

**COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS:
A COMPARATIVE REVIEW**

BY



LEONARD D. SCHWARTZ

**Submitted to the Faculty of Graduate Studies
in Fulfillment of the Requirements
for the Degree of**

MASTER OF LAWS

**Faculty of Law
University of Manitoba
Winnipeg, Manitoba**

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PREFACE

The area of compensation for automobile accident victims is one which is continually changing to meet the present and future demands of both the administrators of the Schemes and the persons who receive the compensation. This thesis has endeavoured to state the law of the various jurisdictions surveyed as of December 31, 1988. Amendments after that date have not been incorporated into the thesis. Readers are advised to update the legislation from January 1, 1989, onwards.

In conclusion, I would like to express my appreciation and gratitude to the following individuals:

Dean D.T. Anderson, Lorrie McLaren, and Linda Skoropata of the Faculty of Law, University of Manitoba, for their assistance in providing office space and other facilities needed in the preparation of this thesis;

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Leonard D. Schwartz

April 3, 1989

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PART ONE

A. Introduction

1. No-Fault Insurance

One of the central conclusions of His Honour Judge Robert Kopstein's recently released study of automobile insurance in Manitoba¹ is as follows:

The highest priority for an automobile insurance plan should be to provide a reasonable living standard for those who are rendered severely and permanently disabled as a result of injuries sustained in a motor vehicle accident.²

This quote illustrates the basic objective of no-fault accident insurance: to compensate victims of accidents, regardless of where or how the accident occurred. The focus of no-fault accident insurance is to compensate accident victims for their losses, not to determine who should be held responsible for causing the accident.³

¹ Manitoba. Autopac Review Commission. Report of the Autopac Review Commission. 2 vols. (Winnipeg, Manitoba: Queen's Printer for Manitoba, 1988) (His Honour Judge Robert L. Kopstein, Commissioner). This report will hereinafter be referred to as the "Kopstein Report."

² Ibid., vol. 1, p. 30.

³ C. Brown, No-Fault Automobile Insurance in Canada (Toronto: Carswell Co. Ltd., 1988) 1 (hereinafter referred to as "Brown"); Atiyah's Accidents, Compensation and the Law (4th ed. P. Cane, 1987) 547 (hereinafter referred to as "Atiyah"); P.H. Osborne, A Critical Evaluation of Liability Insurance, Litigation and Personal Injury Compensation; The Lessons and Choices for Ontario, March 31, 1986 (Unpublished paper in the University of Manitoba Library) 6.

2. Scope of Thesis

Since the emphasis of this thesis is on how victims of automobile accidents should be compensated, rather than who should pay for that compensation, it is appropriate to consider the various approaches to accident compensation. In general, there are three basic approaches to compensating victims of automobile accidents. The three approaches are:

- i. The Tort System: In order to receive compensation, the victim must prove that the negligence of another person is the primary or sole cause of the accident. It is also necessary to identify the other party for the purpose of bringing an action, prove the negligent act, and ensure that the party at fault has sufficient resources to pay for any judgment obtained against him or her.
- ii. Modified No-Fault System: The Modified No-Fault System has two different forms:
 - a. Add On No-Fault: The automobile insurance coverage provides for compulsory no-fault benefits paid on a first party basis, that is by the insured's own insurer. A person injured in an automobile accident is, subject to certain exclusions, entitled to receive

these benefits on a no-fault basis. The benefits are usually quite modest. This system does not restrict the injured person's access to the tort system, but the benefits received are deducted from any tort award.

- b. Threshold No-Fault: Under this approach, first party no-fault benefits are paid to all accident victims. However, an injured party may sue the other party in tort, provided that his or her claim meets a certain threshold in terms of the seriousness of the injury, as set out by statute. Three different kinds of thresholds have been employed in jurisdictions using this approach. The verbal or narrative threshold stipulates that the victim must have suffered a certain kind of injury (i.e. "death, serious impairment of bodily function or permanent serious disfigurement") in order to maintain an action. The Disability Threshold provides that where a victim is disabled for a certain length of time, he or she may maintain an action. Finally, the Dollar Threshold identifies a dividing line between minor and serious injuries by equating the amount of the medical expenses incurred as a

result of the victim's injuries to the degree of their seriousness. Therefore, if the victim suffers injuries resulting in expenses above a certain dollar figure, he or she may bring action.⁴

- iii. Pure No-Fault Insurance: The principal characteristic of Pure No-Fault Insurance is that the injured person loses his or her right to sue in tort entirely. Instead, victims are compensated for injury upon a first party basis, according to a schedule set by the insurer (invariably the Government). Compensation is paid regardless of who is negligent or at fault in the accident. It usually takes a form of payment for income losses, medical and rehabilitation expenses and death benefits. If compensation for non-economic loss is included, that amount of compensation is usually established according to a schedule of disabilities. The amounts of compensation available depend in each case upon limits imposed by statute and upon the factors pertaining to the

⁴ Kopstein Report, supra, n. 1, Vol. 2, Position Paper No. 2, pp. 28, 49-52; Ontario. Inquiry into Motor Vehicle Accident in Ontario. Report of Inquiry into Motor Vehicle Accident Compensation in Ontario. 2 vols. (Toronto, Ontario: Ontario Ministry of the Attorney-General and the Ministry of Financial Institutions, 1988) (Mr. Justice Coulter A. Osborne, Commissioner), Vol. 1, pp. 450-452, 464-471 (hereinafter referred to as the "Osborne Report").

seriousness of the injury.⁵

This thesis examines automobile insurance schemes which exemplify aspects of the different approaches listed above. Part Two will briefly review automobile insurance in Manitoba, where an Add On No-Fault Scheme is employed. We will also examine the insurance systems operating in other jurisdictions, including Ontario (where, as in Manitoba, an Add On No-Fault Scheme is used, and the tort system remains the principal mechanism for compensating automobile accident victims), the province of Quebec and the Commonwealth jurisdictions of New Zealand, which employs a pure No-Fault comprehensive accident compensation scheme, and Victoria, Australia, where a threshold no-fault automobile insurance scheme is in use. Several recent Reports on automobile accident compensation, including a study prepared by the New South Wales Law Reform Commission, will also be reviewed.

Part Three will present a detailed analysis of several important issues in accident compensation. I will discuss the approaches of the systems surveyed to these issues, and make recommendations as to which of the approaches (if any) should be incorporated into a comprehensive compensation Scheme for victims of automobile accidents in Manitoba.

⁵ Kopstein Report, supra, n. 1, Vol. 2, Position Paper No. 2, p. 15; Osborne Report, supra, n. 4, Vol. 1, pp. 452-454.

PART TWO

A. Introduction

Four Canadian provinces (Saskatchewan, Manitoba, British Columbia and Quebec) have government controlled monopolies of automobile insurance. In Quebec, the government delivery of automobile insurance consists of a pure no-fault system of compensation for injuries suffered by victims of automobile accidents (this no-fault system will be discussed later in this Part). In the three western provinces which have public automobile insurance schemes, compensation for personal injuries is dealt with through an "add-on no-fault" system.⁶

In Ontario, the remaining Canadian provinces, and the two Territories, automobile insurance is handled by private insurers. Ontario, all of the Atlantic Provinces (except for Newfoundland) and the two Territories have introduced compulsory no-fault insurance, through an officially sanctioned Standard Automobile Policy. The details of coverage provided by these Policies are listed in Schedules

⁶ C. Brown, No-Fault Automobile Insurance in Canada (Toronto: The Carswell Co. Ltd., 1988), pp. 9, 25-32 (hereinafter referred to as "Brown"); Ontario. Inquiry into Motor Vehicle Accident Compensation in Ontario. Report of Inquiry into Motor Vehicle Accident Compensation in Ontario, 2 Vols. (Toronto: Ont. Min. of A.G. and the Min. of Financial Institutions, 1988) (The Hon. Mr. Justice Coulter A. Osborne, Commissioner), Vol. 1, p. 651 (hereinafter referred to as the "Osborne Report").

attached to the respective legislation of these provinces.⁷

In this Part, we will examine how the insurance schemes operate in different jurisdictions, including Manitoba, the Province of Ontario (where automobile insurance, as indicated above, is in the hands of private insurers), the Province of Quebec (which has a pure no-fault compensation plan) and two Commonwealth jurisdictions. Ontario has been selected because it is representative of the Canadian provinces where automobile insurance is in the hands of private insurers, and is subject to certain standard policy conditions which are stipulated by legislation. The Province of Quebec is the only Canadian jurisdiction to have a pure no-fault plan for compensation of injuries suffered by automobile accident victims. Finally, the Commonwealth jurisdictions to be examined present different approaches to the issue of compensation for accident victims (including, but not limited to, the victims of automobile accidents).

⁷ Brown, supra, n. 6, pp. 13-24 and 31-32.

B. Manitoba Public Insurance Corporation
Act and Regulations

1. Introduction

a. Background of Scheme

The Automobile Insurance Act,⁸ proclaimed September 21, 1970, allowed for the creation of the Manitoba Public Insurance Corporation which came into existence on September 29, 1970. Insurance operations commenced November 1, 1971.⁹ The Act has been substantially amended once since then, in 1974.¹⁰ At that time, its title was changed to The Manitoba Public Insurance Corporation Act.

In 1987, the Act was repealed, and re-enacted in both French and English.¹¹

b. Brief Description of Scheme

Automobile insurance in Manitoba is governed by the Manitoba Public Insurance Corporation Act¹² and Regulations

⁸ S.M. 1970, c.102, s. 1.

⁹ Kopstein Report, supra, n. 1, vol. 2, Introduction to the Manitoba Public Insurance Corporation and Vehicle Insurance, p. 12.

¹⁰ S.M. 1974, c.58, proclaimed in force Nov. 18/74.

¹¹ The Manitoba Public Insurance Corporation Act, R.S.M. 1987, c.P215, s. 1.

¹² R.S.M. 1987, c.P215, s.1.

thereto.¹³

These Regulations contain most of the details of the insurance coverage provided by Autopac. They set out premiums and benefits and are amended and upgraded annually, through Order-in-Council. The coverage defined by the Regulations falls into three broad areas: no-fault accident benefits, all perils, and third party liability.¹⁴ M.P.I.C. is the only supplier of basic vehicle insurance in the province. The insurance is sold by approximately 400 independent agents, of whom about 170 operate in the Winnipeg area. Agents may register and insure most types of vehicles, although some vehicles (such as taxis) must be insured by the Division of Driver and Vehicle Licensing (DDVL) of the Manitoba Department of Highways. People insuring their vehicles do not receive a written insurance contract. The terms of the insuring agreement are specified by the legislation and Regulations.¹⁵

M.P.I.C. provides three major benefits:

- i. no-fault accident benefits, e.g. death benefits,

¹³ A Regulation Respecting Insurance Certificates and Rates Regulation under The Manitoba Public Insurance Corporation Act, Man. Reg. 289/88R and amendments thereto, and A Regulation Respecting Automobile Insurance Coverage Under the Manitoba Public Insurance Corporation Act, Man. Reg. 290/88R, and amendments thereto (hereinafter, these Regulations will be cited as "Man. Reg. 289/88R" and "Man. Reg. 290/88R" respectively).

¹⁴ Introduction to the Manitoba Public Insurance Corporation and Vehicle Insurance, supra, n. 9, p. 13.

¹⁵ Ibid., p. 15.

disability benefits (referred to as "Part II Benefits" because they are described in Part II of Manitoba Regulation 290/88R);

ii. all perils coverage for collision and vehicle roll-over, fire, vandalism and theft (referred to as "Part III Coverage" because the coverage is described in Part III of Manitoba Regulation 290/88R);

iii. third party protection from public liability and property damage claims (referred to as "Part IV Coverage" because the coverage is described in Part IV of Manitoba Regulation 290/88R).¹⁶

The Corporation operates 16 claim centres throughout the province. Five of these centres, along with the Plessis Road commercial claims centre, are in Winnipeg. Vehicle damage is estimated at these centres, and this information is passed on to an adjustor, who has the power to negotiate a settlement. The settlement is then forwarded or taken by the claimant to a body shop of his or her choice, which is required to complete the work specified within the estimator's report, unless hidden damage is uncovered. Labour rates and shop charges are set through negotiation with the repair industry, and listed in

¹⁶ Ibid., p. 16. See also Man. Reg. 290/88R.

policy/procedure manuals.¹⁷

A claim centre for bodily injuries, staffed by special adjustors, has been established at 330 Graham Avenue in Winnipeg. The adjustor attempts to negotiate a settlement, if possible, taking into account the report of the claimant's physician and other doctors. No-fault personal injury benefits are paid according to Regulation.¹⁸ If no settlement can be reached, litigation may be started by the claimant.

2. Scope of Coverage: No-Fault Personal Injury Benefits

The no-fault personal injury benefits (ie. the "Part II Benefits") are described in detail, in Part Three of the thesis.

3. Report of the Autopac Review Commission (The Kopstein Report)

a. Introduction

In the overview of the most important issues concerning Autopac and the most important challenges it faces, Judge Kopstein began by stating:

¹⁷ Introduction to the Manitoba Public Insurance Corporation and Vehicle Insurance, supra, n. 9, pp. 16-17.

¹⁸ Man. Reg. 290/88R, Part II.

My examination of insurance systems outside Manitoba has revealed that there is a major opportunity to reduce costs and improve benefits, both quite substantially. That opportunity lies in the adoption of pure no-fault accident benefits in place of the current partial no-fault system which is usually described as add-on no-fault.¹⁹

Many technical issues (i.e. rate-making and coverage, claims service, financial management, corporate planning and other areas not related to this thesis) were also considered by Judge Kopstein. However, the approach, findings and recommendations of the Commission to be considered below are entirely concerned with the issue of compensation for injuries sustained in automobile accidents.

b. The Approach

(1) Systems Studied

To assist in the examination of issues relating to compensation for personal injury suffered by automobile accident victims, His Honour Judge Kopstein commissioned a Research Paper to be undertaken by two Winnipeg lawyers, Caroline Cramer and Hugh Armstrong. The Research Paper, entitled "Potential Changes in Manitoba's Public Insurance Corporation Plan for Motor Vehicle Accident Injury and

¹⁹ Kopstein Report, supra n. 1, Vol. I, p. 2.

Death"²⁰ endeavoured to provide a comprehensive background on the very broad issue of compensation schemes for victims of automobile accidents. The Research Paper details the findings of an actuarial report, the "Tillinghast Report," which provides costing of three specific (and different) Models of compensation schemes for personal injury and/or death resulting from automobile accidents. Position Paper No. 2 in the Kopstein Report is based upon the Research Paper and upon the actuarial report.²¹

The use of these "Models," and the costs projected for them, are described in the next Section.

(2) The Use of Models

(a) The Models Described

(i) Model 1: Add-On No-Fault

As we shall see, in Ontario, Mr. Justice Osborne relied on the use of a simulation Model, using data collected from various sources (including bodily injury claims surveys conducted by the Inquiry) to predict the costs of various

²⁰ C.B. Cramer and H.J. Armstrong, Potential Changes in Manitoba's Public Insurance Corporation Plan for Motor Vehicle Accident Injury and Death (Unpublished Research Paper prepared for the Autopac Review Commission, July 1988) 2 Vols. (hereinafter referred to as "Cramer & Armstrong").

²¹ Ibid., Vol. I, pp. 134-155, Vol. II, Appendix M, "Tillinghast Report - Three Models and Various Options Costed" (Hereinafter referred to as the "Tillinghast Report"); Kopstein Report, supra, n. 1, Vol. II, Position Paper No. II.

alternatives to the current compensation system for automobile accident victims in that province (see pp. 30-32, infra). There is no question that the costing of a compensation scheme will be a major factor in deciding whether or not to implement that scheme. Therefore, the Models to be employed for the Kopstein Report would test what cost savings might be achieved in Manitoba through the use of alternative compensation schemes. Model No. 1 is an "add-on no-fault" compensation scheme. It is similar to the existing Scheme in Manitoba, except that the no-fault benefits in this Model were increased, and the costs of the tort system were reduced slightly.²² The details of this Model are as follows:²³

- funeral and burial expenses increased to a maximum of \$3,500.00
- medical expenses and rehabilitation assistance increased to maximum of \$200,000.00
- impairment benefit (currently \$20,000.00) to be annually indexed by the Provincial C.P.I. growth rate
- all death benefits increased by 150 percent, i.e.:
 - \$25,000.00 to the primary dependant
 - \$5,000.00 to each secondary dependant
 - if no dependants are entitled:
 - \$10,000.00 divided equally among

²² Ibid.

²³ Tillinghast Report, supra, n. 21, Exhibit II.1 to Exhibit II.6 inclusive.

brother(s), sister(s) and non-dependent child(ren) that were partly provided for by the insured

- \$5,000.00 to supporting parents of a child under 18 years of age
- \$5,000.00 to parents of a son or daughter over 18 who leaves no surviving wife or husband
- total disability benefits to be changed as follows:
 - wage earners to receive 90 percent of average weekly net earnings less (the excess of any wage or profit during the period of disability and benefits payable over 70 percent of the gross weekly earnings from all sources)
 - no minimum, but \$500.00 per week maximum benefit
 - one week waiting period, and no maximum duration
 - benefit indexed annually in accordance with the annual Growth Rate in the average industrial composite index of wages
 - non-wage earners:
 - 90 percent of weekly minimum wage for as long as the claimant remains disabled
 - one week waiting period and no maximum duration
 - indexed annually in accordance with the annual growth rate in the average industrial composite index of wages
 - post-high school students, children aged 16 to 18 and homemakers:
 - benefit is 90 percent of weekly minimum wage (no minimum benefit)
 - no maximum duration, but one week waiting period for homemakers

- students must wait until graduation or for one week (whichever is greater)
- children must wait until their 18th birthday or one week (whichever is greater)
- indexed annually in accordance with the annual growth rate in the average industrial composite index of wages
- partial disability:
 - wage earners:
 - benefit is 100 percent of the weekly net average wage loss
 - no maximum duration, but one week waiting period
 - indexed annually in accordance with the annual growth rate in the average industrial composite index of wages
 - non-wage earners, post-high school students, children aged 16-18 and homemakers:
 - the benefit is the percentage of the total disability benefit based on the degree of partial disability inflicted
 - one week waiting period and no maximum duration
 - indexed annually in accordance with the annual growth rate in the average industrial composite index of wages
- tort liability benefits to remain the same, except that the pre-judgment interest rate is capped at three percent and seven percent for non-pecuniary losses and pecuniary losses respectively (instead of 3.5 percent and the bank rate plus one percent, respectively, as it is today), and;
- collateral benefits (i.e. U.I.C., Workers Compensation, C.P.P. etc.) will be used to offset loss

of income awards; however, private insurance benefits will not be used to offset the disability benefits.

(ii) Model 2: Modified No-Fault

The "modified no-fault" approach (also known as the threshold no-fault approach) uses a verbal threshold to eliminate all of the small non-pecuniary loss awards of \$2,500.00 or less. Only persons who have suffered "serious permanent injury or fatality" would be allowed to claim non-pecuniary losses.²⁴

The details of this Model are as follows:²⁵

- funeral expenses will be same as those discussed above, under "add-on" Model
- medical expenses same as those available under "add-on" Model
- impairment benefit same as that discussed under the "add-on" Model, above
- death benefits to be modelled on Quebec Scheme (see below):
 - death benefit will be annuity based on a percentage of the weekly disability benefit that the deceased would have received had he or she survived and will vary according to the number of dependants:
 - one dependant: 55% of permanent weekly disability benefit
 - two dependants: 65% of permanent weekly disability benefit
 - three dependants: 70% of permanent weekly disability benefit
 - (this increases to a maximum of seven

²⁴ Ibid., p. 6.

²⁵ Ibid., Exhibits III.1 to III.6 inclusive.

dependants, or 90 percent of their permanent weekly disability benefit)

- benefits for total and partial disability to be the same as those discussed in the "add-on" Model, above
- using this Model, tort liability is strictly limited to non-pecuniary losses and these losses are only available to victims who have suffered "serious permanent injury or fatality"
- (this threshold is designed to eliminate non-pecuniary loss claims of \$2,500.00 or less).

(iii) Model 3: Pure No-Fault

This Model provides for a comprehensive statutory compensation scheme, where the common law causes of action and remedies against the tortfeasor are totally replaced by benefits set out in the Legislation (emphasis mine). All benefits are paid on a scheduled basis, regardless of fault. Compensation for pecuniary losses is the same as the modified no-fault system (Model 2, above) and non-pecuniary losses are compensated by increasing the impairment benefit schedule maximum and eligibility requirements.²⁶ The details of this Model are as follows:²⁷

- the funeral expenses, death benefits, medical and rehabilitation expenses, and disability payments in this Model are the same as those set out under the "modified no-fault" Model above (Model 2)
- however, the impairment benefit is increased dramatically as follows:

²⁶ Ibid., p. 4.

²⁷ Ibid., Exhibits IV.1 to IV.6 inclusive.

- both permanent and temporary impairment will be compensated with temporary impairment receiving a percentage of the benefit payable for permanent impairment
 - the permanent impairment benefit is based on the relative severity of the injury, but the maximum benefit payable is now increased to \$200,000.00
 - increasing the benefit eligibility to include persons suffering temporary impairment will have the effect of increasing the number of claimants by a factor of 5.778
 - no tort recovery will be available under this pure no-fault system
- (this assumes that out-of-province accidents settled under tort are negligible).

(b) The Data Used

The actuaries who prepared the Tillinghast Report conducted a random survey of M.P.I.C. files of claims settled during the Corporation's 1987 fiscal year, i.e. November 1, 1986 to October 31, 1987. Data on 200 different files was collected for the Report, and sorted out under a variety of headings, i.e. accident month and year, availability of collateral benefits, the various benefits paid (and their amounts), other expenses and the Part IV benefits paid out.²⁸ The actuaries also relied on a Potential Claimant Distribution (based on population statistics from Statistics Canada, and Revenue Statistics from Revenue Canada), Wage Distribution (based on statistics from Revenue Canada), Disability Deviation, a Mor-

²⁸ Ibid., p. 8 and Appendix A.

tality Table, the Claim Survey referred to above and a Claim Size Distribution for Bodily Injury Liability and Accident Benefits (from M.P.I.C.'s 1984 accident year).²⁹

The following comment of the Tillinghast Report should be noted:

However, it should be recognized that the loss cost estimates under the systems of compensation considered herein are likely to deviate, perhaps substantially, from our estimates. (emphasis mine)³⁰

(c) The Actuaries' Assessment

(i) Model 1: Add-On No-Fault

At the beginning of the Tillinghast Report are summaries of the actuaries' findings in respect of each of the Models costed. The estimate for the "add-on" Model revealed that incurred losses would have increased (as compared to the actual losses for the 1987 fiscal year) by \$2.9 million, or 1.3 percent. The actuaries pointed out that the capping of the pre-judgment interest rate and consideration of collateral benefits in tort awards (i.e. changes to the tort actions) would have only a minor impact on tort awards. The actuaries also noted that if, using this Model, the funeral benefits were to be increased to \$5,000.00 (instead of the proposed \$3,500.00), this increase would raise the cost of the proposed system by an

²⁹ Ibid., p. 8.

³⁰ Ibid., p. 3.

additional \$355,000.00.³¹

(ii) Model 2: Modified No-Fault

Using the "modified no-fault" Model described above, the actuaries estimate that Autopac's 1987 incurred losses would have been reduced by \$23.5 million or 10.3 percent (emphasis mine). The reader will recall that this Model uses a verbal threshold designed to eliminate small non-pecuniary loss awards of \$2,500.00 or less. The actuaries also estimated what the impact would be of a verbal threshold which was designed to eliminate non-pecuniary loss awards of \$5,000.00 or less (twice the previous threshold). The estimate shows that using a threshold designed to eliminate non-pecuniary loss awards of \$5,000.00 or less would have reduced the 1987 losses by a further \$4.8 million (emphasis mine).³²

(iii) Model 3: Pure No-Fault

Perhaps the greatest surprise of the actuaries' Report was the finding in respect of the "total no-fault" Model. The elimination of tort recovery by the use of this Model would result in the disappearance of the entire \$59.3 million worth of losses incurred by Autopac in 1987 (for Part IV third-party liability payments for bodily injury).

³¹ Ibid., p. 5.

³² Ibid., p. 6.

This \$59.3 million would be replaced by scheduled benefits for both pecuniary and non-pecuniary losses. However, the schedule benefits would only increase by \$19.5 million.

In short, the use of the "pure no-fault" Scheme as outlined in Model 3 above would (it is estimated) lead to a \$39.8 million reduction (17.5 percent) in incurred losses.³³

The reader will see that the Osborne Report³⁴ noted that (the person who created) the simulation Model prepared for that Inquiry found that the use of a generous pure no-fault Scheme could result in an increase in the number and duration of lost time injuries, due to the possible behavioural response on the part of victims. Furthermore, the simulation Model forecasted that a pure no-fault scheme would lead to an increase, not a decrease, in costs. One wonders how the very different conclusions of these two Models can be explained. Perhaps, if a behavioural response (using disability statistics from Quebec and other jurisdictions where a pure no-fault scheme has existed for some time) were to be built into the Kopstein Report's pure no-fault Model, the resulting cost estimate may be more realistic.

³³ Ibid.

³⁴ Supra, n. 6, Vol. II, p. 352.

c. Findings of the Commission

Several major issues relating to compensation for bodily injury and/or death resulting from automobile accidents are discussed by His Honour Judge Kopstein in Position Paper No. 2 of the Kopstein Report. The Report's conclusions are discussed both below and throughout the "Analysis" sections of Part Three.

With respect to the issue of rehabilitation, Judge Kopstein concluded that the current Manitoba provision is inadequate, and that M.P.I.C.'s rehabilitation program is limited in scope and does not appear to be pro-active.³⁵

The present add-on no-fault benefits provided by M.P.I.C. are also criticized as being inadequate. The different approaches considered to revising the Manitoba Scheme, such as either enhancing the no-fault benefits, or implementing a modified no-fault plan, both contain flaws (i.e. increased cost, or retaining inequities of the tort system).³⁶

Judge Kopstein's recommendation in respect of these conclusions contain two central points:

- The rehabilitation provision in the Manitoba Regulations be amended to highlight the importance of rehabilitation, and M.P.I.C. must develop a

³⁵ Kopstein Report, supra n. 1, Vol. II, Position Paper No. 2, p. 101.

³⁶ Ibid.

policy towards rehabilitation which will enable it to assist disabled accident victims to return (as much as possible) to a normal life.³⁷

The other such recommendation is for the implementation of a pure no-fault system of compensation for victims of automobile accidents, which generally follows the "pure no-fault" Model described above. An independent arbitration board would settle disputes between claimants and M.P.I.C.³⁸

³⁷ Ibid., p. 103.

³⁸ Ibid., pp. 103-104.

C. Ontario

1. Introduction

a. Background

Automobile insurance first appeared in Ontario's Insurance Act in 1914.³⁹ The coverage stipulated has always included third party protection for bodily injury/property damage. In 1932, minimum bodily injury/property damage limits were established at \$5,000.00, but the purchase of insurance was not compulsory at that time. In 1957, the minimum limits were raised to \$10,000.00 per person injured in an accident, subject to an overall limit of \$20,000.00 per accident. The minimum limits were increased several times in succeeding years, and in 1981 were set at \$200,000.00. This is the current limit.⁴⁰

In 1971, The Insurance Act stipulated that no-fault benefits were to be a mandatory part of any automobile liability insurance policy sold in Ontario.⁴¹ A Schedule, appended to The Insurance Act, set out most of the specific coverage. The coverage provided for disability benefits (to persons employed or engaged in employment for any six

³⁹ S.O. 1912, c.33, as am. by R.S.O. 1914, c.30.

⁴⁰ Osborne Report, supra, n. 6, Vol. 1, pp. 131-132.

⁴¹ S.O. 1971, c.84, s.14.

months out of the twelve months preceding the accident), lump sum benefits for the families of those killed in automobile accidents, and medical and rehabilitation benefits to cover accident-associated costs incurred within four years of the accident, in excess of those covered by medical or hospital care programs.⁴²

The Ontario Task Force on Insurance was appointed on January 9, 1986 by the Minister of Consumer and Commercial Relations. Its mandate was to "seek out solutions for cost and capacity problems in the property and casualty insurance industry in Ontario."⁴³ The Task Force concluded that "the problems that pervade the personal injury area and that in large measure have caused the current liability insurance 'crisis' cannot be resolved through further reform of the tort system."⁴⁴ The Report recommended a "no-tort system" of accident compensation, where compensation would be provided on a no-fault basis. Deterrence would be achieved through a more refined and vigorous penalty rating or premium pricing mechanism.⁴⁵ The Government would implement a mandatory system of automobile

⁴² Brown, supra, n. 6, pp. 17-19.

⁴³ Ontario. Ontario Task Force on Insurance, Final Report of the Ontario Task Force on Insurance (Toronto: Ministry of Financial Institutions, 1986), p. 1 (hereinafter cited as "Ontario Task Force Report").

⁴⁴ Ibid., p. 58.

⁴⁵ Ibid., pp. 67-68.

insurance for personal injury compensation whereby all insureds purchase a basic level of insurance including coverage for loss of income, costs of care, and unlimited rehabilitation and medical expenses.⁴⁶ The Inquiry into Motor Vehicle Accident Compensation in Ontario (the Osborne Inquiry) was commissioned as a direct result of the recommendations in the Task Force Report, supra.⁴⁷ The findings of this Commission will be examined in detail, later in this thesis.

b. Current State of Automobile Insurance in Ontario

It is unlawful for an owner of a motor vehicle to operate or permit that vehicle to be operated on a highway in Ontario unless the vehicle is insured.⁴⁸ Third party bodily injury and property damage coverage, to a minimum of \$200,000.00, is compulsory.⁴⁹ Section 201 of The Insurance Act provides that insurers shall use a uniform form of application, policy, endorsement or renewal certificate, as approved by the Superintendent of Insurance.⁵⁰

⁴⁶ Ibid., 77.

⁴⁷ Osborne Report, supra n. 6, Vol. I, p. 86.

⁴⁸ Compulsory Automobile Insurance Act, R.S.O. 1980, c.83, s.2.

⁴⁹ Osborne Report, supra, n. 6, Vol. 1, pp. 96-97.

⁵⁰ R.S.O. 1980, c.218, s.201.

2. Standard Automobile Policy

a. No-Fault Injury Benefits

The No-Fault Injury Benefits, contained in Section B of the Standard Policy, will be discussed in detail in Part Three of the thesis.

3. Report of Inquiry into Motor Vehicle Accident Compensation in Ontario (The Osborne Report)

a. Introduction

The Report of the Inquiry into Motor Vehicle Accident Compensation in Ontario, headed by Mr. Justice Coulter Osborne of the Supreme Court of Ontario⁵¹ is the most complete and up-to-date review available of compensation for automobile accident victims in Ontario, its history, the present level of benefits, comparison of those benefits of the compensation provided by other schemes, and the consideration and recommendation of an automobile accident victim compensation system for Ontario's future. The reader is referred to this Report as an excellent reference source on the background and current status of the automobile insurance industry in Ontario.

⁵¹ Osborne Report, supra, n. 6.

b. Approach of the Commission

(1) Research Projects

(a) The Bodily Injury Claims Surveys

The Inquiry, through an actuarial consultant, conducted surveys of bodily injury liability claims closed during 1985, 1986 and 1987. The purpose of the surveys was to identify the components of the claims paid, the economic and injury profiles of claimants, transportation costs incurred by these claimants, and their collateral sources of compensation. The data from the surveys was also used as a basis for predicting what increases or decreases in costs would result from the implementation of various compensation plans considered by the Inquiry.⁵²

(b) A Compensation Model for Automobile Accident Victims

As mentioned above, one of the uses of the data collected through the bodily injury claims surveys was to create (and cost) a new automobile accident compensation Scheme for Ontario.⁵³ The Simulation Model was created using data from the 1981 Census of Canada and information on the characteristics of accident victims in Ontario (in

⁵² Ibid., Vol. I, pp. 92-93.

⁵³ See S. Rea, "Compensation for Automobile Accident Victims in Ontario: A Simulation" (hereinafter referred to as the "Rea Model") in the Osborne Report, supra, n. 6, Vol. II, pp. 336-435.

1985) obtained from the Ministry of Transportation and Communications. This produced a database of 110,103 automobile accident victims. The Model was used to form predictions as to how many persons would be injured (in 1985 in Ontario), how many would suffer injuries resulting in lost time of more than one week, and how many would be permanently disabled.⁵⁴

The data from the bodily injury claims surveys (referred to above) was used to impute the amount of tort damages in the simulation Model. The tort damages were also used as a measure of the value of lost time minus Accident Benefits.⁵⁵

The simulation Model created with the use of the above data was used to predict how much accident victims would lose, and how much compensation would be paid to them. The results were surprising. The Model predicted a total after-tax loss of wages of \$311 million. The value of lost time was \$640 million. However, the after-tax compensation was \$628 million, nearly equal to the value of the lost time. The author of the Study concluded that this result supports the view that the total compensation paid in the current Ontario system is adequate, but that it needs to be redistributed so as to more closely match each individual's

⁵⁴ Ibid., pp. 340-341.

⁵⁵ Ibid., p. 341.

loss.⁵⁶

The Model was used by Mr. Justice Osborne to forecast the cost of alternative compensation systems. However, the person who created the Model noted that there is no behavioural response built into the Model. That is, a generous compensation system (such as a no-fault compensation system) would increase the number of lost time injuries and increase the duration of disability. Therefore, any significant extension of benefits (beyond those provided through the Quebec scheme, as the Model based its duration of disability data, in part, on the Quebec experience) could lead to higher costs.⁵⁷

The first alternative Scheme that the Model considered was a pure no-fault scheme with the following features:

- benefit of 90 percent of after-tax earnings up to a maximum benefit of \$30,000.00 per year, with the minimum benefit of \$140.00 per week (\$7,280.00 per year) for all accident victims;
- for persons injured prior to age 65, the benefits would be set at \$7,280.00 a year at age 65;
- for persons injured after age 65, the benefits would equal 90 percent of lost earnings (up to the \$30,000.00 maximum) for life.

