible level for the minor case and greatly increased for all others.[32]

C. Social Security Legislation

Under the present law it is possible to receive benefits under either of the two above methods of compensation, and in addition receive benefits under the Social Security system which provides benefits on a uniform flat-rate basis. In cases where no recovery is possible under either the Workers' Compensation or by common law damages it provides a far from adequate means of financially assisting the accident victim.

The Woodhouse Report proposes a system which seeks to remedy the problem of double compensation and the inadequacies of flat-rate benefits.

The Scheme Proposed

The above outlines the objections raised in the Woodhouse Report to the operation and effectiveness of present forms of compensating the accident victim.

Basing their proposals on two approaches—first, the acceptance

[30] Report, 224, 225.
[31] *ibid.*, 226.
[32] *ibid.*, 230.

of an order of priority of accident prevention, rehabilitation and compensation; and second the acceptance of five principles which their proposals are designed to achieve:

—community responsibility
—comprehensive entitlement
—complete rehabilitation
—real compensation
—administrative efficiency.

the Woodhouse Report proposes an overall comprehensi vecompensation scheme as mentioned in the opening paragraphs of this paper.

The general basis upon which compensation could be claimed would be where any person has received "bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned, but to the exclusion of incapacity arising from sickness or disease."[33] For assessment of compensation the Woodhouse Report proposes that as the basis of benefits a principle of loss of bodily function should be the test. This would enable the real loss to be assessed on an income-related basis as well as including indirectly the economic consequences of the loss of physical faculty to a particular individual.[24] It can be seen that this test is similar to the common law heads of damages for financial loss and loss of physical capacity.[35]

The real compensation proposed is an automatic award made in respect of any personal injury at the level of total incapacity of 80% of previous tax-paid income,[36] proportionate awards being made for partial incapacity.

Payments would be made on a periodic basis and would reach a maximum level of $120, a figure, the Report considered, at which nearly every injured person could feel that his real losses were being fairly met on the proportionate basis outlined.

For the first four weeks of injury compensation should be limited to $25 per week. After that time this limit would be removed for those still incapacitated, and in the cases of those incapacitated for eight weeks or longer compensation should be re-assessed at the full rate for the whole period of the incapacity.

[33] *ibid.*, 289. This will include therefore, the self-employed and housewives injured at home.

[34] *ibid.*, 291.

[35] But excluding the common law head of general damages for physical loss under pain and suffering, nervous shock, loss of pleasure or amenities of life and loss of expectation of life. This has been criticised as a weakness of the Woodhouse Report's proposals in that no recovery can be had under the above heads in the proposed compensation system. While it is difficult to assess any loss under the above heads, it may be possible to devise a schedule to include them as a compensatable injury, at the discretion of the Board.

[36] See the reasons for the 80% limitation under footnote 29.

The object of this provision is that those minor incapacities which drain so much from the present available compensation funds will be dealt with during this period thereby permitting real compensation for those with more serious injury.

In the case of permanent disabilities a schedule would be retained,[37] but completely revised on the basis of new severity ratings which would exclude consideration of relatively minor injuries which have no significant effect upon a man's future life or upon his earning capacity.[38]

The scheme would be administered by an independent authority. This was justified on the basis of the reasons set out on page 7 above, and would also avoid the litigious nature of the present Workers' Compensation procedure, informal and simple procedure being involved in all proceedings within the jurisdiction of the Board.

The pattern of assessment should be application, enquiry, investigation and decision at the first level; review by a review committee at the request of the claimant; an appeal to an appeal tribunal of three members, including a doctor and lawyer, which would hold *viva voce* hearings at which the claimant could be represented if he so desired; and a final appeal to members of the Board itself.[39]

The proposals of the Woodhouse Report are, as will be appreciated, radical. This however was justified on the basis of conclusions drawn from the comprehensive survey of the present methods of compensating accident victims outlined in the first part of this paper. The ideal behind the proposals is for a co-ordinated, efficient, and comprehensive response from the nation as a whole aimed at universality of coverage and minimal cost[40] compared to the benefit obtained.

Considering the purport and intent of the Woodhouse Report its findings have up to the time of writing created little public discussion. Apart from statements made by representatives of various bodies

[37] The advantage of retaining a schedule method of assessing the benefit to be received was that it achieved a fair and reasonably predetermined level of compensation.

[38] Report, 304.

[39] *ibid.*, 308, following the pattern adopted in Canada, in Ontario 1914, and British Columbia 1916. It is based on an assumption that such a process would be administered in a liberal and enlightened attitude on the part of all concerned with the decisions.

[40] The Report estimated that the proposed scheme would cost $38 million annually which was only $2 million more than the present total of funds collected for compensation purposes. The Report proposed that levies be imposed to produce a total of $41,800,000 annually, providing an approximate margin of $3 million. As well as collecting sums already contributed under the present system by insured employers, self insurers, the owners of motor vehicles, and the Health Department, levies would be made on the self-employed of an amount equal to 1% of net income, subject to an annual minimum levy of $5.00 and a maximum of $80.00, and, in respect of all holders of drivers licences, of an annual sum of $1.50—for more detail see Report Part 26.

affected following the publication of the Report, little has been said.