The Model predicted that this program would cost \$519

⁵⁶ Ibid., p. 342.

⁵⁷ Ibid., p. 427.

million per year, or \$99.00 per vehicle per year. Against this cost could be deducted a savings of \$90 million in Accident Benefits (provided under the existing Scheme) and a savings of \$375 million in tort benefits, for a net additional cost of \$54 million or \$10.00 per vehicle.⁵⁸

Mr. Justice Osborne used the Model to predict the cost of one other compensation system. His Lordship chose to investigate a system which would increase the no-fault benefits currently available to Ontario's automobile accident victims, without giving up any rights to individual compensation under tort law.⁵⁹ The features of this "increased no-fault benefit" compensation system are described in detail, in Part Three. In summary, the total cost savings predicted with the use of this new system would be approximately \$65 million per year.⁶⁰

(c) The Role of Deterrence in Motor Vehicle Accident Compensation Schemes and the Effects on Road Safety of Various Features of the Quebec Scheme

The issue of deterrence is not directly relevant to this thesis, but it was most relevant to the Report of Mr.

58 Ibid.

59 Osborne Report, supra, n. 6, Vol. I, p. 585.

60 Ibid.

Justice Osborne. In Chapter 12 of the Osborne Report,⁶¹ various systems of compensation are assessed according to the following criteria:

- compensation
- rehabilitation
- cost efficiency
- incentives/deterrence
- fairness
- Insurance Compatibility
- Constitutionality⁶²

Against each of these criteria are assessed three different compensation schemes: a pure no-fault scheme, a threshold no-fault scheme and a dual scheme where both no-fault benefits and unrestricted access to the tort system co-exist.

The assessment of these three different systems according to the criteria set out above occupied approximately 47 pages of Chapter 12. Mr. Justice Osborne devoted 20 of these pages to the discussion of the issues of deterrence and fairness.⁶³ His Lordship referred to two Studies which had been commissioned for the Inquiry.⁶⁴ Mr.

⁶¹ Ibid., pp. 506-600.

⁶² Ibid., pp. 515-517.

⁶³ Ibid., pp. 530-550.

⁶⁴ M. Gaudry, "The Effects on Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act" (hereinafter

Justice Osborne stated that consideration has to be given to an analysis of driver behaviour as related to the question of how accidents occurs, and how the frequency of accidents can be reduced.⁶⁵ His Lordship referred to conclusions in the White Study that there are deterrence-related advantages to the tort system in tort law, and that their removal would affect driver behaviour.⁶⁶

Mr. Justice Osborne was also concerned with the effect that the introduction of pure no-fault compensation would have on driver behaviour and on accidents. His Lordship referred frequently to the Gaudry Study, with reference to the impact of no-fault compensation on Quebec motor vehicle accident rates. Mr. Justice Osborne noted that following the introduction of no-fault in Quebec, there was an increase in motor vehicle accidents of all types. Bodily injury motor vehicle accidents increased by 26.3 percent, fatal accidents increased by 6.8 percent, and accidents with property damage increased by 11 percent.⁶⁷

In the study of the accident rate following introduction of no-fault compensation in Quebec, the author

referred to as the "Gaudry Study," and N.F. White, "The Function of Deterrence in Motor Vehicle Accident Compensation Schemes" (hereinafter referred to as the "White Study"), in the Osborne Report, supra, n. 6, Vol. II, pp. 1-28 and 436-463, respectively.

⁶⁵ Osborne Report, supra, n. 6, Vol. I, p. 535.

⁶⁶ Ibid., p. 536.

⁶⁷ Ibid.

concluded that flat premium rating (all insureds pay the same premium, and bad risks pay the same premium as good risks) led to an increase in the driver population, and that this increase was weighted in favour of higher-risk (bad) drivers.⁶⁸ However, the Gaudry Study concluded that the introduction of no-fault compensation in Quebec did have some unquantifiable impact on the Quebec motor vehicle accident rate, but that the impact of no-fault compensation was small compared to the impact of compulsory insurance and flat premium rating.⁶⁹

A related issue to deterrence was the consideration of "fairness" as defined by Mr. Justice Osborne.⁷⁰ That is, as a corollary to its deterrent function, the tort system has a capacity for fairness and justice. The public is aware of this concept of fairness, and this is demonstrated by the fact that many people are offended by the idea that an innocent driver and a drunken driver should be compensated equally for an accident caused by the drunken driver.⁷¹

Mr. Justice Osborne concluded that the public's sense of fairness would not be satisfied if fault was left to be dealt with solely through the criminal justice system and

⁶⁸ Ibid., p. 537.

⁶⁹ Ibid., p. 538.

⁷⁰ Ibid., p. 543.

⁷¹ Ibid., p. 545.

the premium rating system. That is, the public demands that fault be taken into account in a compensation process and (where necessary), in the criminal or quasi-criminal justice system.⁷²

c. Findings of the Commission

(1) Coverage and Delivery Problems

The findings of the Inquiry with respect to the Standard Automobile Insurance Policy used in Ontario today will be discussed in Part Three, in the "Analysis" sections of various issues which arise in the compensation of automobile accident victims.

d. Recommendations of the Inquiry

(1) The Recommended System of Compensation

Reference has already been made to several factors which, it is felt, contributed to the development of the system of compensation recommended in the Osborne Report.⁷³ That is, the costs of the various systems considered (as predicted by the simulation Model), and the emphasis placed by Mr. Justice Osborne on the "deterrence" and "fairness" aspects of the tort action played a major role in determining the compensation system recommended by Mr. Justice Osborne. The features of that system are described in

⁷² Ibid., pp. 548-549.

⁷³ Ibid., pp. 570-596.

detail in Part Three.

The Osborne Report predicts (using the recommended system) a total cost savings of \$65 million per year in respect of private passenger cars, provided that the collateral source rule is abolished, that pre-judgment interest be reduced, and that the jurisdiction of the Provincial Court (Civil Division) be expanded to encourage claimants to represent themselves (with assistance of assigned duty counsel and limits upon legal fees).⁷⁴

It should be noted that the proposed Scheme would allow (without limitation) the common law action for personal injury (that is, it is an "add-on no-fault" scheme). However, all no-fault accident benefits would be enriched, and all of these benefits (except for the death benefit) would be indexed.⁷⁵

⁷⁴ Ibid., p. 586.

⁷⁵ Ibid., p. 593.

D. Quebec

1. Introduction

a. Background

In 1974, the Report of the Quebec Committee of Inquiry on Automobile Insurance, known as the "Gauvin Report," after its Chairman, stated that under the insurance system operating at the time, better compensation was provided for those who suffered property damage than for those who suffered bodily injury.⁷⁶ The Gauvin Report also found that minor injuries were favoured over more serious ones, and that the level of compensation was strongly influenced by factors unrelated to the actual loss, e.g. ability of the victim to obtain legal counsel.⁷⁷ The Report recommended that the concept of fault be totally removed from the system for compensating victims of personal injury and death in automobile accidents. It called for a compulsory provincially-run insurance scheme.⁷⁸

⁷⁶ Report of the Committee of Inquiry on Automobile Insurance (appointed by the Government of Quebec, J.L. Gauvin, Chairman) (1974) cited in C.B. Cramer and H.J. Armstrong, Potential Changes in Manitoba's Public Insurance Corporation Plan for Motor Vehicle Accident Injury and Death, July 1988 (Unpublished Research Paper prepared for the Autopac Review Commission), Vol. 1, p. 110 (this paper will hereinafter be cited as "Cramer and Armstrong").

⁷⁷ Ibid.

⁷⁸ Gauvin Report, supra, n. 76, cited in Brown, supra, n. 6, p. 32.

In November 1976, the *Partie Quebecois* was elected. In April 1977 a new proposal calling for a provincially-run compulsory pure no-fault plan for personal injury and death caused by automobile accidents was introduced. Only coverage for property damage (both first and third party) and out-of-province liability was to be left to the private insurance companies.⁷⁹ Legislation giving effect to the plan was passed in December, 1977 and became effective on March 1, 1978.⁸⁰ The no-fault compensation scheme is publicly administered and delivered by the *Regie de L'Assurance Automobile du Quebec*.⁸¹ The Quebec Act is described below.

b. The Automobile Insurance Act of Quebec

The unique (insofar as Canadian legislation is concerned) feature of the Quebec Act⁸² reads as follows:

The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of actions of anyone by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice.

Subject to section 18, where bodily injury was caused by an automobile, the benefits provided for the compensation of such injury by The Act Respecting

⁷⁹ Brown, supra n. 6, pp. 32-33.

⁸⁰ Automobile Insurance Act, L.Q. 1977, c.68.

⁸¹ An Act to Establish the Regie de L'Assurance Automobile du Quebec, L.Q. 1977, c.67.

⁸² Automobile Insurance Act, R.S.Q., Cap. A-25.

Industrial Accidents and Occupational Diseases (Cap. A-3.001), The Act to Promote Good Citizenship (Cap. C-20) or by the Crime Victims Compensation Act (Cap. I-6) are in the place and stead of all rights, recourses and rights of action by anyone by reason of such bodily injury and no action in that respect shall be admitted before any court of justice.

The preceding provisions of this section do not apply to the cases contemplated in section 17.

Nothing in this section limits the right of a victim to claim an indemnity under a private insurance scheme, regardless of who is at fault.⁸³

The insurance coverage takes two forms: a basic compulsory public plan and a supplementary plan (which may be purchased from a private insurer) to provide no-fault insurance for those who do not believe that the basic plan provides adequate coverage. The basic plan provides income replacement indemnities, medical and rehabilitation costs not covered by other public plans (unlimited amount), lump sum payments for injuries, dismemberment, pain and loss of enjoyment of life (up to a maximum, in 1988, of \$41,059.61), and death and survivor's benefits. These benefits are outlined in detail in the Act and Regulations.⁸⁴ The property damage provisions of this Act are administered by private insurers and will not be discussed in this thesis.

⁸³ Automobile Insurance Act, R.S.Q., Cap. A-25, s.4.

⁸⁴ Cramer & Armstrong, supra, note 76, Vol. 1, p. 111.

2. No-Fault Injury Benefits

The No-Fault Injury Benefits will be discussed in Part Three of the thesis.

3. Future Amendments

a. An Act to Amend the Automobile Insurance Act

On November 15, 1988 Bill 92 was introduced by the Minister of Transport into Quebec's National Assembly.⁸⁵ If this Bill is passed (without being changed), it will implement substantial and far-reaching changes to Quebec's pure no-fault scheme for compensation of automobile accident victims.

The most dramatic of these proposed changes is a large increase in the amount of the lump-sum impairment benefit payable under the Scheme. The proposed increase will be to an amount of \$75,000.00 (as of the date of coming into force of the Act) and further increases to levels of \$100,000.00 (as of January 1, 1991) and \$125,000.00 (as of January 1, 1992). Thereafter, the amount will be revalorized on January 1st every year.⁸⁶ It is apparent that to

⁸⁵ "An Act to Amend the Automobile Insurance Act and Other Legislation," Bill 92, 33rd Leg., 1st Sess. Introduced [November 15, 1988] (hereinafter referred to as "Bill 92").

⁸⁶ Bill 92, cl. 74.

fund such an increase in the amount of the impairment benefit, Quebec would either have to increase the level of funding for the Scheme, or reduce the amounts of the other benefits provided. It would appear that Quebec has chosen the latter course.

Other substantial amendments proposed include a recategorization of persons in respect of the income replacement indemnities, the replacement of the death benefit indemnity by a lump-sum payment, changes to the compensation provided to students, new limits on the duration of the income replacement indemnities, changes to the rehabilitation benefits and the introduction of a new "suspension of benefits" clause.

The proposed changes will be described in detail in Part Three.

E. New Zealand

1. Introduction

a. Before No-Fault

In New Zealand, prior to 1974, the system of accident compensation was composed of piece-meal elements of the common law action for damages, workers' compensation, and income - tested flat-rate social welfare benefits.⁸⁷ In September, 1966 a Royal Commission was constituted by the Government. Mr. Justice A.O. Woodhouse (as he then was) was made chairman.

The Report of the Committee headed by Mr. Justice Woodhouse (as he then was) recommended a unified comprehensive scheme for accident prevention, rehabilitation and compensation. Compensation was to be available for all injuries regardless of fault and cause. The common law action for damages would be abolished, and the Scheme would provide: benefits related to earnings and universally available to all accident victims, compensation for both short- and long-term incapacities, and minimum standards of compensation (to be paid to both earners and non-earners). Benefits would be paid periodically (but minor permanent

⁸⁷ G. Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (Wellington: Oxford University Press, 1979), p. 57 (hereinafter referred to as "Palmer").

disabilities would be compensated by a lump sum).⁸⁸

b. The Accident Compensation Act 1972

The original version of the Accident Compensation Act provided full coverage only to earners and persons injured in automobile accidents. Non-earners who were not injured in motor accidents would only be eligible for medical and rehabilitation assistance and lump sum compensation for impairment and non-economic losses (ie. pain and suffering). The Act provided only a brief definition of when the tort action for personal injury would be abolished (ie. the action was abolished when a person had coverage under the Act).⁸⁹ The Accident Compensation Act 1972 was amended on several occasions subsequent to its implementation, and in 1982 a new Act was introduced which consolidated and amended the Accident Compensation Act 1972 and its amendments.⁹⁰

2. The Accident Compensation Act 1982

The benefits provided by the Accident Compensation Act 1982 are described in detail in Part Three of the thesis.

⁸⁸ Ibid. pp. 408-426.

⁸⁹ Ibid. p. 271.

⁹⁰ Accident Compensation Act 1982.

3. Possibilities for Reform

In 1988, the Law Commission of New Zealand (New Zealand's law reform body) published a report entitled Personal Injury: Prevention and Recovery.⁹¹ This Report contained a review of the Accident Compensation Scheme and made several major recommendations which were embodied in the draft of a Bill for a new Safety, Rehabilitation, and Compensation Act.⁹² This draft Bill contained the following provisions:

- (i) The definition of "personal injury by accident" would be enlarged through the use of both general provisions regarding nervous shock, occupational disease, medical misadventure and contracting of diseases, and a detailed Schedule based on part of the International Classification of Diseases developed by the W.H.O.⁹³
- (ii) The one-year limitation period for making claims under the existing Compensation Act would be abolished.⁹⁴
- (iii) The waiting period (currently one week) before commencement of earnings-related benefits would be extended to two weeks, with an accompanying obligation on the employer to pay the employee injured in a work-related accident an amount equivalent to the benefit over the two-week

⁹¹ New Zealand. Law Commission. Report No. 4, Personal Injury: Prevention and Recovery (Wellington: The Commission, 1988).

⁹² Ibid., p. 108.

⁹³ Ibid., p. 47.

⁹⁴ Ibid., p. 49.

waiting period.⁹⁵

- (iv) The maximum earnings-related benefit would be defined by reference to a weekly income of \$2,000.00. There would be a minimum benefit in the amount of the minimum weekly wage for totally incapacitated earners.⁹⁶
- (v) Homemakers and other non-earners would have a periodic benefit assessed against notional earnings, equal to the average ordinary weekly earnings for "all sectors, all persons." That is, totally incapacitated non-earners would receive a weekly benefit of 80% of the average ordinary weekly wage.⁹⁷
- (vi) Lump-Sum Payments for permanent impairment or for pain and suffering would be abolished. Any significant permanent partial disability would be evaluated as a percentage of total disability by reference to the A.M.A. "Guides to the Evaluation of Permanent Impairment." The benefit would be payable periodically, to both earners and non-earners, as a percentage of the base figure (which would be set at 80 percent of the average weekly wage). If the victim is an earner, and feels that receiving a periodic benefit calculated with a base figure of 80% of the average weekly wage results in compensation which is lower than his or her actual loss of earnings, he or she can apply for a permanent partial disability benefit which is calculated using the victim's actual lost earning capacity.⁹⁸

It remains to be seen whether the far-reaching reforms suggested in this Report will be implemented.

⁹⁵ Ibid., p. xxiii.

⁹⁶ Ibid.

⁹⁷ Ibid., pp. xxiii, 64, 65, 97 and clauses 23 and 45(1)(a) and (b) of the Draft Bill.

⁹⁸ Ibid.

F. Victoria

1. Introduction

a. Before January 1, 1987

Victoria enacted the first "add-on no-fault" scheme in Australia in 1973.⁹⁹ A person injured as a result of an accident who suffered deprivation or impairment of earning capacity by reason of the injury could apply for compensation (to a maximum amount of \$20,800.00).¹⁰⁰ Compensation was also payable to the dependants of persons killed in motor vehicle accidents, where the death occurred within two years of the accident.¹⁰¹

The 1973 Act preserved the right to sue at common law. The injured person was obliged to prove negligence of the insured driver. The common law component was administered through the State Insurance Office, which became the sole insurer of motor vehicles in Victoria in 1976.¹⁰²

In May 1986, the Victorian government attempted to implement changes to the Compensation Scheme for accident victims. The Government's proposed reforms were contained

⁹⁹ Motor Accidents Act 1973 (Vic.) s.1.

¹⁰⁰ Motor Accidents Act 1973, s.25.

¹⁰¹ Motor Accidents Act 1973, ss. 26 and 27.

¹⁰² Victoria. Government Statement, Victoria: Transport Accident Compensation Reform (May 1986), p. 29 (hereinafter referred to as "Government Statement").

in a Statement entitled Victoria: Transport Accident Compensation Reform.¹⁰³ A single organization called the Transport Accident Commission would be established to manage a pure no-fault compensation scheme.¹⁰⁴

Four major personal injury benefits would be provided to transport accident victims:

- reasonable cost of medical expenses (subject to a deductible) and rehabilitation assistance;
- income adjustment benefit payable only to earners (either totally or partially disabled) during first eighteen months after accident;
- long-term impairment benefits payable after 18 months following the accident to both earners and non-earners and comprised of both lump sum and annuity payments;
- loss of earning capacity benefit payable after 18 months following the accident to both earners and non-earners.

A death benefit, comprised of both lump sum and periodic payments, would be payable to the surviving spouse and dependent children of the accident victim.¹⁰⁵

The legislative response to the detailed "pure no-fault" compensation scheme proposed by the Government is

¹⁰³ Ibid.

¹⁰⁴ Ibid., p. 13.

¹⁰⁵ Ibid., pp. 76-82 and 90-96.

the Transport Accident Act 1986 (Vic.).

2. The Transport Accident Act 1986

a. Introduction

Had the no-fault compensation scheme proposed by the Government been enacted, Victoria would have joined the handful of jurisdictions where the availability of the tort action for personal injury as a result of motor vehicle accidents has been abolished, namely New Zealand, Israel, Quebec and the Northern Territory of Australia.¹⁰⁶ However, numerous groups, including the Law Institute of Victoria, the Victorian Bar and the State Opposition Parties, were heavily critical of several of the proposal's reforms, including the level of no-fault benefits payable in the first eighteen months following the accident, as well as the calculation of lost earnings capacity utilizing "Guide to Assessment of Permanent Impairment."¹⁰⁷

As a result, a new scheme was devised, which retained the common law action for negligence, where the disability resulting from the accident is "serious." In short, Victoria has adopted a "threshold no-fault" scheme.¹⁰⁸

¹⁰⁶ I. Malkin, "Victoria's Transport Accident Reforms - In Perspective" (1987), 16 Univ. Mel. Law Rev. p. 254 at p. 260.

¹⁰⁷ Ibid., p. 261.

¹⁰⁸ Ibid., p. 262.

b. Details of Scheme

The benefits provided by the Victorian scheme are fully described in Part Three of the thesis.

3. The Common Law

Section 93 of the Act allows a victim to bring an action for personal injury damages where the impairment is assessed at thirty percent or more, or the accident is serious, i.e. involving long-term impairment, loss of bodily function, serious disfigurement, long-term mental or behavioural disorder, or loss of a foetus. However, before any action can be brought, the Corporation must have first determined the degree of impairment of the victim (this determination is made 18 months after the accident occurs or the injury stabilizes, whichever is later, or, in the case of minors, the later of: 18 months after the accident, or 18 months after the injury stabilizes, or the victim's 18th birthday).¹⁰⁹

¹⁰⁹ Transport Accident Act 1986, (Vic.) No. 111 of 1986, ss. 93(1),(2),(3),(4) and (17), as am. by Transport Accident (Amendment) Act 1988, (Vic.) No. 32 of 1988. (Hereinafter referred to as "Vic. Act").

G. Report on a Transport Accidents Scheme For
New South Wales (The N.S.W. Report)

1. Introduction

a. Scope of Report

One of the most detailed examinations of virtually every major issue affecting the question of compensation for victims of accidents, disability or disease is the Report on a Transport Accidents Scheme for New South Wales,¹¹⁰ which was the product of three years of exhaustive research and study by the New South Wales Law Reform Commission. This Report examined the then-existing compensation system for victims of both accident and disease in New South Wales, considered various proposals for reform and investigated a number of important policy questions relating to the area of compensation.

b. Issues Examined

The New South Wales Law Reform Commission conducted a comprehensive study of numerous issues relevant to its consideration of what sort of compensation scheme should be introduced into New South Wales. The issues canvassed

¹¹⁰ New South Wales. New South Wales Law Reform Commission. Report on A Transport Accident Scheme for New South Wales. 2 Vols. (Sydney: The Law Reform Commission, 1984) (Hereinafter referred to as the "N.S.W. Report").

included:

- historical background of the common law negligence action and introduction of liability insurance
- the then-existing compensation system in New South Wales
- the advantages and disadvantages of the common law
- proposals for reform of the common law
- policy questions relating to compensation
- forms of compensation (various benefits)
- scope of the compensation scheme
- administration and finance of the compensation scheme
- assessment and appeal of decision-making within the Scheme.¹¹¹

2. The Approach

The Commission conducted an extensive research and consultation program, involving three major surveys (on persons who had received lump sum awards for personal injury, on the sources and consequences of accidents suffered by persons, and case studies on persons injured in transport accidents), a number of research papers, and numerous consultations with experts in the area of accident compensation (including a visit to New Zealand, to speak

¹¹¹ Ibid., Vols. I and II.

with the administrators of that country's compensation system).

3. Proposals for Reform

a. Comprehensive No-Fault Schemes

The N.S.W. Report reviewed the findings and recommendations of both the New Zealand Royal Commission of Inquiry into compensation for personal injury, and the Australian National Committee of Inquiry into Rehabilitation and Compensation (Woodhouse I and Woodhouse II). Finally, the Report noted that no modification of the common law negligence action can overcome its most serious deficiency, its failure to compensate a substantial number of transport accident victims. This could only be remedied by either supplementing the common law action, or replacing it altogether with a no-fault system of compensation.¹¹²

4. Assessment of Compensation - The Use of Models

The N.S.W. Report noted that the question of assessment of compensation is not a problem confined to no-fault schemes. In fact there are (in general) three different approaches to be considered in determining what should be the basis for assessment of compensation. The first of

¹¹² Ibid., Vol. I, p. 120.

these approaches is called the "Welfare Model." This scheme would provide compensation to injured persons in order to meet needs arising from the injury. The benefits provided can include income maintenance payments, medical, hospital and rehabilitation services, as well as other assistance (such as aids, appliances, and structural modifications). The compensation could be paid in either monetary form or through services.¹¹³ This "Welfare Model" will be discussed in greater detail in the "Analysis" section under "Compensation of Earners: Total Disability" (see Part Three, at p. 113).

The second Model is called the "Disability Model." Under this Model, compensation would be assessed by reference to the degree of physical disability suffered by the victim. The impact of the disability on the victim's earning capacity would not be considered. Persons with similar disabilities would receive similar compensation, regardless of the financial consequences flowing from those disabilities.¹¹⁴ This "Disability Model" will also be discussed in the "Analysis" section under "Compensation of Earners: Total Disability" (see Part Three, at p. 115).

The third Model of compensation is called the "Restitution Model." It provides that compensation (either in the form of money or services) is designed to restore the

¹¹³ Ibid., p. 140.

¹¹⁴ Ibid., p. 142.

injured person, as much as possible, to his or her pre-accident position. This is the approach of the common law assessment of damages.¹¹⁵ Again, as with the first two Models, this "Restitution Model" will be discussed in greater detail in the "Analysis" section under "Compensation of Earners: Total Disability" (see Part Three, at p. 116).

The exact Model recommended by the Report will be the subject of discussion in Part Three of this thesis.

5. Other Issues

a. Form of Compensation

The Report concluded that compensation should generally be provided in a form which matches the losses sustained by accident victims. That is, compensation for loss of earning capacity should be paid on a periodic basis, and medical support and other services required by disabled persons should be provided as the need arises. In two specific cases, compensation for death and compensation for permanent disability, a lump sum is appropriate.¹¹⁶

b. Compensation for Loss of Earning Capacity

The Report recommended that "earners" who are in-

¹¹⁵ Ibid., pp. 144-145.

¹¹⁶ Ibid., p. 159.

capacitated as a result of a transport accident should receive compensation in respect of their loss of capacity (including impairment benefits). The definition of "earner" would include people who have a recent attachment to the work force (i.e. seasonal workers), employees and the self-employed.

"Earnings" would include monetary benefits received through employment, the value of living accommodation, lodging or food and the value of a car provided by the employer. The assessment of earnings would be subject to provisions that a "fair and reasonable" amount representing the normal average weekly earnings of the victim is to be paid, when the usual method of assessment does not produce this results.¹¹⁷

The Report recommends several provisions to deal fairly with self-employed persons and earners who have suffered long-term incapacity.¹¹⁸

Non-earners (i.e. children, full-time unpaid home-makers, long-term unemployed, discouraged job-seekers, students and retired people) would receive compensation for long-term incapacity on the basis of a "notional earning capacity."¹¹⁹

¹¹⁷ Ibid., pp. 185-194.

¹¹⁸ Ibid., pp. 195-211.

¹¹⁹ Ibid., pp. 212-218.

c. Other Benefits

These will be discussed in the next Part.

PART THREE

A. Comparison and Analysis

1. Introduction

a. Comparison

(1) Schemes to be Examined

In this Part of the thesis, we will review the approaches of the compensation Schemes examined thus far, to several major issues which affect the development of a compensation Scheme for victims of automobile accidents.

The Schemes which we will review are:

- Manitoba (includes Part II benefits and the Kopstein Report's recommended Model of a "pure no-fault" compensation scheme);
- Ontario (includes the Standard Insurance Policy and the Osborne Report's recommended Model of an "add-on no-fault" compensation scheme);
- Quebec (includes the current provisions of the Automobile Insurance Act and the proposed amendments, contained in Bill 92);
- New Zealand
- Victoria
- New South Wales Law Reform Commission, Report on a Transport Accident Scheme for New South Wales (the

"N.S.W. Report").

(2) Issues to be Examined and Criteria Employed

Each of the Schemes listed above has its own approach to dealing with several important compensation issues. In many respects, these approaches are similar; in some respects, however, they are not. It is important to examine each issue on the basis of several criteria. For example, when considering how a particular Scheme (e.g. Manitoba Part II benefits) deals with the issue of compensating earners (i.e. employees and the self-employed) who are totally disabled, it is necessary to evaluate the approach on the basis of several criteria, i.e. the definitions employed, the categories of potential claimants, how the benefits are calculated, what are the maximum and minimum benefits payable, and so forth. Complete lists of both the issues to be examined, and the criteria employed in evaluating each Scheme's approach to those issues, are set forth below. Please note that this is the only time that the criteria will be stated in the thesis. In the actual Comparison below, the criteria will not be stated again.

Issues to be Examined

a. Eligibility for Benefits

Criteria Employed in Evaluating Each Scheme's Approach

Definitions leading to eligibility; Injuries eligible for compensation.

- b. Geographical Scope Persons covered within jurisdiction; Persons covered outside jurisdiction.
- c. Compensation for Earners
- (1) Total Disability Definition(s); Categories of potential claimants; How benefits are calculated; Maximum/minimum benefits payable; Waiting period before benefits commence; Duration of benefits; Assessment of post-accident earning capacity; Potential for advancement; Age limits; Indexation; Reduction of Benefits.
- (2) Partial Disability Same criteria as above.
- d. Compensation for Non-Earners
- (1) Total Disability Same criteria as for "totally disabled earners," above.
- (2) Partial Disability Same criteria as for "totally disabled earners," above.
- e. Compensation for Permanent Incapacity and Non-Economic Loss
- Similar criteria as for "totally disabled earners," above, with the exception that some of the criteria stated above are not applicable here, and that a new criteria, Minimum threshold for recovery, is introduced.
- f. Medical expenses and Rehabilitation Assistance
- Similar criteria as for "totally disabled earners," above, except that some of the criteria employed above are not applicable to this category.
- g. Death Benefits
- Similar criteria as for "totally disabled earners," above, except that some of the criteria employed above are not applicable to this category.

h. Exclusions from
Coverage

Exclusions from all benefits; Exclusions from disability/indemnity payments; Exclusions from benefits for permanent incapacity and non-economic loss; Exclusion from medical benefits and rehabilitation assistance; Exclusion from death benefits.

b. Analysis

Following the comparison of the approaches of the various Schemes to each of the Issues listed above, an analysis will be made of the strengths and deficiencies of the various approaches. Conclusions will be stated as to which of the approaches (in the writer's view) is best-suited to incorporation in a compensation scheme for automobile accident victims in Manitoba.

2. Comparison and Analysis

a. Eligibility for Benefits

(1) Comparison

(a) Manitoba

(i) Part II Benefits:

- injuries must result from "accident" (unplanned, unintended event occurring suddenly, without premeditation); excludes suicide or suicide attempts whether sane or insane.¹²⁰

¹²⁰ A Regulation Respecting Automobile Insurance Coverage under the Manitoba Public Insurance Corporation Act, Man. Reg. 290/88R, and amendments thereto, s.4 (Hereinafter referred to as "Man. Reg. 290/88R." Future

- injuries must result from driving, riding in, operating, collision with, entering, getting onto, alighting or being struck by a motor vehicle [s.5(1)].
- "motor vehicle" includes vehicles not run upon rails that are designed to be self-propelled or that are propelled by electrical power obtained by overhead trolley wires, excluding most snowmobiles, mechanically propelled wheelchairs and "self-propelled implements of husbandry."¹²¹

(ii) The Kopstein Report:

- No comments.

(b) Ontario

(i) The Standard Insurance Policy:

- "accident" not defined, except for provision regarding accidents occurring in Quebec (uses same definition of "accident" as the Automobile Insurance Act of Quebec).¹²²
- lengthy definition of "insured person" includes:
 - occupants of insured vehicle, owner of insured vehicle, and (if residing in same premises) spouse and dependent relatives of either insured or spouse while occupants of any other vehicle (provided that other vehicle is not owned or frequently used by the insured or persons residing in the same premises as him, nor is it owned or leased by an employer of the insured or persons residing in the same premises as him, nor is

references to this Regulation will be in the text, within parentheses).

¹²¹ Manitoba Public Insurance Corporation Act, R.S.M. 1987, c.P215, s.1(1).

¹²² Osborne Report, supra, n. 6, Vol. II, p. 761 (future references to this Report will be in the text, in parentheses).

it used for carrying passengers for compensation or for commercial delivery),

- any person struck in Canada by the insured vehicle,
- the insured, his or her spouse and any dependant relatives living in the same house who are struck as pedestrians (provided that they are not selling, repairing or parking cars at the time of the accident, and that the vehicle which struck them is not owned or frequently used by any of them, nor is it owned or leased by an employer of any of them),
- employee or partner of corporation or partnership which owns vehicle, including his or her spouse and dependent relatives living in the same dwelling premises while occupants of private passenger or station wagon vehicle (subject to same conditions as described in parentheses above)
- any employee or partner of the vehicle owner, for whose regular use the vehicle is provided, and his or her spouse and dependant relatives living in the same dwelling premises, who are struck as pedestrians (subject to same conditions as described in parentheses above). (pp. 762-763).
- "accident" must arise out of the "use or operation of an automobile." (Vol. II, p. 760).

(ii) The Osborne Report:

- all persons injured in motor vehicle accidents (including pedestrians) should be given access to no-fault benefits. The Standard Insurance Policy should be expanded to provide these benefits without exclusions related to driving conduct (Vol. I, p. 570).

(c) Quebec

(i) The Automobile Insurance Act:

- compensation provided to "victim(s) of bodily injury caused by an automobile" ("bodily injury"

is physical, psychological or mental injury including death and any damage caused to a victim in an accident).¹²³

- compensation to benefit every victim resident in Quebec and his dependants, whether accident occurred in or outside Quebec [s.6].
- "accident" defined as "an event in which damage is caused by an automobile" [s.1(1)].
- "automobile" defined as "any vehicle propelled by any power other than muscular force and adapted for transportation on a public highway but not on rails" [s.1(3)].
- "damage caused by an automobile" means damage caused by use of an automobile or by its load [s.1(10)].

(ii) Proposed Amendments:

- "bodily injury" redefined to exclude psychological injury (emphasis mine).¹²⁴
- "damage caused by an automobile" redefined to exclude damage caused in doing maintenance or repair work to an automobile (cl. 1).
- "victim" redefined as "every person who suffers bodily injury in an accident" (cl. 6).

(d) New Zealand:

- compensation provided for "personal injury or

¹²³ Automobile Insurance Act, R.S.Q. cap. A-25, ss.1(11), 1(12) and 3 (future references to sections of this Act will be in the text, in parentheses).

¹²⁴ "An Act to Amend the Automobile Insurance Act and Other Legislation," Bill 92, 33rd Leg., 1st Sess. Introduced [November 15, 1988], cl. 2 (hereinafter referred to as "Bill 92". Future references to clauses of this Bill will be in the text, in parentheses).

death caused by accident."¹²⁵

- "personal injury by accident" includes medical, surgical, dental and first aid misadventure and bodily harm (including pregnancy and mental and nervous shock) arising from rape or sexual intercourse with a female under 12 (s.2).
- coverage includes both physical and mental consequences of personal injury by accident (s.2).
- no coverage for deliberately self-inflicted injuries or for diseases unless the disease is a physical consequence of personal injury by accident (s.2).
- "accident" is "any form of damage to the human system which is unexpected and undesigned by the person injured."¹²⁶

(e) Victoria:

- compensation payable to persons injured as a result of "transport accident."¹²⁷
- "transport accident" defined as "incident directly caused by, or directly arising out of, the driving of a motor car, a railway train or a tram" [s.3(1)].
- dependants of persons killed in transport accidents are entitled to compensation if the deceased would have been entitled to compensation in respect of the accident [s.35(2)].

¹²⁵ Accident Compensation Act 1982, s.27 (future references to sections of this Act will be in the text, in parentheses).

¹²⁶ Wallbutton v. Accident Compensation Corporation, [1983] N.Z.A.C.R. 527 (N.Z.H.C.).

¹²⁷ Transport Accident Act 1986 (Vic.) No. 111 of 1986, s.35, as am. by Transport Accident (Amendment) Act 1988, (Vic.) No. 32 of 1988 (future references to sections of this Act, as amended, will be in the text, in parentheses).

(f) N.S.W. Law Reform Commission Report:

- compensation for death or bodily injury caused by or arising out of a transport accident.¹²⁸
- "transport accident" defined as one caused by or arising out of the use of:
 - a motor vehicle (except motor vehicles being used for motor sport) provided that if the accident does not occur on a public street, the motor vehicle is registered under the law of New South Wales; or
 - an omnibus, taxi-cab, train, water taxi, water ferry (whether accident occurs on land or water or public or private property); and
 - other classes of vehicle or transport included in the Scheme from time to time (Vol. II, p. 593).
- pre-natal injury, injury resulting from nervous shock and damage to artificial limbs, eyes or teeth or other aids or spectacles included in "bodily injury" (Vol. II, p. 594).

(2) Analysis

Much of the discussion with respect to eligibility for compensation has been directed to the question of whether a compensation Scheme should provide coverage in respect of both accident and disease. Since this thesis is limited to consideration of compensation for automobile accident victims, this question is clearly outside of the issue to be considered here. It is therefore appropriate to compare the extent of the provisions cited above, and decide which (if any) would be most appropriate for adoption in

¹²⁸ N.S.W. Report, supra, n. 110, Volume II, p. 594 (future references to pages of this Report will be in the text, in parentheses).

Manitoba.

In Manitoba, the payment of no-fault accident benefits is contingent upon the occurrence of an "accident." "Accident" is defined in section 4 of Manitoba Regulation 290/88R as follows:

An unplanned, unintended event that occurs suddenly, unexpectedly, and without actual premeditation upon the part of an insured, but excludes suicide or any attempt at suicide by an insured while sane or insane.

It has been extremely difficult for the courts to determine what conduct is accidental and what conduct is intended (ie. not accidental). In some cases (not involving the present Manitoba definition of "accident"), the courts have distinguished conduct from result. If the conduct was intentional, that has sometimes been sufficient to characterize the entire event as intentional, even if the result could not be predicted. For example, a man who is intentionally driving his car extremely fast around a slippery curve to show off his driving prowess (and, not surprisingly, has an accident) could be said to have intended to get into an accident. A similar approach is to characterize the intended conduct as so reckless, that the result is deemed to have been intended. However, it is clear that if the insured is negligent or even grossly negligent, this conduct does not detract from the acciden-

tal nature of any injury that results.¹²⁹

It would appear that Manitoba's definition of "accident" in the Regulations, as cited above, is narrower than the common law definition of "accident" that the Courts have been willing to apply. It would seem somewhat unfair that a Government Insurer is denying to its clients the no-fault benefits which a private insurer, in an analogous situation, would be required to pay.

One other consideration which is relevant to the determination of whether Part II benefits are payable is the requirement that a "motor vehicle" be involved.¹³⁰ The term "motor vehicle" is defined in subsection 1(1) of the Manitoba Public Insurance Corporation Act¹³¹ to include vehicles not run upon rails that are designed to be self-propelled or that are propelled by electrical power obtained by overhead trolley wires. The definition excludes most snowmobiles, mechanically propelled wheelchairs, and "self-propelled implements of husbandry."

Third party liability coverage for most of the vehicles not included in the definition of "automobile" in Regulation 290/88R is now mandatory in Manitoba. The Off-Road Vehicles Act, which came into effect on October 1, 1988, requires owners of vehicles such as motorcycles, all-

¹²⁹ Brown, supra n. 3, p. 45.

¹³⁰ See Man. Reg. 290/88R, s.5(1).

¹³¹ R.S.M. 1987, c.P215, s.1(1).

terrain vehicles, mini-bikes, dirt-bikes, and snowmobiles (but not farm tractors, golf carts, garden or lawn tractors or implements of husbandry) to register them with the Registrar of Motor Vehicles.¹³² In order to register the vehicles, the owners will have to acquire third party liability coverage of \$200,000.00 per vehicle. The coverage can be purchased from M.P.I.C., and is described in regulations passed pursuant to The Insurance Act.¹³³

If the reader has found the provisions of Ontario's Standard Automobile Policy, as discussed above, to be confusing, lengthy, and downright ridiculous, he or she may be comforted to know that others feel the same way.

In The Standard Automobile Policy Annotated, John Lewcombe states:

The only thing [the policies] are truly "standard in is in being extremely difficult for laymen to understand ...¹³⁴

Mr. Justice Osborne is somewhat more direct and explicit:

[T]he standard form of automobile insurance policy is badly structured and incomprehensible ... [it] contains general provisions, definitions and exclusions, which are supposed to, but do not apply to the entire policy. Section B ... has its own general provisions, definitions and exclusions ... [which] do not apply to that

¹³² R.S.M. 1987, Chap. 031, ss. 1(1) and 3 (hereinafter referred to as "Off-Road Vehicles Act").

¹³³ Off-Road Vehicles Act, s.20.

¹³⁴ J. Newcombe, The Standard Automobile Policy Annotated (Toronto: Butterworths, 1986).

part of Section B which deals with the uninsured/underinsured motorist coverage. It is impossible for a consumer to read Section B of the policy and understand it.¹³⁵

The Standard Policy's definition of "insured person" (for the purposes of the no-fault injury benefit) is unreasonably restrictive, complex and confusing. Furthermore, eligibility for the no-fault benefits is contingent upon the bodily injury or death occurring as a result of "an accident arising out of the use or operation of an automobile."¹³⁶ The word "accident" is not defined in the Standard Automobile Policy, except for the provision regarding accidents occurring in Quebec. In this provision, "accident" is defined as an event occurring in Quebec which results in damage caused by an automobile, the use of an automobile, or the load of an automobile.¹³⁷ The Policy goes on to state that where bodily injury occurs as a result of an accident in Quebec, the insurer agrees to make payments in the same amount and form and subject to the same conditions as if such person were a resident of Quebec as defined in the Automobile Insurance Act (Quebec) and Regulations thereto, and is entitled to payment as set out

¹³⁵ Osborne Report, supra, n. 6, Vol. I, p. 135.

¹³⁶ Ibid., Vol. II, p. 760.

¹³⁷ Ibid., p. 761. See also the definition of "accident" in the Quebec Scheme, infra.

in that Act.¹³⁸

With respect to accidents not occurring in Quebec, the Policy is silent as to the definition of "accident." Please see the comments with respect to the definition of "accident" as set out above, at page 67.

There can be no doubt that the definition of "insured person" as set out in Ontario's Standard Insurance Policy is complex, unclear and arbitrarily limited. Therefore, this provision does not merit consideration. The simplest definition is that employed by the Quebec Scheme. The advantages to a general definition (as used in Quebec) are simplicity of usage, clarity of meaning and increased efficiency in operation resulting from the first two advantages. The disadvantage of a general definition is that without specific inclusions, certain of the less obvious consequences of automobile accidents may be regarded as not arising from the accident, and therefore ineligible for compensation. Clearly, the Quebec Scheme provides its administrators with a fair degree of discretion.

The proposed amendment to the Quebec Scheme, which would amend the definition of "bodily injury" to exclude psychological injury, is both an insensitive and unjust provision. Every serious accident (and some less serious accidents) leaves a psychological injury. For instance,

¹³⁸ Ibid.

some people will refuse to drive after being involved in an accident (if driving is required by the duties of their employment, they risk unemployment as a direct consequence of the automobile accident). Should such people be excluded from coverage?

It is submitted that a general definition, such as that employed by the Quebec Scheme, together with specific inclusions for certain types of losses (as the N.S.W. Report recommends) and provisions dealing with pre-existing incapacities, would provide adequate guidelines in determining eligibility. That is, coverage would be provided to persons who sustain bodily injury (physical, psychological or mental injury, including death) as the result of an automobile accident. "Accident" would be defined simply as "an event in which damage is caused by an automobile," and "automobile" would be defined as "any vehicle propelled by any power other than muscular force and adapted for transportation on a public highway but not on rails."

The improved definitions would also employ certain inclusions, based on the N.S.W. Report, to include in the definition of "personal injury" the following:

- pre-natal injury, injury resulting from nervous shock and damage to artificial limbs, eyes or teeth or other aids or spectacles.

It is evident that one of the most important considerations is difficult, if not impossible, to legislate; that

is the attitude of the Insurer.

The laws should be clear, straightforward, and leave the Scheme's administrators little or no room for bias or absolute discretion in the determination of such important issues as who will be eligible to receive benefits.

b. Geographical Scope

(1) Comparison

(a) Manitoba

(i) Part II Benefits:

- persons injured in Manitoba through use of motor vehicle, or as a result of entering or exiting or being struck by a motor vehicle, are covered, subject to three exceptions:
 - non-Manitoba residents riding in or on vehicles not registered in Manitoba
 - Quebec residents
 - persons driving, riding in or on, struck down, or getting in or out of vehicles which are not required to be registered under The Highway Traffic Act of Manitoba (s.33).
- accidents occurring in North America (not in Quebec):
 - Manitoba licensed drivers covered as are passengers who are Manitoba residents
 - persons riding in Manitoba registered vehicles (excluding Quebec residents) while vehicle is operated by person who is "qualified and authorized by law to operate it" and has vehicle owner's consent
 - coverage does not extend to Manitoba residents outside of Manitoba who are struck as pedestrians (s.7).
- accidents occurring in Quebec:
 - Manitoba licensed drivers operating vehicles not registered in Quebec are covered, as are Manitoba residents who are passengers with them
 - Manitoba residents who are occupants of vehicles registered in Manitoba are also

- covered benefits will be paid by M.P.I.C. in accordance with the Automobile Insurance Act (Quebec) and Regulations (s.8)
- Manitoba residents injured by or in a Quebec-registered motor vehicle in the province of Quebec will not receive benefits from M.P.I.C., but will be eligible for compensation from the Regie.¹³⁹

(ii) The Kopstein Report:

No comments.

(b) Ontario:

(i) The Standard Insurance Policy:

- coverage applies only while insured vehicle (or temporary substitute vehicle) being operated, used, stored or parked within Canada, the U.S.A. or upon a vessel plying between ports of those countries (Vol. II, p. 764).
- persons hit as pedestrians, in Canada (excluding Quebec) by the insured vehicle or temporary substitute automobile (Vol. II, p. 764).
- for accidents occurring in Quebec:
 - Ontario residents who are passengers in Ontario-registered vehicles, the owner of the insured vehicle (and his spouse and any dependant relatives, if residing in the same dwelling premises),
 - persons struck by the insured vehicle, the owner of the insured vehicle (and his or her spouse and any dependent relatives living in the same dwelling premises as the insured) struck by a vehicle which is not the insured vehicle,
 - employees or partners of the owner of the insured vehicle (where the owner is a

¹³⁹ Automobile Insurance Act, R.S.Q. cap. A-25, ss.6 and 8.

corporation, an unincorporated association or partnership) and his or her spouse and dependant relatives (who live in the same dwelling premises) while riding in a vehicle which is not the insured vehicle,

- any employee or partner of the owner of the insured vehicle, for whose regular use the insured vehicle is supplied, and his or her spouse and any dependent relative of either (who are residing in the same dwelling premises as such employee or partner) who are hit as pedestrians, and
- any other person hit (whether as a pedestrian or not) by an automobile being driven by a person who falls into any of the foregoing categories;

coverage will be extended in the same amount and form and subject to the same conditions as if such persons were resident of Quebec and entitled to payment under the Automobile Insurance Act (Quebec) and Regulations thereto (Vol. II, p. 761).

- persons injured in Quebec who do not fall into any of the above categories will be eligible for compensation in accordance with the provisions of the Automobile Insurance Act.¹⁴⁰

(ii) The Osborne Report:

- all persons injured in motor vehicle accidents (including pedestrians) should be given access to no-fault benefits. The Standard Insurance Policy should be expanded to provide these benefits without exclusions related to driving conduct (Vol. I, p. 570).

(c) Quebec:

(i) The Automobile Insurance Act:

- compensation to benefit every victim resident in Quebec and his dependants, whether accident occurs

¹⁴⁰ Automobile Insurance Act, R.S.Q. cap. A-25, ss. 6 and 8.

in or out of Quebec (s.6).

- if accident occurs in Quebec, owner, driver and passenger of Quebec-registered vehicle are deemed to reside in Quebec (s.6).
- "victim" means every person sustaining bodily injury in an accident, including owner or driver of and every passenger in each automobile involved in the accident [s.1(28)].
- victim of accident outside of Quebec who is entitled to compensation from the Regie may receive that compensation, while retaining right of action with regard to excess compensation under the laws of the place where the accident occurred (s.7).
- if the Regie compensates a victim for an accident outside of Quebec, the Regie is subrogated to that victim's rights. It is therefore entitled to receive compensation and capital (representing pensions that it is required to pay to the accident victim) from any non-Quebec resident who is responsible or liable for the compensation for bodily injury caused by that non-resident (s.7).
- non-Quebec residents injured in accidents in Quebec are entitled to compensation from the Regie to the extent that they are not responsible for the accident (unless otherwise agreed between the Regie and the competent authorities of the place of residence of such victim), but victim has right of recourse in respect of disagreement between the Regie and the victim with regard to responsibility (s.8).
- Manitoba, Alberta and Ontario residents injured in Quebec are entitled to compensation in accordance with the Quebec Scheme due to reciprocal agreements between those provinces and Quebec.¹⁴¹

(ii) Proposed Amendments:

- "victim" redefined as "every person who suffers bodily injury in an accident" (cl. 6).
- a person who is a non-resident of Quebec and is

¹⁴¹ Cramer & Armstrong, supra, n. 76, Vol. I, p. 111.

injured in an accident in Quebec will have his/her responsibility for the accident determined by the Regie (this is the same as the current situation-see above). However, if this person wishes to have his or her responsibility determined by a Court, application must be made to Court within 180 days of the Regie's decision as to responsibility for the accident.

(d) New Zealand:

- all persons who are injured or die in New Zealand as a consequence of personal injury by accident are covered, and they (or their dependants) are entitled to the benefits thereunder (s.34).
- tourists are covered but are not eligible for earnings-related compensation (s.34).
- New Zealand earners are covered outside of New Zealand if their absence is temporary and if the purpose of their travel is related to employment in New Zealand (s.30).
- coverage applies 24 hours a day, regardless of fault and location (provided that the accidents are within the territorial reach of the legislation), (s.2).

(e) Victoria:

- persons injured as a result of transport accidents in Victoria are covered, as are Victorian residents injured elsewhere in Australia by Victorian-registered motor vehicles (s.35).
- drivers or passengers of vehicles registered in Victoria which are involved in collisions elsewhere in Australia (i.e. outside of Victoria) are covered (s.35).
- persons not resident in Victoria who are injured by a Victorian-registered motor vehicle elsewhere in Australia (but are not passengers or drivers of the registered vehicle) will be eligible for compensation if they are likely to, as of the accident date, reside in Victoria for at least six months after the accident date (s.36).

(f) N.S.W. Law Reform Commission Report:

- residents of New South Wales who suffer death or injury as a result of a transport accident in New South Wales will be covered (Vol. II, p. 595).
- Australian residents (who are not resident in New South Wales) who sustain death or injury as a result of a transport accident in New South Wales will be covered, provided that the motor vehicle or other form of transport involved was registered or required to be registered in New South Wales, or was operated by the Urban Transit Authority or State Rail Authority of New South Wales (Vol. II, p. 595).
- Australian residents (not resident in New South Wales) injured or killed as a result of a motor vehicle accident in New South Wales caused by an unidentified motor vehicle will be covered (Vol. II, p. 595).
- New South Wales residents injured or killed in transport accidents occurring in Australia (but outside New South Wales) will be covered, provided that the vehicle or other transport involved was registered or required to be registered in New South Wales, or is operated by the Urban Transit Authority or State Rail Authority of New South Wales (Vol. II, p. 595).
- no benefits (except for death benefits) payable under the Scheme to non-Australian residents (Vol. II, p. 596).
- if a person eligible for compensation takes up residence outside Australia after the accident, he or she remains eligible for loss of earning capacity compensation (to the extent that the Corporation considers appropriate) and also remains eligible for the rehabilitation assistance (having regard to the victim's needs and circumstances and comparative costs of the services and the victim's eligibility for benefits in the country of residence or proposed residence), but no other continuing benefits or allowances should be allowed, including needs-based periodic compensation payable to surviving spouses not resident in Australia (Vol. II, pp. 596-597).

(2) Analysis

Again, it is Ontario's Standard Insurance Policy which contains the most confusing and lengthy provisions.

The other jurisdictions surveyed seem to maintain a fairly consistent basis for determining scope of coverage. Coverage will generally be extended to persons injured inside the jurisdiction (whether residents or not of that jurisdiction) as a result of automobile accidents involving vehicles registered within the jurisdiction, or being operated by persons licensed by that jurisdiction. Similarly, coverage will be extended to persons outside the jurisdiction who are residents of that jurisdiction and riding with persons who are licensed by that jurisdiction or in vehicles registered in that jurisdiction. The limitations employed appear to focus on persons who are either non-residents of the jurisdiction in question, or who are non-residents of the country in which that jurisdiction is located.

If Manitoba is to consider a pure no-fault compensation scheme for victims of automobile accidents, it is questionable as to whether the exclusion of non-residents can be justified. The unfairness of such an exclusion is emphasized where the accident is caused by a third party who is licenced in Manitoba, or operating a Manitoba-registered vehicle (if the non-resident is not a passenger in the Manitoba vehicle, or in the vehicle driven by the

Manitoba driver, he or she is not eligible for our No-Fault injury benefits).

Admittedly, non-residents would not ordinarily contribute to the funding of this Scheme, but surely provisions could be drafted which give the accident victim the right to elect between compensation offered by the Manitoba Scheme or that which they may be entitled to under the laws of the place where they are resident. If the accident victim elects to take the Manitoba coverage, the administrator of the Manitoba Scheme (i.e. M.P.I.C.) would then be subrogated to the accident victim's rights to compensation from an insurer (Government or otherwise) of the jurisdiction where the victim is from.

The definition of a "victim" in Quebec's Bill 92 as "every person who suffers bodily injury in an accident" is a straightforward and workable approach to the determination of which persons should be eligible for coverage. It should be employed in an automobile accident compensation scheme for Manitoba.

Victoria's provisions, similar to the N.S.W. Report's recommendations, would extend coverage to persons not resident in Victoria who are injured by a Victorian-registered motor vehicle elsewhere in Australia (but are not passengers or drivers of the registered vehicle) if these persons are likely to, as of the accident date, reside in Victoria for at least six months after the

accident date. This situation is hypothetical at best; the provision requires a degree of prediction on the part of the Scheme's administrators which verges on fortune-telling. An improved provision would be one which simply provides that non-residents injured by Victorian motor vehicles in Australia (but not in Victoria) may elect between the benefits offered by the Scheme or the compensation available under the laws of the jurisdiction where the accident occurs (if compensation under the Scheme is selected, the Corporation would then be subrogated to the rights of the victim in respect of compensation available under the laws of the jurisdiction where the accident occurs).

It is submitted that the provisions of the N.S.W. Report, which deny compensation to persons who are non-residents of Australia, are unnecessarily harsh and unsupportable in view of the basic philosophy of entitlement to compensation for victims of automobile accidents.

It is further submitted that a limitation upon the compensation payable to a non-resident injured in an automobile accident in Manitoba (and thus only eligible for compensation to the extent that he is not at fault for the accident) is also contrary to the purpose of a comprehensive compensation scheme for automobile accident victims. Therefore, provisions in respect of non-residents injured inside the jurisdiction should be similar to those ap-

plicable to residents. The only exception should be that where the non-resident is entitled to other compensation (i.e. from an insurer in his own jurisdiction), M.P.I.C. would, if it had paid compensation to such a person, be entitled to subrogation in respect of that victim's right to other compensation.

c. Compensation for Earners

(1) Total Disability

(a) Comparison

(i) Manitoba

1. Part II Benefits:

- "totally disabled" defined as "condition of mind or body that renders an insured entirely and continuously incapable of engaging for wages or profit in any occupation or employment for which the insured is reasonably suited having regard to his or her skill and ability" (s.4).
- it is the skill or ability before the accident occurs which is relevant.¹⁴²
- "earner" is a person who is actively working for wages or profit at time of accident, or for any six months out of the twelve-month period immediately preceding the accident date [s.12(1)].
Note: this requirement of employment at either the time of the accident or for any six months out of the year preceding the accident will be referred to as the "employment requirement" for the rest of this thesis.
- disability must manifest itself within 20 days of accident [s.12(1)].
- minors must show actual loss of earnings to

¹⁴² DePape v. M.P.I.C. (1980), 7 Man. R. (2d) 119 (Q.B.).

qualify for the "earner's" disability benefit; ie. they must satisfy the "employment requirement" [s.16(2)].

- persons who, by reason of a pre-existing mental or physical infirmity, were unable to provide themselves with the necessities of life, must show actual loss of earnings to qualify for the "earner's" disability benefit; ie. they must satisfy the "employment requirement" [s.16(2)].
- benefit is 70 percent of earner's average gross weekly earnings, subject to minimum of \$150.00 per week and maximum of \$300.00 per week [s.12(1)].
- no minimum benefit in respect of earners who are minors or persons suffering from pre-existing physical or mental infirmity, but these earners are subject to maximum of \$300.00 per week [s.16(2)].
- however, once minors turn 18, if they are still totally disabled, they will be eligible for the weekly disability benefit payable to ordinary adult victims; the benefit is payable as of their 18th birthday [s.16(1)(a)].
- similarly, once it can be shown that persons who, by reason of a pre-existing mental or physical infirmity, were unable to provide themselves with the necessities of life (prior to the accident) would have been completely or substantially cured of that pre-existing condition (but for the accident), those persons will be eligible for the weekly disability benefit payable to ordinary adult victims; the benefit is payable as of the date upon which the victims would have been completely or substantially cured of that pre-existing condition (but for the accident) [s.16(1)(b)].
- it should be noted that where minors and persons who, by reason of a pre-existing mental or physical infirmity, were unable to provide themselves with the necessities of life are non-earners, they may be eligible for the total disability benefit payable to non-earners; see below, under "compensation for Non-Earners: Total Disability," at p. 186.
- one week waiting period before benefits commence (s.15).

- benefits continue for duration of total disability; no maximum duration [s.12(1)].
- benefits are not indexed.
- disability benefits may be cut off where accident victim does not subject himself to reasonable medical, surgical or other treatment or enrolls in program of rehabilitation or re-training as requested by M.P.I.C. (s.19).
- no benefits payable if accident victim qualifies for compensation under the Workers' Compensation Act (s.34).
- no disability benefits payable during any period where victim receives monies under the Unemployment Insurance Act, 1971 (s.35).
- disability benefits reduced by benefits received from a private policy of insurance, so that sum total of the money received by the insured will equal amount of his or her average pre-accident income, to minimum of \$150.00 per week [ss.12(1) and 41(1)].
- indemnity benefits payable are reduced by amount by which total of wages or profit received by victim while totally disabled and indemnity payments paid to victim exceeds 70 percent of the victim's average gross weekly earnings [s.12(2)].
- M.P.I.C. may make a binding agreement with insured for commutation of weekly indemnity to lump-sum settlement; such agreement not to be made to the foreseeable detriment of the insured (s.18).

2. The Kopstein Report:

- No comments with respect to definition of "total disability" or "earners."
- benefit is 90 percent of victim's average weekly net earnings from employment; not subject to any minimum benefit but subject to maximum benefit of

\$500.00 per week.¹⁴³

- one week waiting period before benefits commence (p. 82).
- benefits will be payable as long as claimant remains totally disabled, and there is no maximum duration (p. 82).
- benefits will be indexed in accordance with the annual growth rate in the average Industrial Composite Index of Wages (p. 82).
- as benefits based on net weekly earnings, they would not be taxable.
- benefits will be reduced by the excess of any wage or profit during the period of disability and benefits payable over 70 percent of the gross weekly earnings from all sources (p. 82).

(ii) Ontario

1. The Standard Insurance Policy:

- weekly payment for loss of income available during period "which the insured person suffers substantial inability to perform the essential duties of his occupation or employment" (Vol. II, p. 760).
- the person must be actually employed at date of accident or actively engaged in an occupation or employment for wages or profit for any six months out of the preceding 12 months; persons who fall into the latter category will be "deemed to be employed" as of the accident date (Vol. II, p. 760).
- no benefit payable to persons under the age of 18 or over the age of 65 unless actually employed at the time of accident (i.e. do not qualify for "deemed to be employed" provision) (Vol. II, p. 760).

¹⁴³ Kopstein Report, supra, n. 1, Vol. II, Position Paper No. 2, p. 82 (all future references will be to Vol. II of this Report, Position Paper No. 2, unless otherwise indicated and will be in the text, in parentheses).

- disability benefits are payable as of date of accident, and continue for as long as victim suffers substantial inability to perform essential duties of occupation, subject to maximum of 104 weeks (Vol. II, p. 760).
- no minimum benefit, but benefit will be 80% of the victim's pre-accident gross weekly income, subject to a maximum of \$140.00/week (Vol. II, p. 760).
- disability must manifest itself within 30 days from date of accident (Vol. II, p. 760).
- if at end of two year period, injury continually prevents victim from engaging in any occupation or employment for which he is reasonably suited by education, training or experience, weekly payments continue for duration of such inability, subject to agreement of insurer (Vol. II, p. 760).
- after two weeks have expired, payments subject to reduction by receipt of any income from part-time or other employment, unemployment insurance compensation, or payments from other privately-arranged insurance policies; U.I.C. benefits are deducted from amount of income loss, and payments received from private contracts of insurance are pro-rated to establish weekly disability benefit (Vol. II, p. 760).
- for example: the insured person earns \$300.00 a week and receives the following payments after the accident:
 - (a) \$125.00 a week through his contract of employment;
 - (b) \$75.00 a week through U.I.C. sickness (accident) coverage;
 - (c) \$180.00 a week under a private sickness and accident policy;
 - (d) \$125.00 a week from an automobile club insurance scheme.

(Total collateral source payments: \$505.00 a week)
- For the first two weeks there is no collateral source deduction. The injured person will receive \$140.00 a week for the first two weeks of dis-

ability. After the first two weeks, the calculation of the insured's disability benefit is as follows:

- (a) Take 80% of the pre-accident gross weekly wage of \$300.00 a week - \$240.00
- (b) Deduct the U.I.C. benefit (\$75.00) and amounts received through the contract of employment (\$125.00) (\$200.00)

Income Loss for Disability Benefit Calculation is

\$40.00

- Payments received from the privately arranged contracts of insurance are not deducted from the base income immediately. These payments are pro-rated once the base income loss calculation (\$40.00) has been established:

$$\frac{\text{gross wages} - (\text{U.I.C.} + \text{employment benefits})}{\text{income loss} + (\text{payments from private insurance plans})} \times 40$$

or

$$\frac{\$300 - (75 + 125)}{\$40 + (180 + 125)} \times 40 = \$11.59$$

- In the above example, the injured person would be entitled to a weekly disability benefit of \$11.59.¹⁴⁴
- benefits are not indexed.
- persons who return to work and, within 30 days of returning, are unable to continue (due to an injury sustained in the accident) are still eligible to receive the disability benefits (Vol. II, p. 760).

2. The Osborne Report:

- disability benefits should be based upon 80 percent of victim's gross income, up to maximum of \$450.00 per week (Vol. I, p. 574).

¹⁴⁴ Osborne Report, supra, n. 6, Vol. 1, pp. 157-158.

- one week waiting period before disability benefits payable (Vol. I, p. 576).
- persons "deemed to be employed" (see above, at p. 85) should include persons aged sixteen, not merely eighteen (Vol. I, p. 577).
- persons "deemed to be employed" should be subject to a 60-day waiting period before the disability benefits commence (Vol. I, p. 578).
- once eligible for the disability benefit, a person "deemed to be employed" should be entitled to same benefit as employed person (Vol. I, p. 578).
- disability benefits will be non-primary, except for U.I.C. benefits; that is, disability benefits will be primary to U.I.C. benefits (Vol. I, pp. 575-576).
- disability benefits should continue beyond age 65, and should be offset by pension benefits (including R.R.S.P., pension receipts) received by the accident victim at that age (Vol. I, p. 576).
- disability benefits to be indexed in accordance with the Annual Consumer Price Index, subject to a maximum of two times the stipulated benefit (i.e. proposed disability benefit could increase with the C.P.I. to a maximum benefit of \$900.00/week), following which the increase would stop; benefits to be indexed once a year, as of July 1st (Vol. I, p. 593).
- if accident victim receives 80 percent of his or her gross wage loss from collateral sources (employer benefits), and are therefore ineligible for the no-fault disability benefits, those victims who are placed in a position of disadvantage (due to the fact that collateral benefits are not indexed) should receive an incremental benefit after two years of disability, to compensate those victims who otherwise have no access to indexed disability benefits (Vol. I, pp. 593-594).
- disability benefits to be paid within 15 days of the insurer's receipt of the required forms (Vol. I, p. 596).
- the "30-day return to work" provision in the Standard Insurance Policy (see above, at p. 87) should be increased to 90 days (Vol. I, p. 596).

- right to sue at common law preserved, but receipt of collateral benefits will reduce amount of disability benefit payable (Vol. I, pp. 586-587).

(iii) Quebec

1. The Automobile Insurance Act:

- victim who is a full-time earner is entitled to an indemnity of 90 percent of his/her net income; "net income" is victim's gross income up to a maximum amount of (for 1988) \$36,500.00¹⁴⁵ less income tax, U.I.C. premiums and contributions to the Q.P.P. (ss.26 and 27).
- gross income is that which victim derived from employment at time of accident (s.19).
- "gross income" and "net income" of accident victims who are employees or self-employed will be calculated according to the provisions of the Regulations¹⁴⁶.
- indemnity subject to a minimum (for 1988) of \$164.24 per week (plus \$20.54 per week per dependant), to total of \$287.48 per week (s.26).
- one week waiting period for benefits, and indemnity is paid every other week (s.35).
- indemnity payable for maximum period of five years from accident date, unless at end of five year period, victim is unable to hold any employment or can only obtain employment which pays less than his pre-accident employment (ss. 28 and 32).
- if, at end of five year period, victim is unable to hold any employment, the indemnity is continued (s.32).

¹⁴⁵ All of the Quebec benefits (not merely the indemnity benefits) are stated as of the 1988 calendar year.

¹⁴⁶ A Regulation Respecting Income, Quebec Regulation c.A-25, r.11, ss.3, 4 and 7 and Schedule 1 (future references to this Regulation will be in the text, and it will be referred to as "Que. Reg. c.A-25, r.11").

- if, at end of five year period, victim's earnings are less than they were before the accident, the Regie will pay an indemnity in an amount equal to the difference between the victim's net income (at time of accident) and net income victim is earning or could earn from employment (s.32).
- if victim returns to work prior to end of five year period, indemnity ceases, unless earnings are less than that earned at time of accident (s.31).
- if post-accident earnings are less than pre-accident earnings, indemnity is reduced by amount equivalent to fifty percent of the net income earned from the post-accident employment (not exceeding \$5,000.00), or if the post-accident income exceeds \$5,000.00, fifty percent of the first \$5,000.00 and seventy percent of the remainder; only that part of gross income over \$1,000.00 is considered (s.31). Note: See example, p. 157.
- full-time earners who are 65 years of age or older at date of accident entitled to indemnities for periods ranging from five years to one year (depending on age of victim) (s.25).
- amount of income replacement indemnity payable is indexed in accordance with increases in the Quebec Pension Plan Index (s.48).
- maximum gross earnings eligible for calculation of indemnity equal to 150 percent of a yearly average computed on basis of average weekly earnings of Industrial Composite in Quebec (established by Stats. Canada) for each of the 12 months preceding July 1st of the previous year (s.50).
- minimum amount of indemnity payable is indexed by multiplying it by the ratio that the last annual Pension Index bears to the preceding annual Pension Index, as established under Q.P.P. (s.49).
- indemnity is reduced by amount of disability pensions paid under Q.P.P. (or equivalent plan of other jurisdiction), and also by amount received as Old Age Pension (ss. 29 and 30).

2. Proposed Amendments:

- "maximum yearly insurable earnings" will be

\$38,000.00 for 1989 (cl. 56).