Perhaps because of the wide ranging effects of implementing the proposals it is a little early to expect much public debate. It is known that the three main groups affected by the proposals—the Federation of Labour, the insurance companies and the Law Society—have set up committees to investigate and report on the ramifications of the proposals in the Report.

Judging by statements made immediately after the publication of the Report however it may be some time before a government can take the political risk of implementing the Report's proposals in full. The Federation of Labour, for example, surely the body which represents the group most benefitting from the proposed scheme gave the Report only moderate support. They opposed, for example, abolition of lump sum payments; they considered that the present common law process operated to some extent as a deterrent to the careless employer; they opposed the introduction of income rather than injury related benefits, arguing that it was inequitable for two people with the same injury but in different income brackets to receive different compensation.

The insurance companies, perhaps the group most adversely affected by the proposed scheme,[41] attacked the Woodhouse Report as "comprehensive and extravagant" and oppose any proposal which means the discontinuance of "the present efficient system of compensation through private insurers."[42]

It is submitted, however, that it will take more than mere obviously self-interested arguments to rebut the convincing reasons for changing the present system produced in the Woodhouse Report.

It would not be out of place to reiterate the basic principle behind the Woodhouse Report at this point. This can be stated as the acceptance of the fact that the benefits a society gains from participation of all able-bodied citizens in productive work means that it can afford to bear the cost of losing the services of a particular individual through personal injury, rather than allocating the risks of particular conduct amongst individuals engaged in that productive activity according to the fault principle,which is demonstrably ill-suited to present conditions. If the purpose of imposing liability is to afford compensation there seems to be no reason why access to compensation should be limited according to the cause of injury—rather the injury is a fact which needs to be remedied as far as is possible in the interests of society; hence the abolition of the need to establish the existence of legal liability as a prerequisite for the payment of compensation.

[41] Just the loss of the Workers' Compensation business will cost the Insurance Companies some $15 million in turnover with administrative costs and profits of $5 million—New Zealand Economist and Taxpayer, February 1968. 4.

[42] Insurance Council Bulletin, Vol. 11, No. 9, April 1968.

It is submitted that accepting the Woodhouse Report's approach, criticism should be directed at improving rather than abandoning the proposed scheme.

A number of alternatives to the comprehensive scheme have been suggested, amongst them—

(i) Amending the present system of Workers' Compensation in terms of more appropriate benefits, and procedural amendments in the Common law, such as two separate trials, one determining negligence, the second determining damages, increased costs and trial by Judge alone.[43] The Woodhouse Report considered that mere procedural reform as an approach to the general problem "would at best only enable us to pursue the wrong objectives more efficiently."[44]

(ii) Accepting the problems and anomalies within the present system, some writers propose that the Courts should acknowledge when they are dealing with situations of "enterprise liability" i.e. where the activity which has caused the accident is dangerous yet indispensable to society and those who benefit from it are covered by liability insurance, a form of strict liability is imposed which has the result of ensuring that the victim is compensated, while distributing the loss amongst the particular group benefiting from the activity.[45] In these circumstances an individual could recover according to a schedule or on the common law basis. The imposition of strict liability which would in effect be compensation without proof of fault would be limited to those participating in the enterprise or activity which has produced the loss.

In all other circumstances however it is suggested the "foreseeability" principle, limiting liability should be retained, this being justified by the fact that as insurance does not operate, a real shifting of loss will occur in the event of fault being established. The function of tort liability in this much narrower field would in effect emphasise once again the true admonitory and deterrent function of the "fault" principle.

Briefly, therefore, the proposal is that the courts should draw a distinction between "loss-shifting" and "loss-distributing", in the

[43] See Goodhart, "A Radical Solution Proposed to Meet Auto-Accidental Litigation Delays" (1965) A.L.J. 400, 401. Suggested reforms in common law principles have been the abolition of contributory negligence and the presumption of negligence. But the basic problem is the retention of the adversary system which was designed for the purpose of assessment, determination and attribution of fault. It is, moreover, demonstrably unsuitable to serve the purpose of compensation, which is the main objective of the law.—see G. P. Barton [1966] N.Z.L.J., 220.

[44] Report, 105, citing T. G. Ison, *The Forensic Lottery*, 30.

[45] See Friedmann, *Law in a Changing Society* (1964 Pelican), 129; Fleming, *op. cit.*, 13; Wright, *op. cit.*, 51.

former retaining the common law remedy for damages, in the latter instituting, in effect, compensation without fault.

Ultimately the choice between the latter alternative and the comprehensive proposals of the Woodhouse Report is of course political. The broad social welfare ideals behind the Woodhouse Report may mean that any comprehensive scheme would prove too politically unacceptable to be implemented in full. Popular unacceptability, however, of the broad proposals does not justify no reform at all and the maintenance of an inadequate *status quo*. It is submitted, therefore, that it would be better to implement reform in respect of motor and industrial accidents, which form by far the largest number of plaintiffs in court, than to do nothing merely because political objections may be raised to the comprehensive nature of the scheme.

Appendix

In April 1969 the New Zealand Law Society held its Centennial Conference. At a panel discussion considerable division of opinion was revealed with regard to the proposals of the Woodhouse Report.

The main points of criticism were as follows:

(1) Before compensating the "comparative few" who received their injuries by accidents it would be far more just and in accordance with public opinion to raise the level of the pensions for those physically handicapped by illness or injury caused through no fault of their own. In the case of accidents the injured person should still recover from the person who causes this injury.[46]

It is submitted that this criticism misses an important point of the Woodhouse Report as to the practical operation of the "fault" principle. The injured person is only theoretically recovering his damages from the person who caused his injury. What is in fact happening is that the establishment of fault operates as a pre-condition of access to funds compulsorily contributed by members of society. It seems illogical that a system designed for real shifting of loss between the plaintiff and the defendant personally should operate to impede access to funds which represent the cost of distributing the loss within the community.

The fact that at the present moment social security payments to the physically handicapped may be inadequate should not support the continuation of the present anomalous situation in the accident compensation field.

(2) One of the most radical changes in principle involved is the treatment of the innocent and guilty on the same footing so that the classical

[46] Criticism by Mr B. McClelland, reported New Zealand Herald, 10th April 1969.
[47] See also on this problem [1968] 3 Recent Law 13, 19.

principle of common law and equity that no one should benefit from his own wrongdoing is completely upset. Why, it is argued, should the workman who removes the guard on his machine or the drunken driver receive any compensation at all for his injuries?

The Woodhouse Report however removes any question of fault with all its moral connotations from the system of compensating the accident victim. The question is whether or not *loss* has been suffered, and if answered in the affirmative adequate compensation should follow. This is because society can afford to bear the burden of this loss, except where it has been self-inflicted, because of the benefits it receives from the participation of its members in productive work. This is the community responsibility principle upon which the whole scheme is based. Questions of differing degrees of fault in assessing entitlement to compensation are inappropriate in this context.

(3) Criticism was levelled at the fact that those with comparatively minor injuries would under the new system have to accept much less compensation than they would receive under the present system particularly where common law damages were claimed.

It is submitted, however, that this criticism is unjustified. The fact that persons with comparatively minor injuries receive lesser benefits means money is available to compensate the seriously injured accident victims who under the present system, because of delays, the operation of contributory negligence and the difficulties of establishing fault may receive far from adequate compensation. The person with the lesser injury is in a much better position to bear the burden of part of his loss than a person who is seriously incapacitated. Therefore it seems only just that the latter should take priority over the former and be assured of adequate and certain compensation.

(4) The problems inherent in having compensation pensions administered by a Government Board were raised. The possibility of having a decision based on mistaken fact from which no appeal could be brought was one. The need for an "enlightened attitude" on the part of the Board administering the scheme was another. However criticisms along this line can not be said to go to the substance of the Woodhouse Report's recommendations, and merely emphasise the necessity for the provision of adequate safeguards to be set up to protect the citizen whose rights are being affected by an administrative tribunal.

(5) Finally the Woodhouse Report's assessment of the cost of the proposed new compensation scheme (which was only some $2,000,000 in excess of present costs) was described as startling when it was considered that there would be substantially greater benefits for an increased number of people. While it is clear that a careful study of the costs of any new scheme along the lines of the Woodhouse Report's

proposals will have to be undertaken before it can be instituted, it seems that under present systems providing compensation the major cost is absorbed in administration expenses and compensating the relatively minor injuries. The Woodhouse Report seeks to lay the emphasis, however, on giving adequate compensation to the seriously injured accident victim and cutting administration costs to a minimum. It is because of the large saving in having a centrally administered fund and the fact that serious injuries are nowhere near as frequent as minor injuries that the cost of the proposals does not exceed the present system by a prohibitive amount.

The final word of course will be that of the Government. At the time of writing a Government white paper has been proposed "setting out the form in which the scheme envisaged would run, if adopted, together with the principal variants or alternatives."[48]

This would allow "groups and institutions affected to be given an opportunity to make submissions on matters of particular concern"[49] thus meeting the criticism levied at the Woodhouse Report in particular by the Insurance Companies that the Commission, by failing to state clearly its interpretation of its terms of reference before calling for submissions by interested bodies, had not given those bodies any opportunity of making submissions on the wider field actually covered by the Report's proposals.

[48] The Minister of Labour, reported in the New Zealand Herald, 8th April 1969.
[49] *ibid.*