- categories of potential claimants explicitly set out and new specific provisions introduced (see "non-earners," infra, p. 194).
- Regie authorized to pay indemnity to self-employed person which is based on the gross income determined by Regulation for an employment of the same class, or on the basis of the gross income derived by the victim from his employment, whichever is higher [cl. 16(2)].
- benefit will cease when:
 - victim becomes able to hold employment he held at time of accident
 - victim becomes able to hold employment he would have held at time of accident but for particular circumstances
 - victim becomes able to hold employment determined for him by the Regie pursuant to Section 46 (ie. clause 46 of the Bill)
 - one year after victim is able to hold an employment determined for him by the Regie pursuant to Sections 47 or 48 (cls. 47 or 48)
 - at any time fixed pursuant to a provision of Division I of this Chapter, which time is different from the times provided for [above] (cl. 50).
- full- or part-time earners who regain the ability to hold employment will receive further disability payments for periods of either 30 days (if disability lasted between 90 and 180 days) or 90 days (if disability lasted from 181 days to one year) or 180 days (if disability lasted between one and two years) or one year (if disability lasted for more than two years) (cl. 51).
- Regie authorized to determine employment for accident victims who were not full-time earners at the time of the accident (this will be discussed below, under "non-earners," pp. 195-197).
- minimum indemnity for full-time earner or person for whom the Regie determines an employment (pursuant to cl. 46) is that which would be

computed on the basis of a gross annual income based on the Quebec minimum wage, as defined in Section 3 of the Regulation respecting labour standards (R.R.Q., 1981, chapter N-1, r.3); (cl. 53).

- amount of income replacement indemnity is indexed by multiplying it by the ratio between the C.P.I. for the current year and the C.P.I. for the preceding year (cls. 83.36 - 83.42).
- "maximum yearly insurable earnings" indexed by multiplying the Maximum for 1989 by the ratio between the sum of average weekly salaries and wages of the Industrial Composite in Quebec as established by Stats. Can. for each of the 12 months preceding July 1st of the previous year and the same sum for each of the 12 months preceding July 1st, 1988 (cl. 56).
- minimum amount of indemnity benefit payable is indexed by multiplying it by the ratio between the C.P.I. for the current year and the C.P.I. for the preceding year (cls. 83.36 - 83.42).
- earners aged 65 years and over suffer reduction of income replacement indemnity as follows:
 - by 25% from second year following accident
 - by 50% from third year " "
 - by 75% from fourth year " "
 - victim ceases to be entitled to indemnity four years after accident date (cl. 41).
- persons 65 years of age or over who (due to accident) are unable to hold employment that would have been held during first 180 days following the accident are entitled to indemnity for that 180 day period, for such time as the employment would have been available and that the victim (due to the accident) is unable to hold it (cl. 43).
- accident victims who are receiving the disability benefits and reach the age of 65 years, will suffer reduction in benefits by 25 percent each year to age 68, when no indemnity is payable (cl. 44).
- Bill provides for special payments to earners

under the age of 16 or 16 years of age or older who are students (see infra, p. 197) (cl. 14).

(iv) New Zealand:

- "earner" includes both employees and self-employed persons (s.2).
- "employee" means any person who has engaged to work or works in New Zealand under contract of service or apprenticeship with an employer, and includes persons who work outside New Zealand who are temporarily absent from New Zealand by reason of their employment in New Zealand (ss. 2 and 30).
- "self-employed person" is a person who is not an employee and carries on a business in New Zealand, either alone or with other persons, but does not include persons who carry on business merely as administrators or trustees (s.2).
- "earners" may also include persons who ceased to be earners within a period not exceeding 13 weeks before the accident (s.69).
- "indemnity" is "Earnings Related Compensation" (E.R.C.), and the amount payable varies according to the following:
 - (1) in the first week, no E.R.C. is payable unless the victim is an employee injured in an accident arising from and in the course of employment, in which case the employer must pay 80 percent of any amount the employee would have earned but for the injury; this amount includes overtime (s.57).
 - (2) following the first week after the accident, but prior to assessment of permanent incapacity, compensation is paid at the rate of 80 percent of the injured person's loss of earnings capacity due to the injury [s.59(1)].

Note: loss of earnings capacity is established according to the following statutory formula:

the accident victims's pre-accident (relevant) earnings less earnings (during the period of accident incapacity) as an employee and/or as a self-employed person =

loss of earnings capacity [s.59(2)].

again, the benefit payable is 80% of the loss of earnings capacity [s.59(1)].

- (3) **Short term Incapacity:** The following provision only applies to payments during "short-term incapacity," which is a four-week period beginning on the 7th day after the accident and ending four weeks later:

where "relevant" (pre-accident) earnings would be significantly more or significantly less than the income the victim would have made during this four week period (ie. if he had not suffered the injury), the Accident Compensation Corporation may calculate relevant earnings and pay compensation based on the amount the victim would have made. [s.53(4)]. This provision is designed to protect seasonal workers.

For example, suppose the accident victim works at a relatively low-paying job (or does not work at all) most of the year, and makes much more money during a certain time of the year (eg. he's a builder, and is really busy during the summer months, but not busy during the rest of the year). If this person is just about to stop his low-income work and start lucrative work when the accident occurs, it's clear that establishing his pre-accident income simply on the basis of what he was making just before the accident (a low amount) will result in a small loss of earnings capacity benefit. If, however, the higher amount the victim would have started earning (but for the accident) is used as his pre-accident earnings, this will result in a larger loss of earnings capacity (and a larger benefit).

Once this period ends, the usual rules apply.

- (4) **Permanent incapacity:** once medical condition of permanently disabled earner has stabilized and all steps have been taken towards

rehabilitation, permanent loss of earning capacity is assessed, and permanent pension is awarded. The Corporation compares the amount the accident victim would have been making (if the accident had not occurred) with the amount he is now capable of earning. The loss of earning capacity is expressed as a percentage of the sum that would have been earned but for the accident. This percentage is then applied to the person's relevant earnings as of the date of the assessment, and 80 percent of the figure so obtained is payable as a permanent pension, tax is subtracted from the figure, before payment (s.60).

Clearly, a person who is totally incapacitated will not have any post-accident earnings, so the permanent pension will be 80% of the amount the victim would have been making (if the accident had not occurred) less income tax.

For an example of how a permanent pension is assessed for a victim who does have some post-accident earnings (ie. is partially disabled), see p. 159.

- maximum amount of earnings-related compensation payable is (as of June, 1987) \$976.00 per week¹⁴⁷, before taxes are deducted [ss.59(10) and 60(8)]. Therefore, since compensation is paid at the rate of 80% of relevant earnings (for earners who are totally disabled), the maximum assessable income is \$63,458.00 a year.
- compensation for self-employed persons is based on actual earnings as determined by the average weekly tax-assessable income from business operations during the last complete financial year prior to the accident, or such amount as may be estimated by the Corporation as fairly and reasonably representing those earnings [s.53(3)].
- if self-employed person's income is very low, the Corporation may employ a minimum assessable

¹⁴⁷ All benefit amounts (not merely the weekly disability benefits) are stated in N.Z. dollars, as of June, 1987. Source: Unintentional Injury (Wellington: Accident Compensation Corporation, 1987).

earnings of \$10,400.00 per year (for 1987) for full-time self-employed persons.¹⁴⁸

- self-employed person may purchase (before the accident) an optional scheme which provides compensation based on an average ordinary-time weekly wage, equivalent to (for 1987) \$16,172.00 per year.¹⁴⁹
- the amount of "relevant earnings" determined by the Corporation for the accident victim (both employees and the self-employed) is subject to increase, semi-annually, on the basis of increases in the New Zealand weekly average wage. Increases are specified by Orders in Council [ss.53(6) and (7)].
- note that it is the "relevant earnings" (ie. pre-accident) amount which is directly increased, not the actual weekly benefits paid to the victim; however, the actual benefits paid will be increased as a result of increases in the "relevant earnings" (higher relevant earnings result in a greater loss of earning capacity, and consequently a higher loss of earning capacity benefit).
- the pension for permanent incapacity is also subject to increase by Order in Council [s.60(7)].
- there is a minimum loss of earnings capacity benefit for full-time earners who suffer total loss of earning capacity, and it is payable (weekly) as follows:
 - (i) \$244 for the earner
 - (ii) \$19 for totally dependent spouse
 - (iii) \$10 for a totally dependent child;

provided, however, that the aggregate of the above amounts can not exceed 90% of the victim's relevant (pre-accident) earnings [ss.61(1) & (3)].
- the minimum benefits listed above are subject to increase by Order in Council [s.61(3)].
- employees under 20, apprentices and other accident

¹⁴⁸ Cramer & Armstrong, supra n. 76, Vol. I, p. 105.

¹⁴⁹ Ibid.

victims who (after further training) will qualify for incremental increases in earnings are assessed E.R.C. using a special approach:

the relevant earnings of these persons are to be regarded as having been increased from time to time in accordance with increases which these victims would have received, if the accident had not occurred; relevant earnings may be increased to a maximum amount of \$551/week (subject to further increases by Order in Council) (s.62).

- earnings related compensation is generally payable until victim is 65 years old, but is subject to extension where the accident occurs between the ages of 60 and 69 (compensation will be paid, depending on the circumstances, to a maximum age of 70, or where the statutory retirement age for the victim is greater than 65 years, to the date on which the victim attains that retirement age) (s.66).
- in very exceptional circumstances, the Corporation may commute periodic payments of earnings-related compensation into a lump-sum payment to the accident victim (s.71).

(v) Victoria

- "earner" is normally a person over the age of 18, in full or part-time employment, and is either an employee or self-employed person at any time during the eight weeks preceding the accident or for a period or periods equal to at least 13 weeks during the 12 months preceding the accident, or at least 26 weeks during the two years preceding the accident (victim must not have retired permanently from employment as of the accident date) [s.3(2)].
- "pre-accident weekly earnings" is based on the victim's average weekly earnings over a 12 month period prior to the accident, not including overtime. If victim had not been employed for more than four weeks by the same employer prior to the accident, the "average weekly earnings" may be calculated on the basis of that which the victim could have reasonably earned in the employment, but for the accident (s.4).
- for full-time earners, there are three types of

disability benefits payable:

- loss of earnings benefit payable during the first 18 months following the transport accident (ss.44 and 45)
- long-term impairment benefit, consisting of both a Lump-sum Payment and an annuity benefit, payable after 18 months following the accident, or whenever the injury stabilizes, whichever is later (s.47)
- loss of earnings capacity benefit payable in the period following the first 18 months immediately after the accident, or when loss of earnings payments cease, whichever occurs later (s.49).
- an earner is eligible for a weekly benefit of 80 percent of his or her pre-accident weekly earnings, subject to a minimum amount (for 1988) of \$236.00¹⁵⁰, with additional payments of \$66.00 for the first dependant and \$21.00 for each subsequent dependant. Maximum weekly payment is \$481.00, and payment must not exceed the earner's pre-accident weekly earnings (s.44).
- weekly payment indexed in accordance with the formula:

$$A \times \frac{B}{C}$$
 - A is the amount of the weekly payment,
 - B is the latest average weekly earnings as at June 15 in the preceding financial year of all employees for Victoria, and
 - C is the average weekly earnings of all employees for Victoria as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(1)].
- there is a five day waiting period for this loss

¹⁵⁰ All benefit amounts (not merely the weekly earnings related benefits) are stated in Australian dollars, as of July 1, 1988 (the date upon which the benefits were last indexed).

of earnings benefit, and the benefits are payable during the first 18 months immediately following the transport accident (s.44).

- if the victim returns to any work (whether as an earner or not) after the accident, the Commission must be notified (s.45A).
- the Commission must determine the degree of impairment of a victim who appears to be entitled to the (long-term) impairment benefit as at:
 - if victim was not a minor when the accident occurred, the later of:
 - 18 months after the accident; or
 - when the injury stabilizes.
 - if victim was a minor at the time of the accident, the later of:
 - 18 months after the accident; or
 - when the injury stabilizes; or
 - the victim's 18th birthday (s.46A).
- accident victim may apply to have his or her degree of impairment determined by the Commission prior to the time at which such assessment would normally be made; provided that the victim requires the assessment for the purpose of proceedings for the recovery of damages in respect of the injury and the injury has stabilized or has substantially stabilized [s.47(7)].
- if the Commission makes this "early" determination of degree of impairment (ie. where the victim requests this), the Commission may make a further determination of degree of impairment in substitution for the "early" determination, at 18 months after the accident, or (for minors) when the victim turns 18 [s.47(7A)].
- the degree of impairment is to be determined with the use of the A.M.A. Guides to the Evaluation of Permanent Impairment (2d) ¹⁵¹.

¹⁵¹ Transport Accident (Impairment) Regulations 1988, S.R. 255, s.6(1) (Hereinafter referred to as "Vic. Reg.").

- if Commission has determined the degree of impairment for the victim, and the degree of impairment is greater than 10%, the Commission must assess a long-term impairment benefit in respect of that victim [s.47(1)].
- this benefit is composed of two parts:
 - (a) a Lump-sum Payment, based on a percentage of the maximum sum payable to a totally incapacitated person, which is \$47,910.00 (as of July 1, 1988). Benefit is calculated according to the formula:

$$\frac{A - B}{C} \times \$47,910.00$$
 - A is the degree of impairment of the victim as a result of the accident
 - B is 10%
 - C is 90% (s.47).
 - lump-sum benefit may be paid as periodic payment if accident victim requests this [s.47(4)].
 - the Regulations provide a formula to be used in calculating the periodic payments based on the lump-sum benefit¹⁵².
 - (b) an annuity payment is also available to persons after 18 months following the accident, and it is based on a formula which incorporates the individual's degree of impairment and his or her age, as follows:

$$\frac{A - B}{C} \times \$111,780.00 \times \frac{75 - D}{50} = \text{[amount of annuity payable]}$$

(as of July 1, 1988)

- A is degree of impairment of accident victim.
- B is 10%
- C is 90%
- D is:

¹⁵² Vic. Reg., s.7 and Schedule I.

- if person is 75 or over 75
- if person is 25 or under 25
- if person is over 25 and under 75 age of person in whole years [s.48(1)]

therefore, a totally incapacitated individual between the ages of 18 and 25 is eligible for an annuity benefit based on the maximum amount of \$111,780.00 (s.48).

- the annuity payment is deducted from the loss of earning capacity benefit (described below) [s.48(2)].
- persons with impairments of less than ten percent do not qualify for the annuity payment (s.48).
- the amount of the annuity payment is calculated using a formula in the Regulations; the payment increases with the age of the victim, until age 75¹⁵³.
- persons under 18 who are injured as a result of a transport accident, and who suffer a degree of impairment greater than the ten percent minimum threshold degree of impairment will, after the 18 month period following the accident, receive a weekly payment until age 18 or until the impairment ceases, whichever comes first (s.54).
- the payment is a percentage of the maximum weekly amount (\$66.00, as of July 1, 1988) payable to minors, and it incorporates the minor's degree of impairment (s.54).
- maximum amounts of impairment benefits (both lump-sum and annuity payments) are indexed as of July 1st of each year, in accordance with the formula:

$$D \times \frac{E}{F}$$

where D is amount of either the lump-sum or periodic payment;

E is the all-groups Consumer Price Index for Melbourne as at June 15th in the preceding financial year last published by the Australian

153 Vic. Reg., s.8 and Schedule I.

Statistician in respect of the December quarter of that financial year;

F is the all-groups Consumer Price Index for Melbourne as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(2)].

- if it appears that the victim will suffer loss of earning capacity 18 months after the accident, the Commission must review the victim's entitlement to payment for loss of earning capacity [s.46(1)].
- after 18 months following the accident, or when the loss of earnings payments cease, whichever occurs later, the accident victim (if still totally disabled) is eligible for the loss of earnings capacity benefit; it is equal to 80 percent of the earner's after-tax pre-accident earning capacity, to a maximum of (as of July 1, 1988) \$391.00 a week, and subject to a minimum of \$210.00 per week, with an additional payment of \$60.00 per week for the first dependant, and \$19.00 per week for each dependant thereafter.
- there are special definitions used only in respect of the "loss of earnings capacity" benefit (the benefit payable after 18 months following the accident); these definitions are broader (and therefore more generous) than the definitions employed for other types of benefits. The special definitions are:
 - "earner" is defined as including a person injured as a result of the transport accident who, at the time of the accident, was not an earner, but has attained the age of 18 years after the accident [s.49(5)].
 - "pre-accident earning capacity" is determined according to the formula:

$$\frac{A \times B}{C}$$
 - A is amount that Commission believes the victim would have had the capacity to earn before the accident, in employment that is reasonably available (less tax);
 - B is the latest average weekly earnings

of all employees in Victoria in the financial year prior to June 15th;

- C is the average weekly earnings of all employees in Victoria published prior to June 15th last preceding the accident [s.49(5)].
- loss of earning capacity payments are reduced by any impairment annuity benefits which may be forthcoming [s.49(2)(a)].
- if, at time of accident, victim was an apprentice or minor, the "pre-accident earning capacity" is calculated (before the earner attains the age of 21, or the age at which the highest rate for his employment would be payable, whichever comes first) as if, at the date of the accident, the victim had the capacity to earn at the rate applicable to the age of the earner for the time-being [s.49(6)(a)].
- once apprentice or minor reaches the age at which the highest rate for that kind of work is payable, or the age of 21 (whichever comes first), he or she is entitled to payments as if, at the time of the accident, the victim had the capacity to earn a rate applicable to the highest of those ages or applicable to age 21 [s.49(6)(b)].
- special loss of earnings capacity benefits are payable to persons who are non-earners (see below, under "Non-Earners.," pp. 205-206).
- the loss of earnings benefit and the (long-term, ie. post 18 month) loss of earnings capacity benefit cease when victim reaches age 65 or reaches the normal retiring age of his or her industry or occupation (whichever occurs later). These benefits are also suspended whenever the earner is imprisoned [s.53(1)].
- if an earner is injured after attaining either retirement age or age 65 (or is injured not more than 12 months before attaining either of those ages), he or she is entitled to weekly benefits for up to one year following the accident [s.53(1)].
- no compensation for loss of earning capacity where victim receives common law award or settlement for pecuniary losses resulting from the injury, and no

impairment benefits (either lump-sum or annuity) payable where the victim has received pain and suffering damages at common law [s.53(2)].

- no loss of earning capacity benefits and/or impairment annuity benefits payable once three years following the manifestation of the injury has expired (with qualifications for minors) or the total of the loss of earnings, impairment annuity, and loss of earning capacity benefits equals (as of July 1, 1988) \$76,740.00 [s.53(3)].
- the restrictions listed immediately above do not apply to persons who have had his or her degree of impairment determined at a level of 50 percent or more [s.53(4)].
- no compensation payable (unless Commission decides otherwise) to persons who are also eligible for compensation from various other statutory schemes (s.37).
- the Commission is not liable to pay any compensation where an accident occurred involving a motor vehicle (other than a recreational vehicle) and the victim did not report the accident to the police [s.39(1)(a)].
- if the Commission determines that the failure to report the accident should be excused, compensation will be payable [s.39(1A)].
- no compensation payable to persons eligible for workers' compensation (s.38).
- loss of earnings benefits payable within the first 18 months after the accident are reduced, proportionately, where victim was the driver of the vehicle and had a blood-alcohol content of between .05 and .24 at the time of the accident (s.40).

(vi)

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- "earner" is a person in full-time or part-time employment (whether an employee or self-employed person) at any time during the eight weeks preceding the accident date, or over a period totalling at least 13 weeks during the year preceding the accident date, or for 26 weeks during the two years preceding the accident date.

Persons who have left the workforce permanently as of the accident date should not be regarded as earners (Vol. I, pp. 187-188).

- persons incapacitated in the transport accident should be regarded as "earners" if, as of the accident date, they had made firm arrangements with a particular employer to undertake employment or to commence business at a particular time and place (Vol. I, p. 189).
- "earner" would also include a person incapacitated for at least 6 months after the accident, who would (in the opinion of the Corporation) have undertaken employment within two years of the accident date (Vol. I, p. 189).
- the earnings of an "employee" should include income derived from personal exertion in his or her capacity as an employee, i.e. allowances for living accommodations, board or lodging, value of a car, and other "monetary" benefits (Vol. I, p. 191).
- in determining the employee's normal weekly earnings as of the accident date, one of the following periods should be taken into account:
 - the earnings of the employee for the week preceding the accident
 - the average weekly earnings of the employee during the eight weeks preceding the accident
 - the average weekly earnings of the employee during the 52 weeks preceding the accident
 - the average weekly earnings of the employee during the 104 weeks preceding the accident (Vol. I, p. 192).
- if a person is regarded as an "earner" because of events which would have occurred after the accident, the Corporation should determine an amount that fairly represents that victim's earning capacity as from the date that he or she would have taken up such employment (Vol. I, p. 193).
- the Corporation should use a different measure to assess earning capacity, if the normal weekly earnings are significantly more or significantly less than the victim's earning capacity would have been during the period of incapacity (but for the accident), where:
 - the victim would have been engaged in

- seasonal work
- the victim made firm arrangements as of the date of the accident, to re-enter or leave the workforce, or accept different responsibilities or new and different employment, or varied the hours of paid employment.
- the victim was contractually entitled to significant wage or salary variations arising out of his or her employment as of the date of the accident (Vol. I, p. 194).
- to provide compensation to the self-employed for loss of earning capacity, the Corporation should be able to use one or more of the following bases:
 - the difference between the victim's earning capacity at the date of the accident (generally measured by normal weekly earnings) and his or her earning capacity (if any) during the period of incapacity.
 - the costs in providing services to replace that person in his or her business, trade or profession during the period of incapacity
 - the earnings that the victim could have derived as an employee exercising similar skills and responsibilities to those exercised in his or her business, trade or profession (Vol. I, p. 197).
- in determining the normal weekly earnings of a self-employed person, the Corporation should take into account the (more appropriate) of:
 - the average weekly earnings of the self-employed person during the 52 weeks preceding the accident, or any part of that period, or
 - the average weekly earnings of the self-employed person during any or all of the four completed financial years immediately preceding the date of the accident (Vol. I, p. 198).
- the Corporation should be able to choose among the same approaches to determining the normal weekly earnings of a self-employed person as for an employed person (Vol. I, p. 198).
- if the replacement services approach is used to compensate the self-employed accident victim, the Corporation should pay 80 percent of the remuneration (including incidental costs of employment) provided to a person performing services to replace those of the accident victim in his or her business, trade or profession (Vol. I, p. 200).

- if the self-employed person is incapacitated for a period which does not or is not likely to exceed 13 weeks, the Corporation should use the replacement services approach to determine the compensation payable (Vol. I, p. 200).
- the equivalent employee approach of assessment of compensation is appropriate where the victim has just started a business and his or her earnings are low or would likely remain low during the period of incapacity. The fairest approach may be to assess what the victim could reasonably have expected to earn as an employee, and pay compensation to the victim accordingly. In this situation, the Corporation should pay 80 percent of the wage or salary the victim could reasonably have expected to earn as an employee performing work similar to that he or she performed as a self-employed person (Vol. I, p. 200).
- if the accident victim was both an employee and a self-employed person within the two years preceding the accident, the Corporation should assess his or her normal weekly earnings or earning capacity using such means, consistent with the above guidelines, as are appropriate (Vol. I, p. 201).
- an earner who sustains long-term incapacity as a result of a transport accident should be deemed to have an earning capacity no less than the "notional earning capacity" which is used for non-earners:
 - notional earning capacity of victim to be set as follows:
 - victims age 16-17: 30 percent of A.W.E.
 - victims age 18-20: 40 percent of A.W.E.
 - victims age 21 and over: 50 percent of A.W.E.
 - The notional earning capacity for a person who has attained the age of 21 should be 50 percent of the average weekly earnings of adult male full-time employees in Australia.
 - Note that this "floor-level" support, based on the "notional earning capacity," is only available to earners who have sustained "long-term incapacity," that is, incapacity

which continues for a period or period totalling 104 weeks (Vol. I, pp. 201, and 215-216).

- earners who have sustained long-term incapacities as a result of transport accidents should be eligible to apply for compensation to be assessed on the basis of potential for advancement, i.e. the earnings a person could reasonably have been expected to earn over the likely period of incapacity (if the accident had not occurred).
- The earner should be eligible to apply for assessment on the basis of potential for advancement only where he or she has been incapacitated for a period exceeding 104 weeks, but not exceeding 156 weeks, and has a disability which is likely to have a continuing effect on his or her earning capacity, and has participated as far as is reasonably practicable in vocational training or rehabilitation programs (Vol. I, p. 208).
- the Corporation should have power, in special circumstances, to accept an application for assessment on the basis of potential for advancement after the expiration of 156 weeks following the accident (Vol. I, p. 209).
- the "potential for advancement" approach should only be used if it will result in compensation which is significantly greater than that which would otherwise be awarded (ie. the "notional earnings" approach, described above, or the earnings related benefit which would otherwise be payable to the victim) and the Corporation should take into account:
 - the victim's age, education, training, skills, abilities and work history as of the accident;
 - the likelihood that if the accident had not occurred, the victim would have taken training or education which would have increased his or her earning capacity;
 - prospects for promotion or advancement, whether in the same or different employment as that undertaken by the person at the date of the accident;
 - the likelihood that if the accident had not occurred, the victim would have varied the nature of his or her employment or the extent of his or her involvement in the work force; and

- other factors which, had the accident not occurred, would have increased or decreased the victim's earning capacity (Vol. I, pp. 209-210).
- the Corporation should only take into account those factors which are likely to have an effect or to occur within ten years of the accident, and should specify the victim's likely earnings on an annual basis (Vol. I, p. 211).
- the accident victim's post-accident earning capacity is equivalent to earnings derived from the employment of the victim, following the accident. If the victim is not employed following the accident, his or her post-accident earning capacity is nil (Vol. I, p. 204).
- if the victim is capable of undertaking employment of a kind for which he or she is reasonably expected to apply or which is reasonably available taking into account:
 - the nature and extent of disability
 - victim's age, level of education, training and language skills
 - victim's work experience
 - victim's place of residence, and
 - other relevant factors,

and the victim is capable of competing in the market for this kind of employment at no significant disadvantage (when compared to non-disabled members of the community), the general rule stated above should not apply, and the Corporation should determine the post-accident earning capacity of the victim by taking into account earnings that could be derived from the employment reasonably available to him or her (Vol. I, pp. 204-205).

- the general rule regarding post-accident earning capacity should also not apply where the accident victim has, without sufficient reason, refused an offer of suitable employment, or not taken part in vocational training, rehabilitation or assessment of employment prospects, or failed to take reasonable steps to secure suitable employment, or given up suitable employment (Vol. I, p. 205).
- compensation for loss of earnings capacity should be assessed by reference to the gross earnings of

the accident victim (Vol. I, p. 230).

- a totally incapacitated earner should receive compensation of 80 percent of the loss of earning capacity sustained (Vol. I, p. 231).
- the maximum earning capacity should be 150 percent of the Average Weekly Earnings of an adult male in Australia. As compensation is paid at a rate of 80 percent of the lost earning capacity, the maximum compensation actually payable would be 120 percent of the A.W.E. (Vol. I, p. 234).
- compensation for loss of earning capacity should not commence until the victim has attained the age of 16 unless, as of the accident date, the person was in full-time employment (Vol. I, p. 237).
- no compensation for loss of earning capacity should be paid for the first five working days after the accident date or after the first incapacity caused by the accident (whichever occurs later) (Vol. I, p. 238).
- if an "earner" has not been employed at any time during the eight weeks preceding the accident, compensation should not be paid for the first four weeks from the date of the accident or from the date of the first incapacity caused by the accident (whichever occurs later), but there will not be a further five working day waiting period (Vol. I, p. 239).
- persons who are deemed to be earners because, as of the accident date, they have made firm arrangements to enter the work force, should receive compensation from the date on which they (but for the accident) would have commenced employment. This should be subject to a further waiting period of five working days, but not to the four week period referred to above (Vol. I, p. 239).
- loss of earning capacity benefits should cease upon the termination of the incapacity, or upon the death of the accident victim (Vol. I, p. 239).
- compensation should cease when the victim attains the age of 65, subject to the following exceptions:
 - if victim is an earner and has attained the age of 61 but not 70 (when the incapacity commences), compensation should continue for

- four years from the commencement of the incapacity (to a maximum of age 72)
- where the accident victim is an earner and has attained the age of 70 when the incapacity commenced, compensation should continue for a period of two years from the commencement of the incapacity
 - where an earner who has attained the age of 61 is injured, compensation for loss of earning capacity should not be paid beyond the age of 65 or beyond the age at which the victim would have left the work force permanently, had the accident not occurred (whichever is later), (Vol. I, p. 240).
- where an accident victim sustains permanent disability and his or her medical condition has stabilized, and all practicable steps have been taken towards his or her rehabilitation, the Corporation should be authorized to, with the consent or at the request of the accident victim, make an assessment of his or her permanent loss of earning capacity (Vol. I, p. 243).
- the assessment should be made in accordance with earlier recommendations as to determining pre-accident earnings and post-accident earning capacity, and should take into account any assessment of compensation on the basis of potential for advancement (Vol. I, p. 243).
- the assessment of permanent incapacity should be final and not liable to variation, except that after an assessment of permanent incapacity has been made, if the accident victim's earning capacity is substantially reduced by reason of a deterioration of his physical condition, or loss of or change of employment, and the reduction is caused by the injuries sustained in a transport accident, the Corporation should be able to set aside the assessment of permanent incapacity and make a new assessment, which would increase the previous assessment (Vol. I, p. 244).
- periodic compensation for loss of earning capacity should be indexed and adjusted semi-annually, by reference to changes in the Average Weekly Earnings of adult male full-time employees in Australia. The indexation should be embodied in the legislation (Vol. I, p. 236).
- in general, commutation of periodic compensation

for loss of earning capacity or other losses should not be permitted, but the Corporation should be able to (where the accident victim consents) commute periodic payments for loss of earning capacity to a lump-sum when the amounts involved are so low that the cost of providing compensation unnecessarily burdens the administration of the Scheme. If the commutation occurs, and the injured person's capacity for work is later significantly reduced, the Corporation should be required, on application, to resume the payment of appropriate periodic compensation, making allowance for the lump-sum already paid (Vol. I, pp. 227-228).

- the accident victim's right to compensation under the New South Wales Workers' Compensation System should not be affected by the transport accident compensation Scheme. However, where the victim is entitled to claim compensation under both the transport accident Scheme and some other scheme or system (such as workers' compensation), the victim has three months to elect whether to claim under the transport accident Scheme or to pursue other remedies (Vol. II, p. 447).
- if the victim elects to receive benefits under the transport accidents Scheme, he or she should have to account fully for compensation received from other sources. However, if the accident victim is entitled to workers' compensation and chooses to claim the transport accident benefits, he or she should be entitled to retain the workers' compensation in respect of loss of earnings for the first five days of incapacity, and for any other period (up to the date of the election) if the workers' compensation is greater than that paid under the transport accident Scheme (Vol. II, p. 447).
- benefits under the Scheme should not be reduced or affected where the accident victim receives ex gratia payments, accident insurance, retirement pensions, superannuation or pensions or benefits under Commonwealth legislation (Vol. II, p. 447).

(b) Analysis

The central issue in the determination of compensation for totally-disabled earners is implicit in the title of

this category of accident victims. That is, the important first question to be decided is: should the accident compensation benefits be linked to the earnings of the accident victim?

The N.S.W. Report pointed out that the question of assessment of compensation is not a problem confined to no-fault schemes. The Report (as noted in Part Two) presented three different approaches to be considered in determining what should be the basis for assessment of compensation. The first of these approaches is called the "Welfare Model." This scheme would provide compensation to injured persons in order to meet needs arising from the injury. The benefits provided can include flat-rate income maintenance payments, medical, hospital and rehabilitation services, as well as other assistance (such as aids, appliances, and structural modifications). The compensation could be paid in either monetary form or through services.¹⁵⁴ The N.S.W. Report noted that the Welfare Model has three major advantages:

- assessing compensation on a needs basis would help to integrate the compensation system with the social security system (thus achieving the objective of a national comprehensive compensation scheme);
- the Welfare Model would alleviate the injustice

¹⁵⁴ N.S.W. Report, supra n. 110, Vol. I, p. 140.

that results in negligence actions, where a rich accident victim receives higher damages than a poor one, simply because he or she had higher pre-accident earnings (instead, all persons, not merely wealthy persons, would receive adequate payments and services);

- lower benefits payable in a welfare scheme may increase the incentive for an injured person to undertake rehabilitation and return to the work force.¹⁵⁵

However, there are several disadvantages associated with the Welfare Model. Substantial losses, such as the loss of capacity to earn above a basic income, would not be compensated in full using this Model. The injured person could thus be much worse off financially after the accident than before it. A second problem is the view that a compensation system should not be used to redress inequalities within a community. The result of this would be that only the well-off people who suffer serious incapacity would be reduced to the level of meeting basic needs (other well-off people who are not involved in accidents would not be affected). Inequities should not be addressed through the compensation systems.¹⁵⁶

The second Model of compensation is called the Dis-

¹⁵⁵ Ibid., pp. 140-141.

¹⁵⁶ Ibid., p. 141.

ability Model. Under this Model, compensation would be assessed by reference to the degree of physical disability suffered by the victim. The impact of the disability on the victim's earning capacity would not be considered. Persons with similar disabilities would receive similar compensation, regardless of the financial consequences flowing from those disabilities.¹⁵⁷

There are said to be two advantages to the Disability Model. First, the payment of compensation for physical disability (regardless of the effect of the impairment on the accident victim's earning capacity) may encourage people to return to the work force. That is, people would have an incentive to return to work, because compensation would not be determined by whether or not they were able to work. A second suggested advantage to this Model is that assessment of the degree of physical disability (performed by doctors, with reference to detailed schedules) may be administratively simpler and more efficient than the assessment of loss of earning capacity.¹⁵⁸

There are, however, several important disadvantages with respect to this Model. If compensation is assessed solely on a degree of physical impairment (without regard to the effect of the accident on the victim's earning capacity), gross injustice may result. That is, two

¹⁵⁷ Ibid., p. 142.

¹⁵⁸ Ibid., p. 143.

persons who suffer the same disability will receive the same compensation, even though the earning capacity of one may be far more affected by the disability than the earning capacity of the other. A second disadvantage is that an assessment of physical disability cannot generally be made immediately after the accident has occurred. As the needs of injured people are often most acute immediately following the accident, there must be some other basis for short-term compensation. If several assessments are needed, the administrative advantage of the disability approach is lessened.¹⁵⁹

The third Model of compensation is called the "Restitution Model." It provides that compensation (either in the form of money or services) is designed to restore the injured person, as much as possible, to his or her pre-accident position. This is the approach of the common law assessment of damages. Its advantages are that this Model helps to replace the losses actually sustained by the accident victim. Otherwise, the injured person could be substantially worse off than he or she would have been but for the accident. Also, financial hardship may result to both the victims and their families, if their household income is interrupted or diminished as a result of the incapacity. It is further argued that if compensation is assessed according to the victim's physical disability (the

¹⁵⁹ Ibid.

Disability Model, supra), the system of flat rate benefits which would result would give preference to those with lesser losses. These persons could recover all their lost earnings, while persons whose losses were great would receive no more than a small fraction of them.¹⁶⁰

However, certain disadvantages have been identified with respect to this Model:

- The Restitution Model preserves inequalities in the form of income differentials which can be justified only by reference to the value of productive labour (if a person is prevented from working, it does not necessarily follow that he should be paid as if he had worked). It is said that compensation payments to families of deceased persons cannot be justified by referring to the different earning capacities of the deceased persons. The deceased's (former) earning capacity does not affect the ability of his or her survivors to perform productive work, and these survivors may be discouraged from seeking or retaining employment if substantial compensation is paid.
- A compensation system which uses public resources to implement the restitution principle is regressive, as persons are paid earnings-related

¹⁶⁰ Ibid., pp. 144-145.

benefits although they have not necessarily made earnings-related contributions.

- The restitution principle is not easy to apply to persons who have little or no earnings at the date of the accident (homemakers, children, students, young adults and unemployed people who are looking for work).
- The restitution principle, if applied to persons who are suffering long-term disabilities, might discourage them from seeking rehabilitation (a person who has his or her loss of earnings capacity compensated in full may have little incentive to attempt to resume paid employment).
- The Restitution Model causes difficulties in assessing the losses with respect to which compensation is to be paid. There are two major problems:
 - it is difficult, if not impossible, to determine what an accident victim's earnings might have been but for the accident;
 - some losses (such as pain and suffering, loss of enjoyment of life, and permanent physical disability) are inherently incapable of precise quantification.¹⁶¹

The N.S.W. Report noted that the arguments in favour of

¹⁶¹ Ibid., pp. 146-147.

the Restitution model are strongest with regard to loss of earning capacity and other economic losses sustained by the injured persons, but are less forceful with respect to non-economic losses, which are incapable of precise measurement in financial terms. The use of the Welfare Model would be more appropriate in the context of the development of a national comprehensive compensation scheme.

The argument in favour of earnings-related benefits is dependent on proof that it is justifiable to allow unequal treatment of persons suffering from identical incapacities. The 1967 Woodhouse Report noted that individuals' losses vary, and so do their continuing commitments. Therefore, a system which ignores lost earnings in favour of general average assistance will not relieve the victims of a fair part of their losses and sudden problems.¹⁶² That is, the system was designed to compensate losses, and losses vary. If the benefits did not vary accordingly, they could hardly be considered compensation. Only if the benefits were earnings-related could the replacement scheme match the performance of the common law action for damages at its best.¹⁶³

¹⁶² New Zealand. Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand (Wellington: 1967), para. 250 (hereinafter referred to as the "Woodhouse Report").

¹⁶³ G. Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (Wellington: Oxford University Press, 1979), p. 324 (hereinafter referred to as "Palmer").

This view implies that the community has the responsibility to support the individual at a level which is close or equal to the standard of living which the victim achieved before the interruption of income by physical incapacity. That is, one must accept the proposition that a person who earns \$15,000.00 a year has a claim to be supported at a level which is proportionate to that amount, and deserves more compensation than a person who is earning \$5,000.00 a year.¹⁶⁴ However, it cannot safely be assumed that the relativity of wages in a community is inherently fair or rational, because the determination of wages is the result of a series of complicated arrangements, often political. Yet the complete equality of salaries for all classes of work does not seem practicable or desirable.¹⁶⁵

It could be argued that E.R.C. does not actually cause differences in earnings; it only reflects them. Therefore, if the system of wages is re-arranged to eliminate inequality, the E.R.C. payable to accident victims will reflect this. The drawback of this argument is that there is no reason why a level of earnings should be supported until retirement age. Furthermore, a person who suffers from an incapacity resulting from an automobile accident would be better protected against the vicissitudes of life than a person who is not suffering from an incapacity, i.e.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid., p. 325.

a high earner could be demoted due to poor performance, or could lose his or her job due to changing market conditions, but a person with a disability who is receiving E.R.C. would be protected against these problems.¹⁶⁶

Let us suppose that most people agree that the first priority of a society is to look after the people who are the poorest, those at the bottom of the scale. It has been suggested that the priorities of any comprehensive compensation Scheme should be:

- (a) reasonable income support for all, including non-earners;
- (b) extra expenses of disability to be compensated, at least in long-term cases;
- (c) only when the first two priorities have been satisfied, should there then be some compensation for non-economic loss.¹⁶⁷

Earnings-related benefits can best be justified on a true insurance principle, where the funds are contributed in proportion to the risks to which persons are exposed and the benefits likely to be received. If insurance with earnings-related contributions is not made compulsory, some commentators suggest that benefits should be at a flat-rate, or be earnings-related only up to a reasonable level,

¹⁶⁶ Ibid.

¹⁶⁷ D.R. Harris, et al., Compensation and Support for Illness and Injury (London: Oxford University Press, 1984) pp. 337-338 (hereinafter referred to as "Harris").

thus leaving the high earner to arrange voluntary insurance (to "top up" the compensation provided under the Scheme).¹⁶⁸

The objection of paying full earnings-related compensation to victims of accidents who have not contributed proportionately to the Scheme has been said to apply principally to those suffering from less serious injuries. In cases of serious injury, the Courts have not adequately taken into account the effect of inflation on the lump sum awards; full compensation has not been achieved.¹⁶⁹

It has been noted that as long as we have a tort system in which compensation for pecuniary losses is based on past earnings or future earning capacity and which is supported by liability insurance, there are only two alternatives with regard to lost earnings. Either a flat-rate for lost earnings is paid to all accident victims regardless of their past earnings or future earning capacity, or the present system is retained in which those who suffer higher income losses receive higher compensation without having paid higher premiums. There is no way of making the higher income groups pay higher premiums for the risk within the

¹⁶⁸ H. Luntz, Assessment of Damages for Personal Injury and Death (2nd ed. 1983), (Australia: Butterworths Pty. Ltd.), pg. 10.

¹⁶⁹ Ibid., p. 11.

present framework.¹⁷⁰

If compensation is paid out to accident victims on an earnings-related basis, and the Scheme is paid for by contributions from each earner, the scheme does not achieve redistribution of income from the wealthy to the poor. In fact, there may be even some redistribution in the wrong direction. That is, levies for private cars are determined on the basis of the year and model of the vehicle, and on the owner's driving record. These criteria have nothing to do with the earnings of the owners. Yet, some of these accident victims will receive high earnings-related benefits, while others will receive smaller earnings-related compensation which is not dependant on the amount of the victim's contribution.¹⁷¹

The N.S.W. Report recommended a modified Restitution Model, which was designed to maximize incentives and opportunities for rehabilitation, avoid unfairness to persons who are not working as of the date of the accident, attempt to link (in some way) contribution to benefit and integrate the compensation and national health care systems.¹⁷² We have seen that the recommendations of the N.S.W. Report give effect to the Restitution Model in

¹⁷⁰ Atiyah's Accidents, Compensation, and the Law (4th ed. P. Cane, 1987), (London: Weidenfeld and Nicolson), p. 474. (Hereinafter referred to as "Atiyah").

¹⁷¹ Palmer, supra, n. 163, p. 327.

¹⁷² N.S.W. Report, supra n. 110, Vol. I, pp. 148-149.

several ways, including the linking of a disability benefit to loss of earning capacity. This benefit includes compensation for loss of potential for advancement (a common-law approach). However, the N.S.W. Report recommends certain limits to the Restitution principle as applied to the loss of earnings capacity benefit. First, a ceiling is imposed on the compensation payable for such a loss. Secondly, compensation is paid generally at 80 percent of the loss, not at 100 percent of the loss. Thirdly, for person who are not defined as earners, compensation for loss of earning capacity is only payable in respect of long-term incapacity (i.e. incapacities in excess of two years).

The N.S.W. Report has attempted to resolve some of the inequities of a compensation system which links benefits to earnings by the use of generous provisions related to the definition of "earners" and to compensation payable to non-earners (see below, under the heading "Non-Earners," pp. 207-208).

Every compensation Scheme examined in this thesis has linked the disability benefit payable to the earnings of the accident victim. In the absence of a comprehensive compensation scheme for both injury and illness (which is outside of the scope of this thesis), it is the writer's opinion that a modified Restitution Model is best employed as the basis for compensation. The choice is clearly a

balancing process: the advantages of the common-law (individual assessment) approach must be weighed against the need to provide substantial compensation to those who are seriously disabled, regardless of their pre-accident financial status. Certainly, the N.S.W. Report's approach of limiting the benefits payable under the Restitution Model to earners, while providing some benefit to non-earners (but not so great as the benefits provided to earners, so as to partly preserve, arguably, the linking of benefit to contribution) is the approach which best responds to the issue of on what basis compensation should be paid. I therefore recommend this approach.

We have seen that the definitions of "earner" employed in the various Schemes examined vary considerably. There is no question that the broadest (and in many ways, the most sensitive) definition is that contained in the N.S.W. Report. The definition includes:

- a person in full-time or part-time employment (whether an employee or self-employed person) at any time during the eight weeks preceding the accident date, or over a period totalling at least 13 weeks during the year preceding the accident date, or for 26 weeks during the two years preceding the accident date.
- persons incapacitated in the transport accident if, as of the accident date, they had made firm

arrangements with a particular employer to undertake employment or to commence business at a particular time and place.

- persons incapacitated for at least 6 months after the accident, who would (in the opinion of the Corporation) have undertaken employment within two years of the accident date.

The N.S.W. Report definitions of "normal weekly earnings" (ie. pre-accident earnings) and "post-accident earning capacity" are again the most comprehensive and well-planned definitions employed of any of the Schemes examined. The Report's recommendations allow for a variety of situations to be taken into account, such as the difficulty of determining the earnings of a self-employed person (see above, at pp. 106-107). The New Zealand approach of allowing self-employed persons to pay into optional schemes (and have their benefits paid in accordance with these Schemes) is also a useful approach to the problem of compensation for self-employed persons. Any compensation Scheme for automobile accident victims should incorporate either the New Zealand approach of optional Schemes for self-employed person, or the N.S.W. Report approach of specific provisions dealing with the determination of the "pre-accident relevant earnings" of the self-employed, or a combination of both of these approaches. As self-employed persons may be unlikely to pay into a

voluntary scheme, it may be preferable to adopt the N.S.W. approach.

The appropriate form of compensation for a totally disabled earner should be periodic payments. These payments eliminate the major problems of lump-sum compensation:

- attempting accurate assessment of a victim's actual future losses (including lost future earnings which are dependent upon factors such as the victim's work-life expectancy, salary increases, inflation rates, productivity rates, unemployment rates and taxation rates),
- the need to await stabilization of the victim's medical condition so that the most accurate medical prognosis can be obtained in order to assess damage for future loss,
- the possibility of poor money management by the accident victim, and
- the income tax consequences of the receipt of a large sum of money (the lump-sum itself is not taxable, but interest generated by it is taxable).¹⁷³

Although the inaccuracy of attempting to predict

¹⁷³ Manitoba. Manitoba Law Reform Commission. Report on Periodic Payment of Damages for Personal Injury and Death (Report No. 68), (Winnipeg, The Law Reform Commission, 1987), pp. 46-55 (hereinafter referred to as the "M.L.R.C. Report No. 68").

damages on a once-and-for-all basis is preserved in a system which employs non-reviewable periodic payments (the amount of the payment is set in advance, and cannot be changed), there are still several ways in which a periodic payment award can improve the accuracy of the award. The use of periodic payments would eliminate the need for a "gross-up for future tax liability" (i.e. compensation for tax consequences of the interest earned on the future care portion of a lump-sum judgment), because periodic payments would presumably not be taxable.¹⁷⁴ Also, if periodic payments terminate upon the death of the victim, it is no longer necessary to try to predict the victim's life expectancy when making an award.

The periodic payment award also removes the need for a management fee (fee payable to a person or company to invest the lump-sum and look after the income thus generated for the benefit of the victim) and would, as indicated earlier, reduce the need for a tax "gross-up" in respect of future tax liability on the future care aspect of the lump-sum judgment. The cost of an annuity which periodically pays out a certain sum of principal and interest to a victim is significantly less than the lump-sum which a victim would have to invest in order to receive the same periodic payments of principal and interest; this is because the interest earned under the annuity is received

¹⁷⁴ Ibid., pp. 23-25 and 56.

tax-free, while the interest earned on the lump-sum is taxed.¹⁷⁵

Finally, the use of periodic payment of compensation would greatly reduce the risk of mismanagement and dissipation which accompanies lump-sum awards.¹⁷⁶

It has been stated that compensation in the form of a fixed pension, indexed for inflation, provides the maximum incentive for clinical recovery and vocational rehabilitation. The use, however, of periodic payments which are varied annually according to the estimated loss of actual earnings resulting from the disability will serve no purpose except to cause great anxiety to the accident victim (note that the issue of a permanent pension is discussed below, at pp. 145-146). The optimum compromise between the need for fixed payments and the possibility that unemployment may be attributed to factors not related to the accident, is the use of a benefit level of approximately 90 percent of projected earnings loss.¹⁷⁷

On the basis of the foregoing, it is felt that the N.S.W. approach of payment of an income related benefit equivalent to 80 percent of the victim's loss of earning capacity (ie. the difference between the victim's pre-

¹⁷⁵ Ibid., pp. 57-58.

¹⁷⁶ Ibid., p. 60.

¹⁷⁷ T.G. Ison, "The Therapeutic Significance of Compensation Structures" (1986), 64 Can. Bar. Rev., pp. 328-331 (hereinafter referred to as "Ison").

accident or normal weekly earnings and his or her post-accident earning capacity) represents the appropriate measure of compensation. Furthermore, the N.S.W. Report use of a floor of "notional" earnings below which the benefit cannot be reduced is a useful approach to determining the minimum amount of benefits payable. The Report ties this notional earning to the average weekly wage of a full-time male earner in Australia; the Province of Quebec employs a specified minimum amount (note that the draft Bill would provide a minimum gross annual income using the minimum wage payable in the Province).

It is the opinion of the writer that the N.S.W. Report's approach of relating the minimum disability benefit to the average weekly earnings of a full-time adult male earner is preferable to the use of the minimum wage, as it is more representative of the amount which an average "earner" working in that society could be expected to derive from his or her employment. However, the N.S.W. recommendations that this minimum benefit be (at best) only 50% of the A.W.E. of an adult male earner, and that the minimum benefit only be employed in respect of long-term incapacity (ie. incapacity of over two years) should not be followed.

The recommendations are subject to the criticisms that the "50% of A.W.E." amount may be even less than a benefit based on the minimum wage, and that a minimum benefit

should be available to all totally disabled earners, not merely those suffering from long-term incapacity. The benefit should be tied to average weekly earnings of adult male earners in this Province, but it should be set at a percentage of the A.W.E. which will adequately provide for the victim and his/her family (the percentage should be determined by reference to Statistics Canada figures on the net income needed to adequately support households in this Province). The benefit should be available to all totally disabled earners.

The N.S.W. Report recommended that compensation for loss of earnings capacity be assessed by reference to the gross earnings of the incapacitated person.¹⁷⁸ This recommendation was based on three factors:

- The earnings received by the accident victim before the accident and those which would have been received (if the accident had not occurred) are subject to income tax. Therefore, the compensation should take the same form as the income it is intended to replace (ie. net of income tax).
- There was no guarantee that compensation for loss of earning capacity paid under the N.S.W. Scheme would be regarded as non-taxable by the Australian Government.

¹⁷⁸ N.S.W. Report, supra, n. 110, Vol. I, p. 230.

- The problem of integrating policies of the Commonwealth and the States of Australia in areas of compensation, taxation and welfare should be overcome by negotiations in order to achieve coordination, not actions designed simply to limit the expense incurred by one Government.¹⁷⁹

The Osborne Report, too, advocated the use of a disability benefit based on gross earnings (ie. benefit would be 80% of gross earnings), because the insurers have used gross earnings in the calculation of the disability benefit for nearly 20 years, and because it is simpler than using a net income base for calculation purposes (the net income base requires estimation of the victim's tax rate and the taking into account of the tax consequences of any taxable collateral benefits received by the victim).¹⁸⁰

However, there are responses which could be made with respect to the comments stated above. For instance, any question as to whether or not income replacement compensation would be treated as taxable or non-taxable by the Federal Government could be resolved by an advance reference of the issue to Revenue Canada. It should also be noted that the Quebec Scheme has employed the concept of "net earnings" as a frame of reference for determining what amount of income replacement compensation should be paid.

¹⁷⁹ Ibid., pp. 229-230.

¹⁸⁰ Osborne Report, supra, n. 6, Vol. I, p. 575.

That is, the Quebec Scheme provides for compensation on the basis of 90 percent of the accident victim's pre-accident net earnings. Quebec employs gross or "maximum insurable yearly earnings" as a means of determining the maximum amount which can be used for the purpose of establishing compensation. That is, the maximums under the Quebec Scheme are set by reference to gross income (for 1988 the maximum amount of gross income which can be used in calculating compensation is \$36,500.00). Estimated tax is then subtracted from this gross amount, and compensation is payable at the rate of 90% of the resulting "net income."

The Quebec approach of using gross income to determine the maximum amount of earnings which should be considered for compensation, while employing net earnings to determine what amount of compensation will actually be paid, is a workable approach. However, it is submitted that, on balance, the major concerns of both the N.S.W. Law Reform Commission and Mr. Justice Osborne (as stated above) are applicable (at least in part) to a compensation scheme for automobile accidents in Manitoba.

An improved automobile accident compensation Scheme for Manitoba should incorporate an approach based on the N.S.W. recommendation of payment of an income related benefit equivalent to 80 percent of the victim's loss of earning capacity (ie. the difference between the victim's pre-accident or normal weekly earnings and his or her post-

accident earning capacity). The maximum amount of the benefits should be determined by the Scheme's administrators (with consideration of the N.S.W. Report's recommendation of 150% of the A.W.E.).

When should the benefits commence? The schemes surveyed show a variety of waiting periods; five days, one week, etc. It is submitted that a specific waiting period should not be recommended here. Instead, the Scheme's administrators should be empowered to determine an appropriate waiting period, based on the need to "dovetail" this compensation scheme with other systems operating in Manitoba (eg. U.I.C., C.P.P., etc.). However, this waiting period must be subject to the conditions that the accident victim is at no time left without adequate compensation, and that the victim is allowed to elect between the benefits offered by the automobile accident compensation Scheme and benefits provided by other compensation systems operating in the jurisdiction.

A major issue in any compensation Scheme is the question of whether benefits should be indexed, and if so, how the indexation should be calculated. The no-fault personal injury benefits currently offered under Part II of Manitoba Regulation 290/88R contain no formula whatsoever for indexation. This is hardly surprising, in view of the very modest amounts of benefits offered and the existing philosophy that these benefits should merely be an "add-on"

to compensation obtained through the tort action for personal injury. The current Manitoba approach of no indexation of the no-fault injury benefits is completely inappropriate for any Scheme which is devised to offer real compensation to automobile accident victims. In short, to be useful and appropriate, benefits must be indexed.

Every Scheme that this thesis has examined, with the exception of Manitoba's Part II benefits and the minimal benefits currently offered by Ontario's Standard Insurance Policy, incorporate a mechanism for the indexation of benefits. Some Schemes tie indexation to increases in the Consumer Price Index, some to the increases in average weekly earnings.

The question then becomes; which mechanism is most appropriate for a compensation Scheme for Manitoba?

The Manitoba Law Reform Commission, in its Report on Periodic Payment of Damages for Personal Injury and Death, examines the issue of indexing periodic payments for personal injury in order to take into account inflation.¹⁸¹ The Report states that in considering whether or not a floating index (i.e. one which mirrors inflation on a continual basis) should be used, one must take into account the additional expense caused by the use of such a rate. This expense arises because it is difficult to accurately predict increases in inflation, and therefore large

¹⁸¹ M.L.R.C. Report No. 68, supra, n. 173, pp. 99-106.

premiums would have to be charged in order to cover the increased risks associated with inaccuracy of prediction.¹⁸² The use of a fixed rate would provide long-term accuracy. If a fixed rate is to be used, however, there is still the question of how the long-term rate should be determined. The Report considers several indices.

The Consumer Price Index is referred to as a "measure of the percentage change in the cost of purchasing a constant 'basket' of goods and services, representative of the purchases made by a particular population group in a specified time period."¹⁸³ The Index is published by Statistics Canada on a monthly basis, has specific release dates and is final on publication. It has been used extensively as a measure of economic change throughout the Canadian economy; changes in the Index have been used to adjust wage rates and labour contracts, old age security pensions, U.I.C. benefits, alimony and child support payments and (since 1973) the personal income tax exemption levels.¹⁸⁴

The Report also considers the use of the Implicit Price Index, Gross National Expenditure, which is the measure of changes in the prices of all final goods and services produced in the economy or imported into the country. It

¹⁸² Ibid., pp. 101-102.

¹⁸³ Ibid., p. 103.

¹⁸⁴ Ibid.

is based on the Gross National Product. This Index was recently replaced by Statistics Canada with a similar index called the Implicit Price Index, Gross Domestic Product, which is published on a quarterly basis and is subject to revision after publication.¹⁸⁵ The Manitoba Law Reform Commission Report states that these indices are less appropriate for the measurement of changes in the cost of living of individuals, due to the additional factors which the indices measure, i.e. price trends in the Government and business sectors of the economy and "export and wholesale prices."¹⁸⁶

The Average Weekly Earnings Industrial Composite figure is a third measure of economic change considered by the Report. This figure reflects changes in average weekly earnings of all sectors of employment (except agriculture, government, defense, hospitals, schools, religion, household services, fishing, hunting and trapping).¹⁸⁷ As we have seen, the use of this (or an equivalent) Index has found favour in Quebec, New Zealand, the New South Wales Report and Victoria, Australia.

The Manitoba Law Reform Commission Report recommended that the Consumer Price Index of Canada, All-Items (Not Seasonally Adjusted) be used. The Report stated that the

¹⁸⁵ Ibid., p. 104.

¹⁸⁶ Ibid., pp. 104-105.

¹⁸⁷ Ibid., p. 105.

Consumer Price Index is likely the best single available indicator of inflation in Canada. It has several forms, and the form recommended (the "all-items" form), in the opinion of the Manitoba Law Reform Commission, ensures the widest application to all parties, irrespective of differences in residence, spending patterns or seasonal factors.¹⁸⁸

The New Zealand Scheme has been criticized for its failure to provide for automatic indexation of benefits.¹⁸⁹ The same commentator, however, noted that tying the indexation of benefits to increases in New Zealand's weekly average wage is probably the fairest approach available (given New Zealand's traditionally high rate of inflation).¹⁹⁰ The N.S.W. Report stated that indexation based on average weekly earnings is preferable to the Consumer Price Index, because the benefits provided are earnings-related rather than linked directly to the cost of living. The N.S.W. Report further recommended that adjustment be made on a six-month basis.¹⁹¹

Two observations can be made with regard to the use of

¹⁸⁸ Ibid., p. 106.

¹⁸⁹ P.H. Osborne, Accident Compensation in Manitoba: Reflections after a Decade of No-Fault in New Zealand (Unpublished paper in University of Manitoba Library, 1985), p. 28.

¹⁹⁰ Ibid.

¹⁹¹ N.S.W. Report, supra, n. 110, Vol. I, p. 236.

an index in an automobile accident compensation Scheme for Manitoba. Firstly, the Canadian rate of inflation is traditionally much lower than New Zealand's inflation rate, averaging only between three and six percent over the last 25 or 50 years, despite the period of high and volatile inflation during the mid-1970's and early 1980's.¹⁹² Furthermore, while it is true that the disability benefits are earnings-related, it is also true that the purpose of these benefits is primarily to provide support for persons injured in automobile accidents. The use of an index based on average weekly earnings, only because the compensation provided is earnings-related, is not necessarily an appropriate decision. The Manitoba Law Reform Commission Report stated explicitly that the Consumer Price Index for Canada, All-Items (Not Seasonally Adjusted), is the broadest and probably the single best available indicator of inflation in Canada.¹⁹³ Thus, if the purpose of indexation of benefits is to allow the accident victim to keep pace with the rate of inflation, it would appear that the Index recommended by the Manitoba Law Reform Commission is best suited for incorporation into a comprehensive compensation Scheme for automobile accident victims in Manitoba.

It has been noted that some of the Schemes examined incorporate different indices for different parameters of

¹⁹² M.L.R.C. Report No. 68, supra, n. 173, p. 102.

¹⁹³ Ibid., p. 106.

the earnings-related benefit. For example, the Quebec Scheme currently utilizes increases in the Quebec Pension Plan Index to increase the amount of the income replacement indemnity payable, but the maximum amount of earnings to be used (in the calculation to determine the amount of the income replacement indemnity) is indexed in accordance with changes in the average weekly earnings of the Industrial Composite in Quebec (see above, at p. 90). Furthermore, the Victorian Scheme employs increases in the average weekly earnings of all employees for Victoria to index its loss of earnings benefit, but uses changes in the All-Groups Consumer Price Index for Melbourne to index both the lump-sum and periodic payment components of the impairment benefit (which is payable to both earners and non-earners).¹⁹⁴ The rationale for this approach would appear to be that the earnings-related benefit should be indexed in accordance with changes in the average weekly wage so that earners injured in transport accidents do not receive better protection against inflation than earners who are not injured in transport accidents. However, since the impairment benefit is payable to all persons (whether earners or non-earners) injured in transport accidents, it is therefore more appropriate to use changes in the Consumer Price Index to index the impairment benefits. Another explanation may be that, like the N.S.W. Law Reform

¹⁹⁴ Transport Accident Act 1986 (Vic.), s.61.

Commission, the Victorian Government came to the conclusion that earnings-related benefits should be indexed in accordance with changes in average weekly earnings.

Again, it is felt that the use of several different indices to index benefits within a comprehensive compensation Scheme is both unduly complex and unnecessary. As the Manitoba Law Reform Commission has pointed out, the use of a fixed rate of indexation to compensate for long-term inflation will eliminate the risk of benefits being increased due to short-term changes in the rate of inflation (ie. reduce the risk of over-compensation). As the purpose of a compensation Scheme is to provide sufficient support for its claimants, it is submitted that the use of one comprehensive Index, the Consumer Price Index of Canada, All-Items (Not Seasonally Adjusted), is appropriate for the indexation of both the various benefits offered by a compensation Scheme, and for indexation of the different amounts used as references in the determination of the actual amounts of compensation.

When should earnings related compensation cease?

The reader will have observed that the different Schemes surveyed provide various cut-off points for the payment of earnings-related compensation. Some use fixed periods (beyond which compensation will only be continued if the accident victim satisfies certain disability requirements), all provide that compensation ceases when

the incapacity no longer exists, and most of the Schemes provide for the cessation of benefits once the accident victim turns 65.

There can be no real argument with the contention that benefits should cease once the incapacity for which the benefits have been paid no longer exists.

The N.S.W. Report dealt specifically with the problem of determining whether an accident victim's continued unemployment is due to the incapacity sustained in the accident, or due to unrelated circumstances (i.e. job market, changes in the long-term structure of the economy, technological development which reduces the number of certain types of jobs or eliminates them completely, etc.).¹⁹⁵ The Report recommended a general rule that where an accident victim is employed (following the accident) his or her post-accident earning capacity is equivalent to the earnings derived from that employment. If the accident victim is not employed at all after the accident, his or her post-accident earning capacity is nil (i.e. he or she would be regarded as totally incapacitated).¹⁹⁶ This general rule would not apply where:

- the victim is capable of undertaking employment of a kind for which he or she is reasonably expected to apply or which is reasonably available taking

¹⁹⁵ N.S.W. Report, supra, n. 110, Vol. I, pp. 202-203.

¹⁹⁶ Ibid., p. 204.

into account:

- the nature and extent of disability
 - victim's age, level of education, training and language skills
 - victim's work experience
 - victim's place of residence
 - other relevant factors, and
 - the victim is capable of competing in the market for this kind of employment at no significant disadvantage (when compared to non-disabled members of the community).
- in this situation, the Corporation should determine the post-accident earning capacity of the victim by taking into account earnings that could be derived from the employment reasonably available to him or her.¹⁹⁷

It is immediately apparent that the N.S.W. Report strikes a balance between the objective of returning an accident victim to the work force, and the need for appreciation of the particular circumstances that the accident victim finds himself in, following the accident. The Corporation, in determining whether or not a victim who is unemployed has a post-accident earning capacity, must take into account the different factors listed above, ie:

- the nature and extent of the disability caused by

¹⁹⁷ Ibid., pp. 204-205.

- the accident,
- the victim's age, level of education, training and skills, work experience, and place of residence, and other relevant factors (see above).

This approach is both functional and sensitive to the needs and circumstances of the accident victim. It is recommended for any comprehensive compensation Scheme to be introduced in Manitoba.

It is submitted that the use of specific time-frames to limit the payment of compensation (unless, at the end of this time, the victim remains totally disabled) is both arbitrarily harsh and a disincentive to rehabilitation. For example, the current Quebec Scheme provides for payment of the income replacement indemnity for up to five years, at which time the indemnity will cease unless the victim is unable to hold any employment (in which case the indemnity continues).

Where the victim can only obtain employment which pays a gross income less than that used in computing his or her indemnity, the Regie will pay an indemnity equal to the difference between the victim's net income at the time of the accident and the net income he or she earns or could earn from employment.¹⁹⁸ While the Quebec Scheme could be considered generous in that it provides for a continued

¹⁹⁸ Automobile Insurance Act, R.S.Q., Cap. A-25, ss. 28 and 32 (Hereinafter referred to as the "Que. Act").

indemnity even where the accident victim has some earning capacity following the accident, the use of the five-year limitation (or indeed, any limitation delineated by time) could be considered inappropriate in the context of a comprehensive compensation Scheme. That is, compensation should continue while the disability persists (it should not be based on a certain pre-determined time period).

Where an accident victim is and remains totally incapacitated following an accident, the accepted (and appropriate) approach is to determine, as soon as practicable, a permanent pension for that totally incapacitated accident victim. This is the approach of the New Zealand Scheme. The scheme recommended by the N.S.W. Report allows for the assessment of a permanent pension, either with the consent or at the request of the accident victim. It is submitted that either of these approaches is appropriate for a compensation Scheme in Manitoba. However, the following point should be noted.

We have already concluded that earnings related compensation should continue for as long as the victim remains incapacitated. If the victim remains totally incapacitated or disabled, then E.R.C. would simply continue. The use of a permanent pension for permanent incapacity is really more relevant to the topic of compensation for permanent partial incapacity (where the victim has some residual earning capacity following the accident).

This issue will be dealt with (in detail) in the "Analysis" section under the next heading, "Partial Disability."

However, if it is determined that the victim has suffered a long-term incapacity, (ie. the accident victim is and remains totally incapacitated following an accident), and it is felt that a permanent pension would be in the victim's best interests, then the Scheme's administrators should (either with the consent or at the request of the victim), determine, as soon as practicable, a permanent pension for that totally incapacitated accident victim. This is the approach recommended by the N.S.W. Report. It is appropriate for a compensation Scheme in Manitoba.

What about the cutting off of compensation at a certain age? Almost every Scheme surveyed provides for the cessation of earnings-related benefits when the accident victim attains 65 years of age. The rationale for this cut-off is simply that as most people retire from the work force by age 65, the payment of earnings-related benefits beyond that age is clearly inappropriate. No real quarrel can be taken with that position. However, there are earners who must continue in their employment past the age of 65, in order to support themselves and their families. For those persons, compensation should extend past the age of 65. The Quebec Scheme provides for the payment of the income replacement indemnity up to the age of 75 (for most

earners) and further payment of up to 12 months where the accident victim is an earner who is over 75 years of age (this would clearly be rare).¹⁹⁹

It is submitted that a workable and straightforward approach to this issue would be the adoption of a cut-off point of 65 years for earnings-related benefits, unless the victim works in an area of employment where the retirement age is extended past 65 years of age, or the victim can show that he or she would have worked past that age. In the former case, compensation should continue to the normal retirement age of persons in that area of employment. In the latter case, compensation should continue to age 75. No compensation should be paid past the age of 75, as by this time the accident victim would be eligible for various old-age benefits, and would likely be eligible for a pension from the Canada Pension Plan.

Only the N.S.W. Report specifically addresses the issue of potential for advancement. That is, a person injured in an accident may not only lose income, he or she may also lose opportunities for promotion or career advancement which would have been available to them if the accident had not occurred. The N.S.W. Report recommended that an incapacitated earner should be allowed to apply for assessment on the basis of potential for advancement where:

- he or she has been incapacitated for a period of

¹⁹⁹ Que. Act, s.25.

- more than two years, but less than three years,
- the disability is likely to have a continuing effect on the accident victim's earning capacity,
 - and the victim has participated in vocational or rehabilitation programs provided by the Corporation.²⁰⁰

The Corporation would be able to assess compensation on the basis of potential for advancement only if this assessment would result in compensation which is significantly greater than that which would otherwise be awarded. In making the assessment for loss of potential for advancement, the Corporation was directed to consider the person's age, education, training, skills and work history as of the accident date, as well as the likelihood that (if the accident had not occurred) the victim would have increased his or her earning capacity or varied the nature of his or her employment or involvement in the work force with the result of a likely promotion or professional advancement.²⁰¹ However, the Corporation was only to take into account factors or events affecting earning capacity which were likely to have an effect or occur within ten years of the accident.²⁰²

The N.S.W. Report approach to assessment of potential

²⁰⁰ N.S.W. Report, supra, n. 110, Vol. I, p. 208.

²⁰¹ Ibid., pp. 209-210.

²⁰² Ibid., p. 211.

for advancement should be incorporated into a compensation Scheme for Manitoba.

The limited no-fault personal injury benefits for disability currently available in Manitoba are reduced both by the receipt of other benefits under that Scheme, and by receipt of compensation from other Schemes, e.g. Workers' Compensation. In fact, if an accident victim is eligible for Workers' Compensation in respect of the accident, he must take those benefits (M.P.I.C. will not pay any of the no-fault benefits, except for the death benefits payable to surviving family members).²⁰³ The N.S.W. recommendations in respect of this issue and of the issue of the receipt of other payments is as follows:

- where the victim is entitled to claim compensation under both the transport accident Scheme and some other scheme or system (such as workers' compensation), the victim has three months to elect whether to claim under the transport accident Scheme or to pursue other remedies;
- if the accident victim is entitled to workers' compensation and chooses to claim the transport accident benefits, he or she should be entitled to retain the workers' compensation in respect of loss of earnings for the period up to the date of the election, if the workers' compensation is

²⁰³ Man. Reg. 290/88R, s. 34.

greater than that paid under the transport accident Scheme;

- benefits under the Scheme should not be reduced or affected where the accident victim receives ex gratia payments, accident insurance, retirement pensions, superannuation or pensions or benefits under Commonwealth legislation.²⁰⁴

To prevent double compensation while preserving fairness, accident victims should be allowed to elect between benefits provided by the comprehensive compensation Scheme, and those provided (if available) by Workers' Compensation. The approach of the N.S.W. Report, as described above, should be implemented here (see infra pp. 352-354).

Both the current Scheme of limited no-fault disability benefits in Manitoba and the N.S.W. Report allow for the commutation of periodic benefits to lump-sum payments, in certain specified circumstances.²⁰⁵ The rationale for allowing this commutation is that where the amounts of compensation involved are so low that the cost of providing periodic compensation unnecessarily burdens the Scheme, the periodic payments should be commuted to payment in the form of a lump-sum. The N.S.W. Report recommended that commuta-

²⁰⁴ N.S.W. Report, supra, n. 110, Vol. II, p.447.

²⁰⁵ Man. Reg. 290/88R, s.18; N.S.W. Report, supra, n. 110, Vol. I, p. 228.

tion should only be allowed with the consent of the accident victim.²⁰⁶ The Manitoba Regulations also provide that commutation may only take place with the agreement of the insured.²⁰⁷

The Manitoba Law Reform Commission noted that there are several disadvantages to the use of commutation. First, the commuted value of an annuity will likely be considerably less than a lump-sum award (in respect of the same injury) would have been. Therefore, an uninformed accident victim might seriously impair his long-term financial position through an improvident commutation. Secondly, commutation which requires Court approval would result in a type of review, which is contrary to the Law Reform Commission's recommendation against reviewable periodic payments. Thirdly, the use of commutation may lead to the insurer wanting or being required to purchase a commutable annuity, which would be more costly than an ordinary annuity. Fourthly, the commutability of an award or settlement could lead to Revenue Canada interpreting the ownership of such an award or settlement to be taxable in the hands of the accident victim. As a result, the favourable tax treatment extended to periodic payments would likely not be extended to a commutable damage award. Finally, a victim who is allowed to assign a portion of his

²⁰⁶ N.S.W. Report, supra, n. 110, Vol. I, p. 228.

²⁰⁷ Man. Reg. 290/88R, s.18.

or her periodic payments could use this assignment as security in order to borrow a lump-sum for investment purposes. Therefore, if assignment of payments is allowed, it would not be necessary for the victim to commute his award in order to obtain a lump-sum.²⁰⁸

The Manitoba Law Reform Commission recommended that an accident victim should not be allowed to commute periodic payments to a lump-sum.²⁰⁹ It is submitted that due to the disadvantages of allowing commutation of periodic payments to a lump-sum payment (as listed above), the recommendation of the Manitoba Law Reform Commission is prudent, and should be incorporated into a comprehensive compensation Scheme for automobile accident victims in Manitoba.

(2) Partial Disability

(a) Comparison

(i) Manitoba

1. Part II Benefits:

- "partially disabled" defined as "condition of mind or body that renders an insured entirely and continuously incapable of performing one or more of the essential daily duties pertaining to any occupation or employment for wages or profit to which the insured is reasonably suited, having regard to his skill and ability, and that gives rise to a claim for indemnity benefits..." (s.4).

²⁰⁸ M.L.R.C. Report No. 68, supra, n. 173, pp. 107-108.

²⁰⁹ Ibid., p. 108.

- partial disability must arise within twenty days of the accident, and result from injuries sustained in the accident (s.13).
- "earner" is person who was actively engaged in an occupation or employment for wages or profit at the time the accident occurred, or for any six months out of a twelve month period immediately preceding the accident date (this is the "employment requirement"), (s.13).
- partially disabled earners all receive the same benefit, \$60.00 per week; benefit is not increased even for those with a high income (s.13).
- benefits continue as long as partial disability persists, subject however to a maximum duration of 104 weeks (s.13).
- minors must show actual loss of earnings to qualify for the partial disability benefit; ie. they must satisfy the "employment requirement" [s.16(2)(b)].
- persons who, by reason of a pre-existing mental or physical infirmity, were unable to provide themselves with the necessities of life, must show actual loss of earnings to qualify for the partial disability benefit; ie. they must satisfy the "employment requirement" [s.16(2)(b)].
- weekly indemnity for minors or persons with pre-existing physical or mental infirmity is equal to actual loss of earnings, up to a maximum of \$60.00 per week, and there is no minimum [s.16(2)(b)].
- maximum duration of benefits for minors or persons suffering from pre-existing physical or mental infirmity is 104 weeks [s.16(2)(b)].
- once minors attain the age of eighteen and persons suffering from pre-existing physical or mental infirmity reach the point at which the pre-existing condition would have been cured (but for the accident), if these persons are still suffering from a partial disability, they will be deemed to have been partially disabled from the date of their eighteenth birthday or the date upon which the pre-existing condition would have been cured, respectively [ss.16(1)(a)(ii) and 16(1)(b)(iii)].
- however, persons deemed to be partially disabled

must still show employment as of the date of the accident or for six months of the twelve months preceding the accident date in order to receive the partial disability benefit of \$60.00 per week, for up to 104 weeks (s.13).

- one week waiting period for partial disability benefits (s.15).
- benefits not indexed.
- benefits may be cut off where accident victim does not subject himself to reasonable medical, surgical or other treatment or enrolls in program of medical rehabilitation or re-training as requested by M.P.I.C. (s.19).
- no benefits payable if accident victim qualifies for compensation under the Workers' Compensation Act (s.34).
- no disability benefits payable during any period where a victim receives monies under the Unemployment Insurance Act, 1971 (s.35).
- partial disability benefits reduced by benefits received from a private policy of insurance, so that the sum total of the money received by the insured will equal amount of his or her average pre-accident income; benefits may be reduced to zero [ss.13 and 41(1)].
- M.P.I.C. may make a binding agreement with insured for commutation of partial disability benefit to lump-sum settlement; such agreement not to be made to the foreseeable detriment of the insured (s.18).
- persons who received total disability benefits and subsequently ceased to be totally disabled, but remain partially disabled, may receive partial disability benefit for full period in respect of which that benefit is payable, from date of transition from total disability to partial disability, provided that requirements for partial disability payment are met (s.17).

2. The Kopstein Report:

- no comments with respect to definition of "partial disability" or "earners."

- benefit is 100 percent of the weekly net average wage loss; this term is not defined, but the actuarial Report assumes that an average net wage loss for wage earners will be 20 percent of the average net weekly earnings before the accident²¹⁰ (p. 84).
- Kopstein Report did not specify minimum or maximum benefits, but if weekly net average wage loss is assumed to be 20 percent of the victim's average net weekly earnings before the accident, it would appear that the limits with respect to the total disability benefit payable to earners would, by reference, apply proportionately to the partial disability benefit payable to earners.
- one week waiting period before benefits commence (p. 84).
- benefits payable as long as victim remains partially disabled, and there is no maximum duration (p. 84).
- benefits will be indexed in accordance with the annual growth rate in the Average Industrial Composite Index of Wages (p. 84).
- as benefits based on weekly net average wage loss, they would appear to be non-taxable.
- Kopstein Report silent as to whether benefits would be reduced by any wage or profit or other compensation received during the period of disability, therefore impossible to ascertain whether any reduction would take place.

(ii) Ontario

1. The Standard Insurance Policy:

- no specific provision regarding "partial disability" in the Standard Policy; accident victims must show "substantial inability to perform the essential duties of his occupation or employment" (Vol. II, p. 760).

²¹⁰ Tillinghast Report, supra, n. 21, Exhibit IV.5, Sheet 5.

- victim must show employment as of the date of the accident, or, if eighteen years of age or over and under the age of 65 years, must show employment for any six months out of the 12 months immediately prior to the accident (Vol. II, p. 760).
- the provisions requiring manifestation of disability within thirty days, two year limitation period on payment of benefits, reduction of payments by receipt of any income for employment, U.I.C. benefits etc. are the same as the provisions applicable to the disability benefit for totally-disabled earners; therefore these provisions will not be repeated here (see "Total Disability: Ontario - The Standard Insurance Policy, supra, pp. 85-87).

2. The Osborne Report:

- no specific recommendation re partially disabled earners in Osborne Report; therefore persons suffering from partial disability as a result of automobile accidents must meet the same eligibility requirements and are subject to same restrictions and waiting periods as totally disabled earners (see "Total Disability: Ontario-The Osborne Report," supra, pp. 87-89).

(iii) Quebec

1. The Automobile Insurance Act:

- Quebec's Scheme does not provide exact equivalent of Manitoba's partial disability benefit; accident victim is entitled to income replacement indemnity for initial period of five years, or longer if the disability persists at the termination of five years (ss.28 and 32).
- if, at the end of five years, the victim is able to hold an employment but the employment pays a gross income less than that used in computing his or her indemnity, the victim is entitled, for the sixth year following the accident, to an income replacement indemnity equivalent annually to the difference between his net income used in computing his income replacement indemnity at the time of the accident, and the net income he earns or

that he could earn from such an employment (s.32).

- if the accident victim returns to work prior to the end of the five year period, the benefits will cease unless the victim earns a gross income that is less than that used in computing his income replacement indemnity, at the time of the accident. If this is the case, the victim is entitled to an income replacement indemnity reduced by an amount equivalent to fifty percent of the net income earned from such other employment not exceeding \$5,000.00, or, if such income exceeds \$5,000.00, fifty percent of the first \$5,000.00 and seventy percent of the remainder. Only that part of the gross income over \$1,000.00 is taken into consideration (s.31).
- Example:
 - prior to accident, victim earns gross income of \$35,000.00/year, of which \$25,000.00 is his net (after tax) income;
 - victim is hurt in accident and is (at first) unable to work; his income replacement indemnity is 90% of his net income, or \$22,500.00;
 - eventually, victim returns to work, but because he is partially disabled, his gross income is now only \$25,000.00;
 - the gross income to be considered here is that amount over \$1,000.00, ie. \$24,000.00;
 - the net income resulting from the gross income above (ie. \$24,000.00) is \$18,000.00;
 - the amount of the reduction is 50% of the first \$5,000.00 of net income (ie. \$2,500.00) plus 70% of the remainder (70% of \$13,000.00 is \$9,100.00) so that the total reduction is \$2,500.00 plus \$9,100.00 equals \$11,600.00;
 - therefore, the new income replacement indemnity payable to the victim is \$22,500.00 minus \$11,600.00, or \$10,900.00;
 - \$10,900.00 plus victim's post-accident gross income of \$25,000.00 = \$35,900.00 (encourages victim to return to work).

- earners who have sustained partial disabilities as a result of automobile accidents are subject to the same eligibility requirements, waiting periods, and other conditions as earners who are totally disabled (see "Compensation for Earners-Total Disability: Quebec - The Automobile Insurance Act," pp. 89-90).

2. Proposed Amendments:

- the proposed amendments do not contain any provisions which are specific to partially disabled earners; the changes proposed by Bill 92 would affect both earners suffering from total disability and partial disability (see "Total Disability: Quebec - Proposed Amendments," supra pp. 90-93).

(iv) New Zealand

- the New Zealand Scheme does not have a specific provision regarding the E.R.C. partially disabled earners.
- the victim's loss of earning capacity benefit is established using the same formula applicable to totally disabled earners, ie.:
 - pre-accident (relevant) earnings less earnings during period of incapacity = loss of earning capacity [s.59(2)].
 - E.R.C. is payable at the rate of 80% of loss of earning capacity, subject to the same maximum as that applicable to totally disabled earners [s.59(2)].
 - the minimum E.R.C. payable to partially disabled earners is calculated as follows:

$$\frac{a \times c}{b}$$
 - a is the weekly loss of earning capacity under s.59 (E.R.C. for temporary partial incapacity) or s.60 (pension for permanent partial incapacity; see p. 159)
 - b is the weekly rate of relevant (pre-accident) earnings

- c is the minimum weekly rate of earnings related compensation for total loss of earnings capacity (as of June, 1987; \$244 for a single earner) [s.61(3)(b)].
- as with the temporary partial incapacity benefit, the New Zealand Scheme does not have a specific provision regarding permanently partially disabled earners. Therefore, an earner who suffers permanent partial incapacity as a result of an accident will qualify for a permanent pension calculated in the same manner as a permanent pension for persons who are totally incapacitated (s.60).
- the Accident Compensation Corporation compares the amount the accident victim would have been making (if the accident had not occurred) with the amount that he or she is now capable of earning. The loss of earning capacity is then expressed as a percentage of the sum that would have been earned but for the accident. This percentage is applied to the person's relevant earnings as of the date of assessment, and eighty percent of the figure thus obtained is payable as a permanent pension. This procedure works as follows:

accident victim's earnings had accident not occurred	\$500.00
accident victim's present earnings	350.00
loss of capacity to earn is	150.00
\$150.00 divided by \$500.00	30%
the accident victim's relevant (ie. post-accident) earnings as of the effective date of the assessment	\$400.00
30% of \$400.00	\$120.00
80% of \$120.00 is the permanent pension	\$96.00
tax is subtracted from the permanent pension of \$96.00 (suppose tax is \$30.00) this gives a final net figure of	\$66.00
- the pension cannot be decreased but it can be increased if the injured person's condition and earning capacity deteriorates (s.60).

- same provisions as to eligibility requirements, waiting periods, cessation of benefits etc. which are applicable to totally disabled earners are also applicable to partially disabled earners (see "Compensation for Earners - Total Disability: New Zealand," supra, pp. 93-97).
- the amount of "relevant earnings" determined by the Corporation for the accident victim (both employees and the self-employed) is subject to increase, semi-annually, on the basis of increases in the New Zealand weekly average wage. Increases are specified by Orders in Council [ss.53(6) and (7)].
- note that it is the "relevant earnings" (ie. pre-accident) amount which is directly increased, not the actual weekly benefits paid to the victim; however, the actual benefits paid will be increased as a result of increases in the "relevant earnings" (higher relevant earnings result in a greater loss of earning capacity, and consequently a higher loss of earning capacity benefit).
- the pension for permanent incapacity is also subject to increase by Order in Council [s.60(7)].

(v) Victoria

- definition of "earner" and "pre-accident weekly earnings" is the same as set out under "Total Disability: Victoria," supra p. 97.
- partially disabled earners are entitled to a loss of earnings benefits of 85 percent of the difference between the victim's current weekly earnings and the victim's pre-accident weekly earnings, subject to the same minimum and maximum amounts as totally disabled earners (s.45).
- if the earner is a self-employed person, and (after the accident) is unemployed (and therefore has no earnings), the weekly payment for partial loss of earnings is 80 percent of the earner's pre-accident weekly earnings, subject to the same maximum and minimum as applicable to totally disabled earners [s.45(4)].
- the loss of earnings partial disability benefit payable to self-employed persons must not exceed 100 percent of the self-employed person's pre-

accident weekly earnings [s.45(5)].

- weekly payment indexed in accordance with the formula:

$$A \times \frac{B}{C}$$
- A is the amount of the weekly payment,
- B is the latest average weekly earnings as at June 15 in the preceding financial year of all employees for Victoria, and
- C is the average weekly earnings of all employees for Victoria as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(1)].
- there is a waiting period of five days after the accident or after the injury first manifests itself, and no loss of earnings benefit is payable after the first eighteen months after the accident or after the disability first manifests itself, whichever is later [s.45(6)].
- "current weekly earnings" does not include overtime earnings [s.45(6)].
- the Commission must determine the degree of impairment of a victim who appears to be entitled to the (long-term) impairment benefit as at:
 - if victim was not a minor when the accident occurred, the later of:
 - 18 months after the accident; or
 - when the injury stabilizes.
 - if victim was a minor at the time of the accident, the later of:
 - 18 months after the accident; or
 - when the injury stabilizes; or
 - the victim's 18th birthday (s.46A).
- accident victim may apply to have his or her degree of impairment determined by the Commission

prior to the time at which such assessment would normally be made; provided that the victim requires the assessment for the purpose of proceedings for the recovery of damages in respect of the injury and the injury has stabilized or has substantially stabilized [s.47(7)].

- if the Commission makes this "early" determination of degree of impairment (ie. where the victim requests this), the Commission may make a further determination of degree of impairment in substitution for the "early" determination, at 18 months after the accident, or (for minors) when the victim turns 18 [s.47(7A)].
- the degree of impairment is to be determined with the use of the A.M.A. Guides to the Evaluation of Permanent Impairment (2d)²¹¹.
- if Commission has determined the degree of impairment for the victim, and the degree of impairment is greater than 10%, the Commission must assess a long-term impairment benefit in respect of that victim [s.47(1)].
- this benefit is composed of two parts:
 - (a) a Lump-sum Payment, based on a percentage of the maximum sum payable to a totally incapacitated person, which is \$47,910.00 (as of July 1, 1988). Benefit is calculated according to the formula:

$$\frac{A - B}{C} \times \$47,910.00$$
 - A is the degree of impairment of the victim as a result of the accident
 - B is 10%
 - C is 90% (s.47).
 - lump-sum benefit may be paid as periodic payment if accident victim requests this [s.47(4)].
 - the Regulations provide a formula to be used in calculating the periodic payments based on

²¹¹ Transport Accident (Impairment) Regulations 1988, S.R. 255, s.6(1) (Hereinafter referred to as "Vic. Reg.").

the lump-sum benefit²¹².

- (b) an annuity payment is also available to persons after 18 months following the accident, and it is based on a formula which incorporates the individual's degree of impairment and his or her age, as follows:

$$\frac{A - B}{C} \times \$111,780.00 \times \frac{75 - D}{50} = \text{[amount of annuity payable]}$$

(as of July 1, 1988)

- A is degree of impairment of accident victim.
- B is 10%
- C is 90%
- D is:
 - if person is 75 or over 75
 - if person is 25 or under 25
 - if person is over 25 and under 75 age of person in whole years [s.48(1)]
- for example, if an individual is 45 years old and suffers a degree of impairment assessed at 20 percent, the annuity payment payable over many years would be:

$$\frac{20 - 10}{90} \times \$111,780.00 \times \frac{75 - 45}{50} = \$7,452.00$$

[maximum amount of benefit as of July 1, 1987] (s.50).

- the amount of the annuity portion of the impairment benefit is deducted from any loss of earning capacity benefit which may be payable to the accident victim [s.49(2)(a)].
- where the accident victim is a minor, he or she will receive a special impairment benefit after the initial eighteen month period following the accident. This benefit continues until age 18 or the impairment ceases whichever occurs first [s.54(1)].
- the minor's impairment benefit is calculated by

²¹² Vic. Reg., s.7 and Schedule I.

multiplying the assessed degree of permanent impairment by (as of July 1, 1988) \$66.00, to arrive at the weekly impairment benefit payable to the minor [s.54(2)].

- as with the other impairment benefits, no impairment benefit is payable for an impairment of ten percent in degree or less [s.54(1)].
- payments for persons under the age of eighteen will be paid to their parents or guardian [s.54(4)].
- maximum amounts of the impairment benefits (both lump-sum and annuity payments) are indexed as of July 1st of each year, in accordance with the formula:

$$D \times \frac{E}{F}$$

where D is amount of the lump-sum or periodic payment;

E is the all-groups Consumer Price Index for Melbourne as at June 15th in the preceding financial year last published by the Australian Statistician in respect of the December quarter of that financial year;

F is the all-groups Consumer Price Index for Melbourne as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(2)].

- after 18 months following the accident, or when the loss of earnings payments cease, whichever occurs later, the accident victim (if an earner who suffers a partial loss of earning capacity as a result of a transport accident) will receive weekly payments of 85 percent of the difference between his post-accident earning capacity and pre-accident earning capacity (s.50).
- the same stipulations that applied in the case of total loss of earning capacity (i.e. maximum and minimum amounts payable, when payments are to commence, reduction of payment by the amount of any available impairment annuity benefit) also apply to "earners" who suffer partial loss of earning capacity (see pp. 102-104) (s.50).

- as with the total loss of earnings capacity benefit, there are special definitions used only in respect of the "partial loss of earnings capacity" benefit (the benefit payable after 18 months following the accident); these definitions are broader (and therefore more generous) than the definitions employed for other types of benefits. The special definitions are:
 - "earner" is defined as including a person injured as a result of the transport accident who, at the time of the accident, was not an earner, but has attained the age of 18 years after the accident [s.50(5)].
 - "pre-accident earning capacity" is determined according to the formula:

$$\frac{A \times B}{C}$$
 - A is amount that Commission believes the victim would have had the capacity to earn before the accident, in employment that is reasonably available (less tax);
 - B is the latest average weekly earnings of all employees in Victoria in the financial year prior to June 15th;
 - C is the average weekly earnings of all employees in Victoria published prior to June 15th last preceding the accident [s.49(5) and s.50(5)].
- it is obvious from the above formula that the "pre-accident earning capacity" will increase with changes in the average weekly earnings of all employees in Victoria (ie. it is indexed).
- the provisions applicable to the partial loss of earnings capacity benefit also provide a definition of "post-accident earning capacity." "Post-accident earning capacity" is defined as:

the amount that the Commission determines as a weekly amount the accident victim has the capacity to earn, despite the injury, in employment reasonably available to the victim, having regard to the nature of the injury, the degree of impairment, the victim's age, training, skills and ex-

perience, and the potential for rehabilitation," less such amount that is reasonably regarded as the amount of income tax that would have been payable on that amount [s.50(5)].

- the amount determined as the post-accident earning capacity of the earner must not exceed the actual weekly earnings of the earner (following the accident) unless it is determined that the accident victim is capable, despite the injury, of employment which would provide him with weekly earnings equal to that greater amount [s.50(6)].
- the partial loss of earning capacity benefit is subject to the same minimum and maximum amounts as the total loss of earning capacity benefit, and no payment need be made if the difference between the accident victim's pre-accident earning capacity and post-accident earning capacity (as defined in s.50) is less than ten percent of the pre-accident earning capacity (s.52).
- the definition of "pre-accident earning capacity" used in the calculation of the partial loss of earning capacity benefit (see above) is subject to the same stipulations regarding earners under the age of 21 and apprentices that are applicable to the total loss of earning capacity benefit, ie.:
 - if, at time of accident, victim was an apprentice or minor, the "pre-accident earning capacity" is calculated (before the earner attains the age of 21, or the age at which the highest rate for his employment would be payable, whichever comes first) as if, at the date of the accident, the victim had the capacity to earn at the rate applicable to the age of the earner for the time-being [ss.49(6)(a) and 50(5)].
 - once apprentice or minor reaches the age at which the highest rate for that kind of work is payable, or the age of 21 (whichever comes first), he or she is entitled to payments as if, at the time of the accident, the victim had the capacity to earn a rate applicable to the highest of those ages or applicable to age 21 [ss.49(6)(b) and 50(5)].
- special partial loss of earnings capacity benefits are payable to persons who are non-earners (see

below, under "Compensation for Non-Earners: Partially Disabled," pp. 230-231).

- the loss of earnings payments (payable during the first 18 months after accident) and loss of earnings capacity benefits (payable after 18 months following the accident) cease when the accident victim reaches age 65, or reaches the normal retiring age of his or her industry or occupation, whichever is later [s.53(1)].
- if an earner is injured after attaining either retirement age or age 65 (or is injured not more than 12 months before attaining either of those ages), he or she is entitled to weekly benefits for up to one year following the accident [s.53(1)].
- the loss of earnings payments and loss of earnings capacity benefits are suspended any time the accident victim is imprisoned [s.53(1)].
- the Commission need not pay the loss of earning capacity benefits to an accident victim who has received a settlement or award of common law pecuniary damages in respect of the injury; furthermore, the Commission need not make lump-sum and annuity impairment payments to an accident victim who has received a settlement or award of pain and suffering damages at common law [s.53(2)].
- the Commission does not have to continue to pay any loss of earning capacity or impairment annuity benefit as soon as three years following the manifestation of the injury have expired or the total of the amounts received by the victim under the categories of loss of earnings, impairment annuity and loss of earning capacity total (as of July 1, 1988) \$76,740.00 [s.53(3)].
- the impairment lump-sum benefits do not figure into the calculations made under these "expiration" provisions.
- these restrictions (i.e. the three year period or \$76,740.00 total restriction) do not apply where the accident victim receives an impairment benefit and his or her impairment is assessed at a level of fifty percent or more; in such cases, the benefits continue until retirement age [ss.53(1) and 53(4)].

- no compensation payable (unless Commission decides otherwise) to persons who are also eligible for compensation from various other statutory schemes (s.37).
- no compensation payable to persons eligible for workers' compensation (s.38).
- loss of earnings benefits payable within the first 18 months after the accident are reduced, proportionately, where victim was the driver of the vehicle and had a blood-alcohol content of between .05 and .24 at the time of the accident (s.40).

(vi) N.S.W. Law Reform Commission Report

- definitions of "earner," "normal weekly earnings," and "post-accident earning capacity" are the same as those employed for total disability cases (see "Total Disability: N.S.W. Law Reform Commission Report," supra, pp. 104-111).
- the accident victim's post-accident earning capacity is equivalent to earnings derived from the employment of the victim, following the accident. If the victim is not employed following the accident, his or her post-accident earning capacity is nil (Vol. I, p. 204).
- if the victim is capable of undertaking employment of a kind for which he or she is reasonably expected to apply or which is reasonably available taking into account:
 - the nature and extent of disability
 - victim's age, level of education, training and language skills
 - victim's work experience
 - victim's place of residence, and
 - other relevant factors,

and the victim is capable of competing in the market for this kind of employment at no significant disadvantage (when compared to non-disabled members of the community), the general rule stated above should not apply, and the Corporation should determine the post-accident earning capacity of the victim by taking into account earnings that could be derived from the

employment reasonably available to him or her (Vol. I, pp. 204-205).

- the general rule regarding post-accident earning capacity should also not apply where the accident victim has, without sufficient reason, refused an offer of suitable employment, or not taken part in vocational training, rehabilitation or assessment of employment prospects, or failed to take reasonable steps to secure suitable employment, or given up suitable employment (Vol. I, p. 205).
- compensation is again paid in respect of loss of earning capacity, but, as persons suffering from partial incapacity would return to the work force, they would be compensated for a higher proportion of their residual loss of earning capacity than 80 percent. Therefore, a person who suffers from partial incapacity and resumes employment for a substantial part of the working week, should receive compensation for proportion of the loss of earning capacity sustained higher than 80 percent (Vol. I, p. 232).
- the same provision as to maximum amount of compensation payable that applied to earners suffering total disability will apply to earners suffering partial disability:
 - the maximum earning capacity should be 150 percent of the Average Weekly Earnings of an adult male in Australia.
- where a person who has a high earning capacity suffers a partial loss of capacity, and is left with a residual earning capacity which is higher than the ceiling normally applied to the loss of earning capacity benefit, the accident victim should be compensated for the loss sustained (irrespective of the amount of the victim's residual earning capacity), subject to the overall limit on earnings related compensation of 150 percent of the average weekly earnings of the full-time adult male earner in New South Wales (Vol. I, p. 235).
- as with the total disability benefits, the benefits for partial loss of earning capacity would be indexed in accordance with changes in the average weekly earnings of full-time adult male earners in New South Wales (Vol. I, p. 236).

- payments for partial loss of earning capacity are subject to the same limitations, waiting periods, and termination dates as payments for total loss of earning capacity (see "Compensation for Earners: Total Disability - N.S.W. Law Reform Commission Report," supra, pp. 104-112).
- where an accident victim sustains permanent partial disability and his or her medical condition has stabilized, and all practicable steps have been taken towards his or her rehabilitation, the Corporation should be authorized to, with the consent or at the request of the accident victim, make an assessment of his or her permanent loss of earning capacity (Vol. I, p. 243).
- the assessment should be made in accordance with earlier recommendations as to determining pre-accident earnings and post-accident earning capacity, and should take into account any assessment of compensation on the basis of potential for advancement (Vol. I, p. 243).
- the assessment of permanent partial incapacity should be final and not liable to variation, except that after an assessment of permanent partial incapacity has been made, if the accident victim's earning capacity is substantially reduced by reason of a deterioration of his physical condition, or loss of or change of employment, and the reduction is caused by the injuries sustained in a transport accident, the Corporation should be able to set aside the assessment of permanent partial incapacity and make a new assessment, which would increase the previous assessment (Vol. I, p. 244).
- periodic compensation for partial loss of earning capacity should be indexed and adjusted semi-annually, by reference to changes in the Average Weekly Earnings of adult male full-time employees in Australia. The indexation should be embodied in the legislation (Vol. I, p. 236).

(b) Analysis

Before we begin our analysis of the major issue in respect of compensation for partial incapacity, one point should be stressed with respect to the current benefits

offered under the Manitoba Scheme. It has been noted that there is a 104 week limitation on the partial disability benefit payable to accident victims under the Manitoba Scheme as it currently stands. It has also been noted that where an accident victim suffers a disability for which he is entitled to a weekly disability benefit, and the victim receives benefits under a contract of other insurance, the aggregate of the amount payable to the accident victim cannot exceed his or her pre-accident average income. That is, the partial disability benefit can be reduced by private insurance benefits. As there is no minimum with respect to the partial disability benefit currently offered by the Manitoba Scheme, the private insurance could reduce the partial disability benefit to zero.

The complications posed by this approach are obvious. Suppose an accident victim suffers a partial disability as a result of the automobile accident, and receives private insurance which reduces his partial disability benefit to zero. Two years after the accident has occurred, the private insurance benefits run out. The accident victim, however, could be barred from claiming any partial disability benefits (as these benefits are only payable for a period of up to 104 weeks). If M.P.I.C. interpreted this 104 week period to run from the date of occurrence of the disability, the accident victim would not only have not received any partial disability benefits from M.P.I.C., he

or she could be precluded from suing M.P.I.C., due to the limitation period contained in Section 46 of Manitoba Regulation 290/88R. The limitation provides that any action proceeding against M.P.I.C. for the recovery of any of the Part II no-fault injury benefits shall be commenced within two years after the cause of action arose. If the cause of action is interpreted as arising as of the date that the disability manifested itself, the accident victim would be left without any recourse against M.P.I.C., in respect of the no-fault partial disability benefit.

It is submitted that the current limitation of two years with respect to partial disability benefits is unfair and can lead to manifest injustice, as demonstrated above.

It is further recommended that with respect to the partial disability benefits, the same conclusions as to the definitions of "earner," "pre-accident earnings" and "post-accident earning capacity" (subject to the provision on pp. 142-143 concerning determination of post-accident earning capacity where the victim is unemployed following the accident, but is still able to work), the duration of benefits, indexation, provision for potential for advancement, commutation, age limits and other issues as discussed in the "Analysis" of the "Total Disability Benefit," supra, pp. 112-152, should be adopted (where applicable) with respect to the partial disability benefit.

It is submitted that on balance, the best approach of

the Schemes surveyed with regard to compensation of partially disabled earners during the early stages of disability (ie. temporary partial incapacity) is the approach recommended by the New South Wales Law Reform Commission. That is, partially disabled earners would receive a benefit equal to 80 percent of their loss of earning capacity. Clearly, an earner who is partially disabled has some residual earning capacity, therefore the loss of earning capacity would not be as great as for a totally disabled earner. As to the maximum level of compensation, this issue would be dealt with as follows:

- The same maximum should be employed for partially disabled earners as are applicable to totally disabled earner, with one exception.
- The exception is the situation where a partially disabled earner returns to work following the accident. The N.S.W. Report recommended, as indicated above, that a person who resumes employment following the accident for a substantial part of the working week, should receive compensation for a proportion of the loss of earning capacity sustained higher than 80 percent.

This exception makes sense, as the loss of earning capacity would clearly be less than that assessed for a totally disabled earner, so that the accident victim would (taking into account both his earnings from employment and

the loss of earning capacity benefit payable to him) be in a better position financially, than if he did not seek such employment. It is true that the loss of earning capacity benefit would be reduced in this situation, but it would not be reduced on a dollar for dollar basis with respect to the earnings derived from the part-time employment following the accident. This would enable the administrators of the compensation Scheme to both save money while at the same time offering partially disabled earners an incentive to return to work, as well as an incentive to rehabilitation.

The difficult question of a minimum benefit for temporary partial incapacity would be dealt with using an approach modelled on the New Zealand Act. That is:

- the minimum E.R.C. payable to partially disabled earners is calculated as follows:

$$\frac{a \times c}{b}$$

- a is the weekly loss of earning capacity (E.R.C. for temporary partial incapacity)
- b is the weekly rate of relevant (pre-accident) earnings
- c is the minimum weekly rate of earnings related compensation for total loss of earnings capacity (ie. the "notional earning capacity" based on A.W.E.).

The major issue in determining the compensation payable for partial incapacity in any compensation Scheme is the question of how to compensate persons for permanent partial incapacity. Much of the argument has centred on the use of

lump-sum payments, determined according to a Schedule of Permanent Impairments, and payable both to earners and non-earners. The reader will appreciate that the issue here is not strictly how to compensate earners who have suffered partial disability, but is the broader question of how to compensate all persons who have suffered permanent partial disability or incapacity. Consequently, the comments and conclusions stated here are of equal application to the issue of compensation for non-earners who have suffered permanent partial incapacity.

This analysis must go beyond the mere question of compensation for partial loss of earning capacity. Put simply, how should compensation for any permanent partial incapacity (whether affecting earners or non-earners) be paid? The Manitoba add-on no-fault personal injury benefits currently offer a ridiculous low benefit of \$60.00 per week to partially disabled earners, and a permanent impairment benefit of up to \$20,000.00 (for persons who are seriously and permanently injured as a result of an automobile accident) to both earners and non-earners alike. Is this the correct approach to dealing with permanent partial incapacity? Should we offer both a weekly payment (limited in both duration and amount, and payable only to partially disabled earners) and a larger lump-sum award based on a Schedule of Impairments?

The author of the Woodhouse Report, whose contribution

to the field of accident compensation is demonstrated by the comprehensive no-fault accident compensation Scheme which has been operating for the last 15 years in New Zealand, has stated that if compensation is divided up into categories, it is not possible to avoid a tailor-made assessment in all cases for each component. Thus, actual loss of earnings, rather than apparent loss of earning capacity must be demonstrated and the advantage of speedy assessments made possible by the use of a formula or schedule are lost. This complication leads to administrative delays and the natural reluctance of accident victims to push quickly back to maximum recovery, if by doing so their compensation is likely to be reduced. Therefore, the separation of the different aspects of loss into categories leads to argument and acts as an impediment to rehabilitation.²¹³

The 1967 Woodhouse Report recommended that every assessment of a permanent partial disability should be made on a single schedule basis at the earliest possible stage. Once the assessment was made, it could be revised upwards (should that prove to be necessary) but could never be varied downwards against the accident victim. This recommendation was not followed.²¹⁴

²¹³ O. Woodhouse, "Aspects of the Accident Compensation Scheme," [1979] N.Z.L.J. 395 at 401.

²¹⁴ Ibid..

A later Woodhouse Report, prepared for the Australian Government, again attempted to implement payment for permanent partial incapacity on a periodic basis, according to a formula. The formula was to be as follows:

$$\frac{AP}{100}$$

A is 85 percent of the average weekly earnings of persons in Australia last published before the benefit begins to be payable. P is the percentage of the accident victim's incapacity.²¹⁵

In determining the percentage of the incapacity, the doctor was to consider the person's physical or mental disability and the extent to which his personal efficiency and ability to lead a normal life had been impaired by the accident. The physician was to have regard to the tables of relevant impairments set out in the Guide to the Evaluation of Permanent Impairment, prepared by the A.M.A. However, the Bill introduced into Australia's House of Representatives provoked criticism, as it contained a provision allowing the administrators of the compensation Scheme to use actual earnings, instead of average earnings, as the base upon which the permanent partial incapacity benefit would be calculated. As a result of this criticism, a new provision was introduced:

²¹⁵ Palmer, supra, n. 163, p. 230.

Where the rate $(a) + (b)$ is less than the rate $\frac{85(c)}{100},$

the administrators of the Scheme may determine that the weekly rate of benefit payable to a permanently incapacitated accident victim is the rate as set out in the formula $\frac{85(c)}{100}.$

- (a) is the new income per week that the accident victim is capable of earning;
- (b) is the rate per week of the benefit that, but for this section, would be payable to the person;
- (c) is the weekly income of the person ascertained in accordance with [other provisions in the Bill].²¹⁶

The intent of this provision was to provide for the use of the accident victim's actual weekly earnings (prior to the accident) as the base upon which to determine compensation for permanent partial incapacity, rather than the average weekly earnings of persons in Australia. The actual earnings would only be used where the total of the accident victim's post-accident earning capacity, ie. "(a)," and permanent partial incapacity benefit, ie. "(b)," is less than 85 percent of the victim's pre-accident weekly earnings, ie. "(c)."

The new approach was heavily criticized as well. It was pointed out that the consequence of the method would be that many accident victims who suffered no loss of income whatsoever would be compensated for their incapacity. This

²¹⁶ Ibid., p. 232.

compensation could only be considered as compensation for pain and suffering and loss of amenities. But if some persons are entitled to compensation for this non-pecuniary loss, it would then become unfair to deny such compensation to others. Simply put, where two persons suffer the identical impairment, and receive exactly the same benefit, but one of them has suffered no loss of earnings as a result of the impairment, the one who has not suffered any loss of earnings will be in a better position than the accident victim who has suffered a loss of earnings.²¹⁷

Geoffrey Palmer, who is one of the architects of New Zealand's no-fault comprehensive compensation Scheme for accident victims, has pointed out that although the criticism is valid, the method should still not be discarded because of that criticism. There are other points to consider:

- the need to get people back to work and promote rehabilitation,
- the delays and difficulties inherent in showing future loss of earnings,
- the problem of having any scheme accepted which has made no provision for intangibles,
- the difficulty of compensating only proved loss of future earnings,
- the administrative problems in having more than a

²¹⁷ Ibid..

single-pronged assessment for permanent partial incapacity,

- the need to avoid tailor-made assessments and,
- the issue of the re-introduction of the adversary system.²¹⁸

The use of an approach which deals with many of these problems, while resulting in the over-compensation of only a few accident victims, should not be rejected merely because of that over-compensation. Even where some accident victims are over-compensated, as long as there is adequate compensation for all victims, the approach should be considered appropriate.²¹⁹

A recent review of the accident compensation Scheme operating in New Zealand contains specific recommendations as to the most appropriate method of compensating accident victims suffering from permanent partial incapacity. The review in question is the Report of New Zealand's Law Commission on Personal Injury: Prevention and Recovery.²²⁰

This Report stated that the compensation Scheme should not provide (in general) for lump-sum payments for permanent impairment or for pain and suffering. The Report noted that the existing provisions in the New Zealand Act

²¹⁸ Ibid., p. 233.

²¹⁹ Ibid., p. 233.

²²⁰ New Zealand. Law Commission. Report No. 4, Personal Injury: Prevention and Recovery (Wellington: The Commission, 1988).

regarding lump-sum payments for permanent physical disability and loss of amenities or capacity for enjoying life are actually carry-overs from the common law damages for pain and suffering, loss of amenity, and loss of enjoyment of life. The use of Schedules to assess damages has been imported from workers' compensation schemes.²²¹

The Report noted the advantages of periodic payments over lump-sums (see the discussion of this issue in the "Analysis" section under "Total Disability," supra, pp. 127-129). Unlike the lump-sum awards, there is no need to attempt to forecast into the future, as periodic payments can be fixed early and later adjusted upwards, if need be. Thus, the delay in determining the amount of compensation (which, as noted earlier, impedes rehabilitation) is avoided, and payments are available to the accident victim in response to the continuing needs and problems arising from the incapacity.²²²

The Law Commission Report made several recommendations in respect of partial incapacity (both temporary and permanent):

- (1) compensation for temporary partial incapacity is earnings related and based on the victim's actual loss of earnings; it is only payable in respect of work-related accidents (so non-earners and earners

²²¹ Ibid., pp. 56-57.

²²² Ibid., p. 57.

injured in non-work accidents are not eligible for this benefit). The temporary partial incapacity benefit is payable for 6 months following the accident, and it is payable at the weekly rate which would have been payable to the victim if he or she had been totally incapacitated, less 85% of the highest amount the victim could reasonably be expected to earn in respect of that week.²²³

- (2) where the victim suffers permanent partial incapacity, the Report recommends that this permanent loss of physical capacity be evaluated by reference to the A.M.A. Guides to the Evaluation of Permanent Impairment. The percentage of permanent disability obtained by the use of the Guides would (subject to a minimum eligibility requirement of 5% disability) be applied against the base figure set at 80 percent of the average weekly wage in New Zealand. The amount thus obtained would be payable as a periodic benefit in respect of permanent partial incapacity, and the benefit would be payable to both earners and non-earners alike.²²⁴

- (3) The Report also recommended two exceptions to the

²²³ Ibid., p. 97 and cls. 24 and 46 of the Draft Bill (pp. 118 and 129).

²²⁴ Ibid., pp. 58 and 97, and cls. 25 and 47.

general rule that compensation for permanent partial incapacity be calculated using a base figure of 80% of the average weekly earnings in New Zealand:

(a) where the use of the average weekly earnings of persons in New Zealand as the basis for determining compensation produced an amount which was less than the actual loss of earning capacity due to the permanent partial incapacity (eg. a low percentage of impairment has had a disproportionately negative effect on the victim's ability to either continue in his/her old job or to find new work), the victim could receive compensation calculated as follows:

- the amount that would be payable to the victim in respect of total incapacity (at the time the Corporation determines that the partial incapacity is permanent) less 85 percent of the highest amount (if any) that the victim would have been able to earn after the accident, if he or she were to engage in suitable work.²²⁵

²²⁵ Ibid., pp. 97-98 and cls. 25(2) and 48 of Draft Bill (pp. 119 and 130).

- (b) the second exception to the general rule that compensation for permanent partial incapacity is to be calculated using a base figure of 80% of the average weekly wage is the exception which provides for the assessment of an increased degree of impairment where the victim has suffered severe facial or bodily disfigurement as a result of personal injury, or has suffered severe nervous shock or lasting emotional harm or psychiatric illness caused by homicide or intentional injury. In these situations, the medical practitioner shall take into consideration the extent to which the disfigurement, shock or emotional harm has permanently affected the victim's ability to lead a normal life.²²⁶

The recommendation of the Law Commission for a periodic benefit payable to all persons (not just earners) suffering from permanent partial incapacity following the accident provides both an appropriate benefit for such persons, as well as an adequate resolution of the problems created by the use of the lump-sum benefit for impairment. It is submitted that rather than offer accident victims large amounts of money for non-economic losses, such as pain and

²²⁶ Ibid, p. 98 and cl. 27 of the Draft Bill (p. 120).

suffering or loss of amenities of life, the money would be put to better use if paid out in the form of a weekly pension payable for permanent partial incapacity, and assessed with reference to a detailed Schedule (such as the A.M.A. Guides, recommended by the Law Commission Report) of disabilities. This issue will be dealt with further during the "Analysis" of "Compensation for Permanent Incapacity and Non-Economic Loss," infra, pp. 248-254.

d. Compensation for Non-Earners

(1) Total Disability

(a) Comparison

(i) Manitoba

1. Part II Benefits:

- "non-earner" is person who does not meet the definition of "earner," as cited above, at p. 82.
- totally disabled non-earner is entitled to weekly indemnity of \$150.00 [s.12(1)].
- there is a waiting period of one week for the benefits, and the benefits continue as long as the total disability persists; no maximum duration [ss.12(1) and 15].
- Regulations create special categories of non-earners:
 - "homemakers" defined as a husband or wife or widow or widower who manages and controls an independent domestic establishment for one or more persons other than himself or herself, and who does not engage in employment for wages or profit or report for or engage regularly in employment in a place outside his or her residence; these persons who are totally disabled are entitled to a weekly indemnity of \$150.00 [ss.4 and 14(1)].

- minors who are non-earners are not entitled to any total disability benefit; however, if once they turn eighteen, they are still totally disabled, they shall be deemed to be totally disabled as of the date of their 18th birthday and begin to receive the total disability benefit of \$150.00 per week as of that date, and the benefits will continue as long as the total disability persists [ss.12(1) and 16(1)].
- persons suffering from pre-existing mental or physical infirmity (and, as a result, are unable to provide themselves with the necessities of life) who are non-earners do not qualify for the non-earner total disability benefit;
- if, however, such persons can show that their pre-existing condition would have been cured but for the injuries sustained in the accident, they will be deemed to have been totally disabled as of the date upon which the pre-existing physical or mental infirmity would have been cured (but for the accident), and will receive the total disability benefit of \$150.00 per week as of that date, for as long as the disability persists [ss.12(1) and 16(1)].
- benefits are not indexed.
- disability benefits may be cut off where M.P.I.C. requests the accident victim to subject himself to medical, surgical or other treatment, or to enroll in occupational rehabilitation or re-training, and the victim refuses; victim may apply within 120 days of the cessation of benefits for an injunction to stop M.P.I.C.'s action (s.19).
- disability must manifest itself within 20 days of the date of the accident [s.12(1)].
- as non-earners not in receipt of income from employment, such persons would likely not have to worry about reduction or limitation of benefits due to receipt of Workers' Compensation, U.I.C. benefits, income from employment, or benefits from other contracts of private insurance.
- the disability benefit is also subject to the

general time limit provisions of giving notice to M.P.I.C. within 30 days of accident (or as soon as reasonably practicable) and providing proof of claim within 90 days [ss.38(1), (2) and (3)].

2. The Kopstein Report:

- in general, the Report recommended benefit payable to totally disabled non-wage earners of 90 percent of weekly minimum wage for as long as the claimant remains disabled (p. 84).
- the benefits would be subject to a one-week waiting period, but there would be no maximum duration (p. 84).
- benefits would be indexed annually in accordance with the annual growth rate in the Average Industrial Composite Index of Wages (p. 84).
- Report created several categories of non-wage earners eligible for this benefit:
 - homemakers would receive the non-wage earners benefit as set out above;
 - children aged 16 to 18 would also receive the non-wage earners benefit, but they would have to wait for the greater of one week or their eighteenth birthday;
 - post-high school students would also receive the benefit, but they would be subject to a waiting period of either one week or until their graduation date, whichever is greater (pp. 83-84).
- no comments with respect to definition of "homemaker," nor with respect to any restriction imposed on persons suffering from a pre-existing physical or mental infirmity.

(ii) Ontario

1. The Standard Insurance Policy

- totally disabled "homemaker" eligible for no-fault benefit of \$70.00 per week for twelve weeks (Vol.

II, p. 760).

- benefit only available if homemaker is unpaid, resides in the household, is not engaged in employment for wages or profit and is "completely incapacitated and unable to perform any of his or her household duties" (Vol. II, p. 760).
- homemaker need not be related to owner of insured vehicle (Vol. I, p. 159).
- no weekly disability benefit payable to persons under the age of eighteen or over the age of 65 who are not actually employed as of the accident date (Vol. II, p. 760).
- no weekly disability benefit payable to persons between the ages of 18 and 65 who were not actively engaged in an occupation or employment for wages or profit as of the accident date, or for any six months out of the 12 months preceding the accident (Vol. II, p. 760).
- in general, accident victims who are not homemakers and who are non-earners will not receive any no-fault disability benefit.

2. The Osborne Report:

- Report recommends benefits for some categories of non-earners:
 - "home care" benefit of up to \$50.00 per week (payable for reasonable expenses which are actually incurred) to accident victim who, prior to the accident, was engaged in home care and as a result of the accident has suffered substantial inability to perform the essential duties of this work. Benefit is subject to seven day waiting period, and is designed to look after household expense, i.e. preparation of meals, housekeeping, snow shovelling etc. (Vol. I, p. 582).
 - "child care" benefit of \$200.00 per week payable to person who is responsible for the care of a child and who suffers substantial inability to perform the essential duties of this work as a result of the accident. Additional benefit of \$50.00 per child or dependant per week should be payable, to a

maximum of \$350.00 per week. Benefit should be paid for two weeks without presentation of receipts and thereafter for reasonable and proven expenses to the maximum of \$350.00 per week (Vol. I, p. 582).

- "students" to receive no-fault compensation as follows:
 - \$1,000.00 for each elementary school year lost;
 - \$2,000.00 for each secondary school year lost;
 - \$4,000.00 for each college or university year lost (to a maximum of three years), or proportion thereof for loss of less than one year;
 - injured elementary and secondary school students to be entitled (upon attaining age 19) to \$340.00 a week, if still disabled and not attending school;
 - injured college or university students, if disabled, should receive \$340.00 a week (once no longer entitled to loss of school year benefit) (Vol. I, pp. 579-580).
- all of the above benefits indexed once a year to annual Consumer Price Index, subject to maximum of twice the stipulated benefit (Vol. I, p. 593).

(iii) Quebec

1. The Automobile Insurance Act:

- in general, Quebec Scheme provides for payment of indemnities to four categories of persons not actually employed at time of accident:
 - notional or casual workers (persons who, at time of accident, held no employment but were able to work, or held casual or part-time employment, or worked without pay in a family undertaking or were "persons at home"),
 - students,
 - persons under the age of 16, and
 - persons who at the time of the accident were unable to work for any reason whatsoever

(except age).

- persons in the first category (those who are unemployed but were able to work, or held casual employment, or worked without pay in a family undertaking etc.) are entitled to an income replacement indemnity if, due to the accident, they become unable to hold employment that they could have held on a regular and full-time basis (s.20).
- the Regie will calculate a notional gross income for the accident victim in this category, based on his or her qualifications, experience and physical and intellectual capacities (s.20).
- presumptive gross income will be based on the employment determined for the accident victim, the periods during which the victim was without employment or held casual or part-time employment and (if applicable) the income from a previous employment (s.20).
- presumptive gross income of victim who, at time of accident, held casual or part-time employment which corresponds to employment that Regie determined for him, is the gross income earned by the victim from his employment, computed according to Regulation and readjusted in accordance with Schedule to Regulation.²²⁷
- if victim, at time of accident, holds no employment or holds casual or part-time employment which does not correspond to that which is determined for him by the Regie, but (in the five years prior to the accident) had at least one employment which corresponds to the one determined for him by the Regie, his gross income is computed according to Regulation and both indexed and adjusted in accordance with Schedules to the Regulation (Que. Reg. c.A-25, r.11, s.8 and Schedules 1 and 2).
- if victim, at time of accident, held no employment and (in the five years prior to the accident) did not hold any employment corresponding to the one determined for him by the Regie, his gross income

²²⁷ A Regulation Respecting Income, Quebec Regulation c.A-25, r.11, ss.3, 4 and 7 and Schedule 1 (future references to this Regulation will be in the text, and it will be referred to as "Que. Reg. c.A-25, r.11").

is determined according to a Schedule in the Regulations which lists numerous different occupations, and the income is re-adjusted according to another Schedule to the Regulations (Que. Reg. c.A-25, r.11, s.9 and Schedules 1 and 3).

- victims who, at the time of the accident, held a part-time or casual employment which does not correspond to the employment determined for them by the Regie, and (in the five years prior to the accident) did not hold an employment corresponding to the one determined for them by the Regie, will have their gross income calculated in accordance with the Schedule to the Regulations which lists numerous different employments, and this income will be re-adjusted in accordance with another Schedule to the Regulations (Que. Reg. c.A-25, r.11, s.10 and Schedules 1 and 3).
- "person at home" is defined as a person, with or without a spouse, whose chief occupation consisted of attending to the usual occupations of a person who stayed at home, for the benefit of that person's household [s.1(21)].
- persons eligible for the presumptive or notional gross income will receive 90 percent of the net income derived from the gross income established by the Regie, subject to the same minimums and maximums as a totally disabled earner (s.26).
- "person at home" who, as a result of the accident, becomes unable to engage in one or more of the ordinary occupations of such a person, may claim an indemnity for the reimbursement of expenses incurred by reason of his or her disability, up to a maximum of (for 1988) \$307.95 per week, including expenses for home care or support (s.23).
- "person at home" may be considered incapable of attending to one or more of the usual occupations of such a person if his or her physical or mental activity (taking into account the victim's age) is no longer sufficient to enable the victim to carry out his or her normal household chores, care for his or her children or for any other member of his or her household, prepare meals and attend to clothing, provided that the victim was responsible

for that work before the accident.²²⁸

- "student" is person who is at least 16 years of age and in full-time attendance at a secondary or post-secondary educational institution (s.21).
- "student" is considered to attend institution on full-time basis from the time that he or she enrolls full-time until the final term is completed, or the student quits, or no longer meets the requirements of the institution for continuing his or her studies, whichever occurs first (Que. Reg. c.[A-25 r.7.1], s. 24).
- student who was earning income at time of accident (but is unable to continue working because of accident) is entitled to indemnity based on the gross income earned from that employment for as long as it would have been available; if income does not equal minimum indemnity of \$164.24 per week (for 1988), student is entitled to minimum indemnity [s.21(a)].
- students who cannot meet the "employment" criteria stated in above category but, due to accident, are unable to pursue their studies, are entitled to the minimum income replacement indemnity [s.21(b)].
- if student is delayed in his or her entry on the labour market by reason of the accident, he or she is entitled to an income replacement indemnity for the period of delay caused by the injuries; for students in the post-secondary level, indemnity is based on average weekly earnings of industrial composite in Quebec as established by Statistics Canada, and for students at secondary level, indemnity is 75 percent of gross income based on the average weekly earnings of the Industrial Composite in Quebec. For 1988, benefit is \$15,024.88 for post-secondary student, and \$11,929.65 for secondary student [s.21(c)].
- income replacement indemnity payable for delay caused by accident is reduced by income replace-

²²⁸ A Regulation Respecting Indemnities Payable under Title II of the Automobile Insurance Act, Quebec Regulation c.[A-25, r.7.1], s.25 (future references to this Regulation will be in the text, and will be referred to as "Que. Reg. c.[A-25, r.7.1]").

ment indemnities already received by the student (s.21.1).

- student contemplated by Section 21, who resumes studies but is unable (due to the accident) to hold employment after finishing or ending his studies, is entitled to income replacement indemnity from the end of his studies; indemnity is based on 100 percent of Industrial Composite in Quebec if student is at the post-secondary level, or 75 percent of the Industrial Composite if the student is at the secondary level (s.21.3).
- accident victims who are under 16 years of age at the time of the accident are entitled to an income replacement indemnity if, due to the accident, they become unable to engage in the ordinary occupations of their age group (s.22).
- victim under 16 may be considered incapable of performing usual activities where:
 - if under six months of age, is in a comatose state or cannot sleep or be fed as normal infant;
 - if between 6 and 24 months, is incapable of making movements and gestures usually considered typical for a child of his or her age due to his or her condition;
 - if between age 2 and 6, is incapable of walking or performing movements considered to be most important and typical for a child of his or her age or is not able to express himself/herself as well as a child of that age;
 - if 6 years of age or over, is not able to continue or begin all his or her normal studies ((Que. Reg. c.[A-25, r.7.1], s.26).
- persons under 16 who meet this eligibility requirement are entitled to a minimum income replacement indemnity of (for 1988) \$164.24 per week (s.22).
- once victim under 16 becomes of full age, if he or she is unable to work due to the accident, the income replacement indemnity will continue; the victim's gross income will be deemed equivalent to an annual amount equal to the yearly average

computed on the basis of the average weekly earnings of the Industrial Composite in Quebec, as established by Statistics Canada (s.22).

- "victim who at time of accident was unable to work for any reason whatsoever (except age)" is eligible for the minimum income replacement indemnity of (for 1988) \$164.24 per week if, due to the accident, he or she is suffering from a serious physical or mental disability (s.24).
- "victims unable to work for any reason whatsoever (except age)" include persons whose physical or mental capacity prior to the accident was not sufficient to allow them to hold a regular full-time job for which they would have been paid (at least) minimum wage (Que. Reg. c.[A-25, r.7.1], s.27).
- these persons will be considered to be suffering from a "serious physical or mental disability" (and thus be eligible for the indemnity payment) if bodily harm sustained in the accident has seriously altered their condition, and resulted in a disability which persists for more than 12 consecutive weeks following the accident (Que. Reg. c.[A-25, r.7.1], s. 28).

2. Proposed Amendments:

- Bill 92 explicitly divides persons eligible for the income replacement indemnity into several categories, each with their own headings and specific provisions.
- the categories are as follows:
 - victim holding full-time employment (see "Totally Disabled Earners, supra, pp. 91-92);
 - victim holding temporary or part-time employment (cls. 19-23);
 - victim unemployed but able to work (cls. 24-27);
 - victim 16 years of age or over in full-time attendance at an educational institution (cls. 28-34);
 - victim under 16 years of age (cls. 35-40);

- victim 64 years of age or over (cls. 41-44);
- victim regularly unable to hold any employment (cl. 45).
- the above categories will obviously consist of either earners, non-earners or both earners and non-earners.
- I will deal with all categories other than full-time earners in this Section.
- an accident victim who, at the time of the accident, holds a regular employment on a temporary or part-time basis is entitled to an income replacement indemnity for the first 180 days following the accident if (by reason of the accident) he is unable to hold his employment (cl. 20).
- indemnity is computed on the basis of the gross income the victim derives from his employment (if he was a salaried worker) or on the basis of the gross income determined by regulation of the Regie (if the victim was self-employed) for an employment of the same class, or on the basis of the gross income the accident victim derives from his employment (whichever is higher) (cl. 21).
- from the 181st day after the accident, the Regie shall determine an employment for the victim in accordance with clause 46 of the new Bill (cl. 22).
- clause 46 provides that the Regie must take into account, in addition to the standards and terms and conditions prescribed by regulation, the training, work experience and physical and intellectual ability of the victim on the date of the accident. The employment must be an employment which the victim could have held at the time of the accident on a regular and full-time or, failing that, part-time basis (cl. 46).
- the indemnity is computed on the basis of the gross income that the victim could have derived from the employment which the Regie determines for him. This gross income is established by the Regie according to regulation, taking into account:

- the fact that the victim could have held the employment on a full-time or part-time basis;
 - the work experience of the victim in the five years preceding the accident (especially the periods during which he was fit to hold employment or was unemployed or held only temporary or part-time employment);
 - the gross income the victim derived from an employment held before the accident (cl. 22).
- the above provisions regarding persons who held temporary or part-time employment prior to the accident do not apply to accident victims under the age of 16, or to victims 16 years of age or older who are students (cl. 19).
- the Bill proposes compensation for real lost income during the first six months of work, and lost potential income, starting on the seventh month following the accident for persons who held part-time or temporary employment prior to the accident.
- victims who (at the time of the accident) are unemployed but able to work are entitled to income replacement indemnities for the first 180 days following the accident if (due to the accident) they are unable to hold an employment that they would have held during that 180 day period had the accident not occurred, or (due to the accident) they are deprived of unemployment insurance benefits which they were entitled to at the time of the accident (cl. 25).
- if an accident victim is entitled, during the 180 day period, to the income replacement indemnity (i.e. he or she meets the conditions listed immediately above), the victim will receive the indemnity for such time as either the employment would have been available (and the victim is unable to hold it by reason of the accident) or for such time that the victim is deprived of benefits by reason of the accident (cl. 25).
- the income replacement indemnity for persons who would have had a job (if not for the accident) is computed on the basis of the gross income the victim would have derived from the employment he or she would have had, if the accident had not occurred. The person who is deprived of un-

employment insurance benefits (as a result of the accident) is entitled to an indemnity on the basis of the unemployment insurance benefits that would have been paid to the victim, had the accident not occurred (cl. 26).

- if the accident victim remains disabled after the 180 day period referred to above has expired, the Regie will determine an employment for the victim in accordance with the terms of clause 46 (described above, on p. 195).
- the victim is entitled to an indemnity if (due to the accident) he is unable to hold the employment determined by the Regie (cl. 27).
- this indemnity is computed on the basis of the gross income that the victim could have derived from the employment determined for him or her by the Regie (cls. 27 and 22).
- the indemnity will not be less than that which the victim was receiving at the end of the 180th day after the accident (cl. 27).
- again, these provisions do not apply to victims under the age of 16 or to victims who are 16 years of age or older who are students (cl. 24).
- the Bill places the emphasis on compensation for real lost income during the first six months of the disability, and lost potential income, starting on the seventh month following the accident for persons who are unemployed as of the date of the accident.
- students (16 years of age or over) who held employment at the time of the accident or (had the accident not occurred) would have held employment are entitled to an income replacement indemnity if, due to the accident, they are unable to hold that employment (cl. 31).
- the indemnity will be paid for the scheduled duration of the student's studies, for such time as the employment would have been available and for such time as the student is unable to hold it (due to the accident) (cl. 31).
- the income replacement indemnity payable to students who held employment at the time of the accident (or would have held employment, if not

for the accident) is computed on the basis of the gross income the student derives or would have derived from the employment, or (if self-employed) the indemnity is computed on the basis of the gross income determined by regulation of the Regie for an employment of the same class, or on the basis of the gross income the student derives or would have derived from that employment (if it is higher) (cl. 32).

- these indemnities are subject to the same maximums and minimums as those payable to ordinary earners.
- students who are 16 years of age or older (as of the date of the accident) and attending a secondary or post-secondary educational institutional on a full-time basis are entitled to an indemnity for the period of time that (due to the accident) they are unable to begin or to continue their current studies (cl. 29).
- the indemnity ceases on the day scheduled (as of the date of the accident) for the completion of the current studies (cl. 29).
- the indemnity shall be in the amount of:
 - \$5,500.00 for every school year missed at the secondary level;
 - \$5,500.00 for every term missed at the post-secondary level, up to \$11,000.00 a year (cl. 30).
- "current studies" are defined as studies which are part of a program at the secondary or post-secondary level which (as of the accident date) the victim has admission to begin or continue at an educational institution [cl. 28(1)].
- "attendance on a full-time basis" is the time from the admission date as a full-time student until such time as the student completes the last term, abandons his or her studies, or no longer meets the requirements set by the institution which he is attending (whichever happens first) [cl. 28(2)].
- students who, after the scheduled date for completion of their current studies are unable (due to the accident) to begin or continue the studies and also unable to hold any employment are

entitled to an income replacement indemnity for the duration of the incapacity (cl. 33).

- the indemnity is computed on the basis of a gross income equal to a yearly average computed on the basis of the average weekly earnings of the Industrial Composite in Quebec as established by Statistics Canada for each of the 12 months preceding July 1st of the year prior to the scheduled date for the completion of the studies (cl. 33).
- students who resume their studies but (due to the accident) are unable to hold any employment after completing or ending their current studies are entitled to an indemnity from the date of the end of the studies and for such time as the incapacity continues thereafter (cl. 34).
- if the studies end before the scheduled date for their completion, the student is entitled to one of the lump sum indemnities listed above; see p. 198 (cl. 34).
- if the studies end after the scheduled date for their completion, the student is entitled to an income replacement indemnity computed on the basis of a gross income which is equal to an annual average established on the basis of the average weekly earnings of the Industrial Composite in Quebec, as set out above (cl. 34).
- benefits payable to students 16 years of age or older are not radically different in the proposed Bill, except for the above-mentioned difference:

Lump sum payments, not minimum income replacement indemnities, will be paid to students who are forced to miss school due to an automobile accident (cls. 29 and 30).

- compensation for persons under 16 has two aspects:
 - students under the age of 16 are entitled to lump-sum indemnities in the amounts of \$3,000.00 for every school year missed at the elementary level, and \$5,500.00 for every school year missed at the secondary level (cls. 36 and 37).
 - accident victims under the age of 16 who

(whether students or not) hold employment or (had the accident not occurred) would have held employment, are entitled to an income replacement indemnity, if (due to the accident) they are unable to hold that employment. This indemnity is payable until the end of the school year in which the victim reaches 16 years of age, for such time as the employment would have been available and for such time as the victim is unable to hold it by reason of the accident. The indemnity is computed in the same manner as the indemnity payable to students over the age of 16 who held employment prior to the accident (see above, on pp. 197-198) (cl. 38).

- if, once the accident victim reaches 16 years of age, he or she is unable to begin or continue his or her studies and to hold employment by reason of the accident, then the victim is entitled to an income replacement indemnity for the duration of the incapacity (cl. 39).
- this indemnity is computed on the same basis as that payable to a student over the age of 16 who is unable (due to the accident) to begin or to continue his or her studies and is unable to hold any employment i.e., on basis of gross income computed using the average weekly earnings of the Industrial Composite in Quebec (cl. 39).
- a student who resumes his studies but (due to the accident) is unable to hold any employment after finishing or ending his studies will receive either the lump-sum indemnity (if studies end before scheduled date) or indemnity based on average weekly earnings of Industrial Composite in Quebec (if studies end after scheduled date for completion) (cl. 40).
- if a victim is 64 years of age or over on the date of the accident, the income replacement indemnity payable is reduced as follows:
 - by 25 percent from the second year following the accident date
 - by 50 percent from the third year " " "
 - by 75 percent from the fourth year " " "

- the victim ceases to be entitled to the indemnity four years after the accident date (cl. 41).
- it appears that the income replacement indemnity referred to in respect of victims 64 years of age or over is that payable to an earner, as the new Bill states that accident victims who are 65 years of age or over (as of the accident date) and do not hold any employment are not entitled to an income replacement indemnity (cl. 42).
- person 65 years of age or over who (due to the accident) is unable to hold an employment that he would have held during the first 180 days following the accident, is entitled to an income replacement indemnity for that 180 day period (cl. 43).
- the indemnity is computed on the basis of the gross income the accident victim would have derived from the employment that he could have held (had the accident not happened) (cl. 43).
- the victim is entitled to the indemnity for such time as the employment would have been available and that (due to the accident) he is unable to hold such employment (cl. 43).
- after 180 days following the accident, the (65 year old or older) accident victim is entitled to an income replacement indemnity which is computed on the basis of the gross income that the victim could have derived from any employment determined for him by the Regie (see p. 195) (cls. 43 and 22).
- this indemnity shall not be less than the indemnity the victim was receiving at the end of the 180th day following the accident (cls. 43 & 23).
- indemnity payable to (65 year old or older) victim is reduced by 25 percent from second year following the accident, by 50 percent from the third year, and so on until no benefit is payable, four years after the accident (cls. 43 and 21).
- the Bill also provides that when an accident victim who is receiving an income replacement indemnity reaches his 65th birthday, the indemnity is reduced by 25 percent from that date, by 50 percent from the date of his 66th birthday and by

75 percent from the date of his 67th birthday; age 68, the victim ceases to be entitled to the indemnity (cl. 44).

- indemnities proposed by the Bill for elderly earners are far more limited (in both amount and duration) than those currently available (see p. 90, supra).
- Bill 92 is quite clear about the treatment of persons who (for whatever reason) are unable to work before the accident occurred. These persons will not receive the income replacement indemnity (cl. 45).
- this provision would wipe out the current minimum income replacement indemnity payable to persons whose physical or mental capacity (prior to the accident) was not sufficient to allow them to hold a regular full-time job for which they would have been paid (at least) a minimum wage (see above, pp. 193-194).
- physically or mentally handicapped people who were unable to work prior to the accident, but sustained serious injury and are thus currently available for a minimum income replacement indemnity, would be denied that indemnity if the Bill passes without change (cl. 45).

(iv) New Zealand

- provision is made for compensation to potential earners such as persons under age 16, secondary school pupils and persons in training for a career or occupation who have not as of yet entered the labour force or who have recently entered the labour force.
- E.R.C. is paid on the basis of a notional weekly earning of (as of June, 1987) \$305.00 (s.63).
- this compensation is really in regard to loss of potential earning capacity.
- the assessment date will generally be when the opportunity to work is denied or restricted by the injury; this will not be earlier than age 16.²²⁹

²²⁹ Unintentional Injury, supra, n. 147, p. 44.

- special provision has been made for injured homemakers.
- Corporation will pay directly to an agency the cost of child care, meal preparation, housework, gardening and other chores.²³⁰
- if the injured person pays someone to replace his or her lost services, the Corporation will reimburse the injured person at \$7.45 per hour to a maximum of 20 hours per week.²³¹
- the benefits are payable as long as disability continues (subject to the provision of a medical certificate).²³²
- if accident victim qualifies for this compensation, any assessment of permanent loss of earning capacity under Section 60 of the Act will, if necessary, be made on the basis that the victim's relevant earnings were the amount prescribed by Section 63(5) [s.63(2)].
- compensation payable for permanent incapacity cannot be reduced, even where victim's earning capacity increases [s.60(5)].
- if accident victim, at time of accident, had started an occupation for which they had studied, and had relevant earnings, they will receive either compensation based on the prescribed weekly amount or compensation based on relevant earnings, whichever is higher [s.63(1)].
- Corporation has discretion to determine relevant earnings above the amount prescribed, but must not exceed that amount by more than 50 percent [s.63(5)].

(v) Victoria

- "non-earner" is someone who does not meet the definition of "earner," cited above at p. 97.

²³⁰ Cramer & Armstrong, supra, n. 76, Vol. I, p. 106.

²³¹ Ibid.

²³² Ibid.

- totally disabled non-earner is eligible for both the long-term impairment benefit (which consists of a lump-sum payment and an annuity benefit) and a loss of earnings capacity benefit (ss.47, 48 and 51).
- long-term impairment benefit is calculated in the same way as that paid to a totally disabled earner, as follows:
- the degree of impairment is to be determined with the use of the A.M.A. Guides to the Evaluation of Permanent Impairment (2d)²³³.
- if Commission has determined the degree of impairment for the victim, and the degree of impairment is greater than 10%, the Commission must assess a long-term impairment benefit in respect of that victim [s.47(1)].
- this benefit is composed of two parts:
 - (a) a Lump-sum Payment, based on a percentage of the maximum sum payable to a totally incapacitated person, which is \$47,910.00 (as of July 1, 1988). Benefit is calculated according to the formula:

$$\frac{A - B}{C} \times \$47,910.00$$
 - A is the degree of impairment of the victim as a result of the accident
 - B is 10%
 - C is 90% (s.47).
 - lump-sum benefit may be paid as periodic payment if accident victim requests this [s.47(4)].
 - the Regulations provide a formula to be used in calculating the periodic payments based on the lump-sum benefit²³⁴.

²³³ Transport Accident (Impairment) Regulations 1988, S.R. 255, s.6(1) (Hereinafter referred to as "Vic. Reg.").

²³⁴ Vic. Reg., s.7 and Schedule I.

- (b) an annuity payment is also available to persons after 18 months following the accident, and it is based on a formula which incorporates the individual's degree of impairment and his or her age, as follows:

$$\frac{A - B}{C} \times \$111,780.00 \times \frac{75 - D}{50} = \text{[amount of annuity payable]}$$

(as of July 1, 1988)

- A is degree of impairment of accident victim.
- B is 10%
- C is 90%
- D is:
 - if person is 75 or over 75
 - if person is 25 or under 25
 - if person is over 25 and under 75 age of person in whole years [s.48(1)]
- maximum amounts of impairment benefits (both lump-sum and annuity payments) are indexed as of July 1st of each year, in accordance with the formula:

$$D \times \frac{E}{F}$$

where D is amount of either the lump-sum or periodic payment;

E is the all-groups Consumer Price Index for Melbourne as at June 15th in the preceding financial year last published by the Australian Statistician in respect of the December quarter of that financial year;

F is the all-groups Consumer Price Index for Melbourne as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(2)].

- loss of earnings capacity payments begin after the first eighteen months after the accident (or when the person stops receiving the loss of earnings benefit, whichever occurs later), and provided that the loss of earning capacity is continuing (s.51).
- the amount of the weekly payment for loss of

earning capacity payable to non-earners is calculated in the same way as the amount payable to earners who suffer total or partial loss of earning capacity, with one exception.

- the exception is that the amount of the benefit (calculated as if the accident victim was an earner) is reduced as follows:

[Amount of Loss of Earning Capacity
benefit payable to Totally-Disabled - $A \times \frac{B}{C-D}$
Earner; Will likely be minimum
of \$210/week]

- A is the amount to which the person would have been so entitled (i.e. that the accident victim would have been entitled to if he or she was an earner).
- B is the number of years before the person attains retirement age during which the person is reasonably likely not to be employed.
- C is the retirement age of the person.
- D is the age of the person in whole years [s.51(2)].
- the longer a person would reasonably be likely not to be employed (i.e. the greater the value of B), the greater the amount the reduction will be.
- using the above formula, persons who are likely to be non-earners for long periods of time following the accident will receive a lower loss of earnings capacity benefit.
- the non-earner's loss of earnings capacity benefit does not apply in respect of minors [s.51(1)].
- the (long-term, ie. post 18 month) loss of earnings capacity benefit ceases when victim reaches age 65 or reaches the normal retiring age of his or her industry or occupation (whichever occurs later). This benefits is also suspended whenever the earner is imprisoned [s.53(1)].
- no compensation for loss of earning capacity where victim receives common law award or settlement for pecuniary losses resulting from the injury, and no impairment benefits (either lump-sum or annuity)

payable where the victim has received pain and suffering damages at common law [s.53(2)].

- no loss of earning capacity benefits and/or impairment annuity benefits payable once three years following the manifestation of the injury has expired (with qualifications for minors) or the total of the loss of earnings, impairment annuity, and loss of earning capacity benefits equals (as of July 1, 1988) \$76,740.00 [s.53(3)].
- the restrictions listed immediately above do not apply to persons who have had his or her degree of impairment determined at a level of 50 percent or more [s.53(4)].
- no compensation payable (unless Commission decides otherwise) to persons who are also eligible for compensation from various other statutory schemes (s.37).
- the Commission is not liable to pay any compensation where an accident occurred involving a motor vehicle (other than a recreational vehicle) and the victim did not report the accident to the police [s.39(1)(a)].
- if the Commission determines that the failure to report the accident should be excused, compensation will be payable [s.39(1A)].

(vi) N.S.W. Law Reform Commission
Report

- "non-earner" is person who sustains incapacity in transport accident and is not within the definition of "earner," cited above at pp. 104-105 (Vol. I, p. 213).
- in general, compensation to be based on victim's "notional earning capacity;" notional earning capacity of non-earner to be set as follows:
 - victims aged 16-17: 30 percent of A.W.E.
 - victims aged 18-20: 40 percent of A.W.E.
 - victims aged 21 and over: 50 percent of A.W.E.

- A.W.E. is average weekly earnings of adult male full-time employees in Australia (Vol. I, p. 216).
- non-earner should be eligible to apply for compensation for loss of earning capacity on the basis of potential for advancement, subject to same eligibility requirements and principles as applicable to earners; see above at pp. 108-109 (Vol. I, p. 216).
- same approach to assessing non-earner's post-accident earning capacity as was used with earners; see above at p. 109 (Vol. I, p. 217).
- non-earners only eligible for loss of earning capacity benefit if incapacitated for at least 104 weeks following the accident; ie. no loss of earning capacity benefit until 104 weeks have expired (Vol. I, p. 219).
- however, non-earners suffering from incapacity of less than 104 weeks would be entitled to other benefits under the Scheme (Vol. I, p. 219).
- compensation benefits will be 80 percent of loss of earning capacity sustained; therefore a totally incapacitated non-earner over the age of 21 would receive 80 percent of 50 percent of the A.W.E., or 40 percent of the A.W.E. (Vol. I, p. 231).
- benefits are indexed in accordance with changes in A.W.E. (Vol. I, p. 236).
- totally disabled non-earner may be eligible for assessment of permanent incapacity, subject to the same conditions and eligibility requirements as a disabled earner; see above, at p. 111 (Vol. I, pp. 243-244).

(b) Analysis

Some initial observations may be made with respect to Manitoba's no-fault personal injury disability benefits. The Regulations provide for a \$150.00 weekly benefit to be paid to totally disabled non-earners, including homemakers. Now, some people may attempt to justify this low benefit by

arguing that the "no-fault" benefits are merely intended as "add-on" benefits (the real compensation is obtained through the tort action for personal injury) and that since non-earners weren't working before the accident, they shouldn't be paid adequate earnings related benefits.

The question of whether any disability benefit should be payable to non-earners will be dealt with later in this analysis. However, two points should be made with respect to the Part II weekly disability benefits currently payable to non-earners:

- a totally disabled homemaker will also only be eligible for the minimum total disability benefit of \$150.00/week. Even if it could be argued that non-earners do not preform any services of economic value (and therefore should not receive earnings related benefits), this argument has no force with respect to homemakers. Their services do have a quantifiable economic value, even if the homemakers are unpaid. The benefit currently payable to such persons is far too low; it does not recognize the value of the services rendered by homemakers. The benefit should be increased to (at least) cover the expense of replacement services.
- the second point concerns the weekly disability benefit which may be payable to persons suffering

from pre-existing mental or physical infirmity (and, as a result, are unable to provide themselves with the necessities of life). These persons do not qualify for the non-earner total disability benefit unless they can show that their pre-existing condition would have been cured but for the injuries sustained in the accident. If this is done, they will be deemed to have been totally disabled as of the date upon which the pre-existing physical or mental infirmity would have been cured (but for the accident), and will receive the total disability benefit of \$150.00 per week as of that date, for as long as the disability persists. The point is: how can such persons possibly show that their pre-existing condition would have been cured but for the injuries sustained in the accident? It is unlikely (if not impossible) that the future capability (including possibility of cure) of these persons can be demonstrated in such a way so as to convince M.P.I.C. that the total disability (minimum) benefit should be paid. A vast improvement on this situation would be to incorporate a provision based on the Quebec benefit currently payable to persons "unable to work for any reason whatsoever (except age)." These persons will be

paid the minimum income replacement indemnity currently available under the Quebec Scheme (\$164.24/week) where, as a result of the accident, they suffer serious physical or mental disability (bodily harm which seriously alters their condition and results in a disability which persists for more than 12 consecutive weeks following the accident).

The Kopstein Report, too, can be criticised for recommending a non-earner's total disability benefit which overlooks persons with pre-existing conditions. These persons may be subjected to further or increased suffering and disability as a result of the accident, yet no disability benefit would be payable to them; they were not included in Judge Kopstein's recommendations.

Of the disability benefits available to non-earners under Ontario's Standard Insurance Policy; the less said, the better. These benefits are minimal or do not exist. They deserve only criticism.

Quebec's Act contains fairly generous provisions with respect to the compensation payable to non-earners, but the new amendments are subject to several criticisms:

- if implemented, the amendments would deny the minimum income replacement indemnity to persons who were unable to work for any reason (except age) prior to the accident. We have already noted

the criticism of Manitoba's provision concerning victims with pre-existing infirmities. The same remarks apply here; person with handicaps may suffer further or increased disabilities as a result of an accident. It would be insensitive and unjust to deny them compensation.

- if implemented, the amendments would deny compensation to victims over 65 who were unemployed at the time of the accident, and had no immediate prospect of employment (even where such persons usually worked, but unfortunately were laid off just before the accident). In the "Analysis" section of compensation for totally disabled earners, it was recommended that earnings related compensation continue until a cut-off point of 65 years, unless the victim (usually) works (or has predominantly worked) in an area of employment where the retirement age is extended past 65 years of age, or the victim can show that he or she would have worked past that age. In the former case, compensation should continue to the normal retirement age of persons in that area of employment. In the latter case, compensation should continue to age 75. No compensation should be paid past the age of 75, as by this time the accident victim would be eligible for various old-

age benefits, and would likely be eligible for a pension from the Canada Pension Plan. A similar cut-off point should be adopted for persons who were unemployed as of the date of the accident, but would likely have been employed following the accident (due to their area of work, or continuing financial obligations).

The central question of this issue is: Should any earnings-related or income replacement benefit be payable to non-earners?

It has been stated that the priorities of compensation for victims of disability should be:

- reasonable income support for all, including non-earners;
- extra expenses of disability, at least in long-term cases;
- only when the first two priorities have been met, some compensation for non-economic loss may be considered.²³⁵

Suppose that we separate the criteria for entitlement to compensation from the criteria under which the financial support for that compensation is raised. It has been the common law approach to link the two criteria by requiring a particular justification (the proof of "fault") for ordering one person to make a payment to another person in

²³⁵ Harris, supra, n. 167, pp. 337-38.

respect of the particular consequences suffered by the second person, as the result of a specific event. There is therefore a link required between the victim's need for support and the contributor's responsibility to pay. This is the reasoning of the common law; but it is not the reasoning which underlies the philosophy of compensation. If compensation is concerned with providing a reasonable living standard for those who are seriously and permanently disabled as a result of accident or illness, then there can be no justification for a blanket exclusion of persons from compensation simply because they do not happen to be earners. Put another way, if the support of persons who are permanently and seriously disabled is a community concern, then it must also be a community responsibility. This was the reasoning of the first Woodhouse Report.²³⁶ It is equally applicable to the compensation of automobile accident victims in Manitoba.

This thesis has already recommended the adoption of the N.S.W. Report's definition of "earner" as an appropriate and sensitive provision for the determination of who should be entitled to benefits payable to earners. Therefore, it is appropriate that the N.S.W. Report's definition of "non-earner" be adopted as well (ie. a person who has suffered an incapacity as the result of the accident, and who does not meet the recommended definition of "earner" on pp. 104-

²³⁶ Palmer, supra, n. 163, p. 56.

105).

One small suggestion may be made here; if the accident victim, as of the date of the accident, had permanently ceased to be either an employee or a self-employed person or both, he or she should not be regarded as an "earner" and would therefore qualify for any income replacement indemnity payable to non-earners.

The Kopstein Report has recognized the value of services provided by non-earners (and their need for support in the event of accidents) by recommending that a disability benefit, based on the weekly minimum wage, be payable to these victims (the influence of the Quebec Scheme is obvious, because, as noted earlier, the proposed amendments to the Quebec Act would introduce a new minimum benefit, based on the minimum wage). However, three criticisms may be made in respect of these recommendations:

- the use of the minimum wage as a "floor" or notional benefit is unfair to non-earners, because the minimum wage is not representative of salaries normally paid in the community. A benefit based on the weekly average wages of full-time adult male earners in the Province would be preferable;
- the requirement that students must wait until their graduation date or for one week (whichever is longer) before receiving benefits is clearly inequitable. Suppose the student is on a fellow-

ship (which s/he loses if no longer at school), is supporting a family and requires a regular source of income immediately following the accident. Furthermore, does "graduation date" mean that the student is actually required to graduate before benefits are payable (s/he may never graduate if totally disabled);

- the waiting period for children is also unfair. Many young people have already started work before their 18th birthday. Suppose a 17 year old youth does not meet the expanded definition of "earner" as recommended above, at pp. 104-105, yet has financial obligations to meet (or even persons depending on him/her for financial support). Should such a person be required to wait a year before regular weekly benefits are payable? What if the money is needed now?

The first Woodhouse Report recommended compensation for loss of earning capacity be paid to apprentices, trainees, students and others whose earnings, but for the accident, would probably increase. These persons would be entitled to review of compensation on one or more occasions following the original assessment.²³⁷

The Australian Woodhouse Report created three groups:

- persons incapacitated before attaining the age of

²³⁷ Ibid., p. 238.

15;

- persons over 15 but younger than 26 who had embarked on a course of training for a trade, profession, or career which was incomplete at the time the incapacity commenced;
- persons over 15 but younger than 26 who had begun to earn a living but whose potential had not been reached in the employment.²³⁸

Persons in the first group were to be paid a benefit based on the notional minimum of earnings, to avoid speculation. For persons in the other two groups, a determination would be made at ages 21 and 26 to decide what that person might have been earning had he not been incapacitated. The Bill based on this Report extended the cut-off point from age 26 to 31. Only persons between the ages of 15 and 31 could have their earnings base raised to take into account loss of potential (persons under that age were non-earners and entitled to the minimum notional earnings benefit upon reaching the qualifying age of 15). There would be an administrative determination of what the victim would have been earning (but for the injury) at three ages: 21, 26 and 31. The benefit was not payable

²³⁸ Australia. National Committee of Inquiry on Compensation and Rehabilitation in Australia. Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia. 3 Vols. (Canberra: Government Printer of Australia, 1974), para. 369 (hereinafter referred to as "Woodhouse II").

until full-time education would (but for the incapacity) normally have been completed.²³⁹

The Australian Woodhouse Report also recommended that non-earners receive an impairment benefit assessed on the basis of 60 percent of the average weekly earnings per male unit (for a totally disabled non-earner).²⁴⁰

It is important to realize that there are two issues here; compensation for loss of earning capacity (even though the victim has never been an earner) and compensation for permanent impairment. Some commentators have expressed the view that, as it is unfair to divide non-earners into two classes, those who had potential and those who did not, it would be better to do away with the category of loss of potential earning capacity benefit and pay a benefit based on a floor level of notional earnings for all accident victims.²⁴¹

The N.S.W. Report noted the difficulty of attempting to assess loss of earning capacity for accident victims who do not have any recent past or imminent future income to use as a measure. The Report concluded that as all non-earners, in the long run, have the potential to enter or re-enter the paid work force, any attempt to distinguish among the various categories (by regarding some as more

²³⁹ Palmer, supra, n. 163, pp. 239-240.

²⁴⁰ Ibid., p. 230.

²⁴¹ Ibid., p. 240.

"deserving") would produce arbitrary and unjustifiable results.²⁴² It was for this reason that the N.S.W. Report recommended a notional earning capacity for non-earners:

- notional earning capacity of victim to be set as follows:
 - victims age 16-17: 30 percent of A.W.E.
 - victims age 18-20: 40 percent of A.W.E.
 - victims age 21 and over: 50 percent of A.W.E.
- The notional earning capacity for a person who has attained the age of 21 should be 50 percent of the average weekly earnings of adult male full-time employees in Australia.
- Note that this "floor-level" support, based on the "notional earning capacity," is only available to earners who have sustained "long-term incapacity," that is, incapacity which continues for a period or period totalling 104 weeks.

However, the N.S.W. recommendations that this minimum benefit be (at best) only 50% of the A.W.E. of an adult male earner, and that the minimum benefit only be employed in respect of long-term incapacity (ie. incapacity of over two years) should not be followed.

The recommendations are subject to the criticisms that the "50% of A.W.E." amount may be even less than a benefit

²⁴² N.S.W. Report, supra, n. 110, Vol. I, pp. 213-215.

based on the minimum wage, and that a minimum benefit should be available to all totally disabled earners, not merely those suffering from long-term incapacity. The benefit should be tied to average weekly earnings of adult male earners in this Province, but it should be set at a percentage of the A.W.E. which will adequately provide for the victim and his/her family (the percentage should be determined by reference to Statistics Canada figures on the net income needed to adequately support households in this Province). The benefit should be available to all totally disabled non-earners (ie. should be payable to victims immediately after the accident, not just to those who are incapacitated 104 weeks later).

We have also seen that the Quebec Scheme divides non-earners into categories, the approach which was rejected by the New South Wales Law Reform Commission. The Quebec Scheme also makes use of detailed Schedules in the Regulations to determine what the income level would be for non-earners for whom the Regie had determined an employment (this involves some forecasting on the part of the Regie). Is this approach preferable to the New South Wales approach of a single standard for all non-earners?

On balance, it is submitted that the best approach would be to combine features of both the New South Wales Report and the Quebec Scheme. That is, all non-earners would be entitled to a floor level notional loss of earning

capacity benefit. If the accident victim, as of the date of the accident, was clearly about to embark on a defined profession or occupation, resort could be had to detailed Schedules to determine what income that victim would be likely to earn. The victim would then be awarded a loss of earning capacity benefit based on either the floor level notional earning benefit, or on the income which he or she would likely earn from the employment determined by the Scheme's administrators. Therefore, the Quebec use of categories and the New South Wales approach of a floor level earning capacity benefit would both be incorporated into a compensation Scheme.

The approach to compensation for permanent incapacity has already been discussed in the "Analysis" section for "Totally Disabled Earners," supra, pp. 145-146. The approach recommended was:

- earnings related compensation should continue for as long as the victim remains incapacitated. If the victim remains totally incapacitated or disabled, then E.R.C. would simply continue. The use of a permanent pension for permanent incapacity is really more relevant to the topic of compensation for permanent partial incapacity (where the victim has some residual earning capacity following the accident). This issue will be dealt with (in detail) in the "Analysis" section under the next heading, "Partial Disability."

- if it is determined that the victim has suffered a long-term incapacity, (ie. the accident victim is and remains totally incapacitated following an accident), and it is felt that a permanent pension would be in the victim's best interests, then the Scheme's administrators should (either with the consent or at the request of the victim), determine, as soon as practicable, a permanent pension for that totally incapacitated accident victim. This is the approach recommended by the N.S.W. Report. It is appropriate for a compensation Scheme in Manitoba.

The recommendations for compensation of totally disabled non-earners can be summarized as follows:

- (1) A compensation benefit for loss of earning capacity should be paid to all non-earners, regardless of category, on the basis of a floor level notional earning capacity determined in the same way as the N.S.W. Report's approach to this issue (i.e. notional earning capacity of non-earner expressed as percentage of average weekly earnings of full-time adult male earner in jurisdiction, and percentage is dependent on age of victim). However, the two year waiting period dictated by the N.S.W. Report is unnecessarily long, and should be shortened to the same waiting period applicable in respect of totally disabled

earners (this waiting period is to be determined according to the time deemed necessary for the Scheme to dovetail with other compensation schemes in Manitoba).

- (2) If non-earner accident victim was embarking or about to embark on a clearly defined career or occupation, resort may be had to detailed Schedule listing numerous occupations and incomes in respect of those occupations; if the benefit thus derived would be higher than the floor level notional earning capacity benefit, the accident victim would be able to elect the higher benefit.
- (3) If the disability becomes permanent, E.R.C. would simply continue. However, if it is felt that a permanent pension would be in the victim's best interests, then the Scheme's administrators should (either with the consent or at the request of the victim), determine, as soon as practicable, a permanent pension for that totally incapacitated accident victim.
- (4) Recommendations regarding other issues (i.e. indexation of benefits, duration of benefits, commutation, cessation of benefits) with respect to totally disabled earners (see pp. 134-152, supra) would be applicable to totally disabled non-earners, subject to necessary modification.

(2) Partial Disability

(a) Comparison

(i) Manitoba

1. Part II Benefits:

- in general, there is no minimum partial disability benefit payable to non-wage earners.
- the exception to this general rule is a homemaker (see definition of "homemaker," *supra*, p. 185) who sustains bodily injuries and is rendered incapable of performing one or more essential daily household duties; victim is eligible for partial disability payment of \$60.00 per week, as long as disability persists, to maximum duration of 104 weeks [s.14(2)].
- persons who sustain injuries resulting in partial disability prior to their eighteenth birthday will, if the disability persists after they attain the age of majority, be deemed to be partially disabled as of that date [s.16(1)(a)].
- merely being deemed "partially disabled" is apparently not of itself sufficient to qualify for the \$60.00 per week benefit; it would seem that accident victim must still meet "employment requirement," actively employed at time of accident or for six out of the twelve months preceding the accident (s.13).
- persons suffering from pre-existing physical or mental infirmity will, subsequent to the date upon which they would have been cured of that physical or mental infirmity (but for the occurrence of the accident), be deemed to be "partially disabled" [s.16(1)(b)].
- it would appear that these persons too must show employment at the time of the accident or for six full months of the year preceding the accident (s.13).
- the disability benefit is also subject to the general time limit provisions of giving notice to M.P.I.C. within 30 days of accident (or as soon as reasonably practicable) and providing proof of

claim within 90 days [ss.38(1), (2) and (3)].

- benefits are not indexed.
- it would appear that the partial disability benefit may be reduced by receipt of payments from private insurance plans [s.41(1)].

2. The Kopstein Report

- non-wage earners divided up into categories; homemakers, children aged 16 to 18 and post-high school students (pp. 85-86).
- benefit is calculated in the same way for all partially disabled non-earners; these persons will receive a percentage of the total disability benefit based on the degree of partial disability suffered as a result of the accident (pp. 85-86).
- there is a one week waiting period, and the benefits will continue as long as the accident victim remains partially disabled; there is no maximum duration (pp. 85-86).
- total disability benefit for non-earners is 90 percent of the weekly minimum wage; therefore partially disabled non-earners will receive a percentage of this, according to the degree of partial disability.
- benefits are indexed in accordance with the annual growth rate in the Average Industrial Composite Index of Wages (pp. 85-86).

(ii) Ontario

1. The Standard Insurance Policy:

- no provision for partial disability benefit for non-earners.
- homemaker is eligible for benefit of \$70.00 a week for twelve weeks if "completely incapacitated and unable to perform any of his or her household duties" (Vol. II, p. 760).

2. The Osborne Report:

- no specific recommendation with regard to partial disability benefit for non-earners.
- recommended benefits for students and homemakers (including child care expenses) where such persons suffer substantial inability to perform the essential duties of his or her occupation or employment (this would include attending school, looking after a household, etc.); see "Totally Disabled Non-Earners," supra, pp. 188-189 (Vol. I, pp. 579-582).

(iii) Quebec1. The Automobile Insurance Act:

- Quebec does not provide exact equivalent of Manitoba's partial disability benefit.
- victim is entitled to income replacement indemnity for initial period of up to five years (or longer if disability persists at termination of five year period) where, due to the accident, he or she becomes unable to hold employment that he or she could have held on a regular and full-time basis (s.20).
- if victim returns to or obtains work, indemnity ceases; however, if income from post-accident employment is less than that used in computing victim's income replacement indemnity, he or she is entitled to the indemnity reduced by an amount equivalent to 50 percent of the net income earned from such other employment not exceeding \$5,000.00 or, if such income exceeds \$5,000.00, fifty percent of the first \$5,000.00 and 75 percent of the remainder. Only the part of the gross income over \$1,000.00 is taken into consideration Note: see example of this calculation on p. 157 (s.31).
- if disability persists for five years, and victim obtains employment which pays a gross income less than that used in computing his income replacement indemnity, such victim is entitled, from sixth year following the accident, to income replacement indemnity equivalent to the difference between his net income used in computing the income replacement indemnity at the time of the accident and the

net income he earns or could earn from such employment (s.32).

- for specific provisions regarding students, persons at home, persons under 16, and other non-earners, see "Totally Disabled Non-Earners," supra, pp. 189-194.

2. Proposed Amendments:

- see summary of these amendments under "Totally Disabled Non-Earners," supra, pp. 194-202.
- no specific provision for partially disabled non-earners in the new Bill.
- it would appear that non-earners wishing to claim the income replacement indemnity must fit into one of the categories discussed supra, at pp. 194-202.

(iv) New Zealand

- compensation for partially disabled non-earners who are prevented (in whole or in part) from entering the work force due to the injury, is determined on the same basis as set out under "Totally Disabled Non-Earners," ie. :
 - provision is made for compensation to potential earners such as persons under age 16, secondary school pupils and persons in training for a career or occupation who have not as of yet entered the labour force or who have recently entered the labour force.
- E.R.C. is paid on basis of notional weekly earnings; compensation is really in regard to loss of potential earning capacity (s.63).
- where partial disability is permanent, the notional benefit will be reduced accordingly, for example:

victim's earnings assessed on
notional earnings basis

\$200.00

assessed loss of capacity to earn
is 30 percent

30 percent of \$200.00 is	\$60.00
80 percent of \$60.00 i.e. permanent pension	\$48.00
taxation on pension of \$48.00 is	\$16.00
This leaves final pension of	\$32.00
	[ss.60 and 63(2)]

- loss of earning capacity benefit for both totally and partially disabled non-earner is increased by Order in Council in accordance with changes in average weekly wage [s.63(5)].

(v) Victoria

- benefits payable to partially disabled non-earners are similar to those payable to totally disabled non-earners, except that the amounts will be reduced.
- partially disabled non-earner will clearly not receive the loss of earnings benefit which is payable only to earners during the first eighteen months following the accident.
- these victims will, however, be eligible for both the long-term impairment benefits (lump-sum and annuity payment) and the loss of earning capacity benefit.
- long-term impairment benefit is calculated in the same way as that paid to a totally disabled earner, as follows:
- the degree of impairment is to be determined with the use of the A.M.A. Guides to the Evaluation of Permanent Impairment (2d)²⁴³.
- if Commission has determined the degree of impairment for the victim, and the degree of impairment is greater than 10%, the Commission must assess a long-term impairment benefit in respect of that victim [s.47(1)].
- this benefit is composed of two parts:

²⁴³ Transport Accident (Impairment) Regulations 1988, S.R. 255, s.6(1) (Hereinafter referred to as "Vic. Reg.").

- (a) a Lump-sum Payment, based on a percentage of the maximum sum payable to a totally incapacitated person, which is \$47,910.00 (as of July 1, 1988). Benefit is calculated according to the formula:

$$\frac{A - B}{C} \times \$47,910.00$$

- A is the degree of impairment of the victim as a result of the accident
- B is 10%
- C is 90% (s.47).
- lump-sum benefit may be paid as periodic payment if accident victim requests this [s.47(4)].
- the Regulations provide a formula to be used in calculating the periodic payments based on the lump-sum benefit.²⁴⁴

- (b) an annuity payment is also available to persons after 18 months following the accident, and it is based on a formula which incorporates the individual's degree of impairment and his or her age, as follows:

$$\frac{A - B}{C} \times \$111,780.00 \times \frac{75 - D}{50} = \text{[amount of annuity payable]}$$

(as of July 1, 1988)

- A is degree of impairment of accident victim.
- B is 10%
- C is 90%
- D is:
 - if person is 75 or over 75
 - if person is 25 or under 25
 - if person is over 25 and under 75 age of person in whole years [s.48(1)]
- annuity benefit is deducted from amount of loss of earning capacity benefit [ss.51(2) and 50(2)].

²⁴⁴ Vic. Reg., s.7 and Schedule I.

- maximum amount of lump-sum benefit, maximum amount used in calculating periodic payment, and the amount of the periodic payment itself are all indexed as of July 1st, of each year, in accordance with the formula:

$$D \times \frac{E}{F}$$

- D is maximum amount used in calculating lump-sum benefit or annuity payment;
- E is the all-groups Consumer Price Index for Melbourne as at June 15th in the preceding financial year last published by the Australian Statistician in respect of the December quarter of that financial year;
- F is the all-groups Consumer Price Index for Melbourne as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(2)].
- partially disabled non-earner also eligible for loss of earning capacity benefit (after 18 months following the accident) which is calculated in same way as benefit payable to partially disabled earner, except that benefit is subject to reduction, as follows:

[amount of loss of Earning Capacity Benefit payable to partially disabled earner: will likely be minimum of, as of July 1, 1988, \$210.00 per week, less amount of impairment annuity benefit]

minus

$$A \times \frac{B}{C - D} = \text{[amount of loss of earning capacity benefit payable]}$$

- A is amount to which the person would have been so entitled (i.e. benefit which would have been payable to partially disabled earner).
- B is number of years before person attains

retirement age during which person is reasonably likely not to be employed.

- C is retirement age of person.
- D is age of person in whole years [s.51(2)].
- the longer a person would reasonably be likely not to be employed (i.e. the greater the value of B), the greater the amount the reduction will be; therefore, the smaller the amount of the benefit will be.
- the partially disabled non-earner's loss of earnings capacity benefit does not apply in respect of minors; minors who suffer a degree of impairment that is more than ten percent will receive a weekly payment after the first 18 months following the accident calculated by multiplying the percentage of impairment by (as of July 1, 1988) \$66.00 [ss.51(1) and 54(1) and (2)].
- Commission not liable to make payments to partially disabled earner if difference between pre-accident earning capacity and post-accident earning capacity is less than ten percent of the pre-accident earning capacity; if the Commission is not liable to pay partially disabled earner any loss of earnings capacity benefit in this situation, it is arguable as to whether a partially disabled non-earner who falls in this category would be able to receive a benefit (s.52).
- same provisions regarding cessation of loss of earnings capacity benefits which apply to totally-disabled non-earner will also apply to partially disabled non-earner (see above, at pp. 206-207).

(vi) N.S.W. Law Reform Commission Report

- same provisions regarding the compensation for loss of earning capacity payable to totally disabled non-earners also apply to partially disabled non-earners (see p. 207).
- Report does not differentiate between partially and totally disabled non-earners.
- that is, a non-earner who has sustained a long-term loss of earning capacity should receive

compensation determined by reference to victim's "notional earning capacity" (see above, at p. 207).

- as partially disabled non-earners would receive reduced compensation, compensation would be payable as percentage of compensation which would be payable to totally disabled non-earner, i.e. percentage of 80 percent of the non-earner's notional earning capacity of 50 percent of average weekly earnings (for non-earners over the age of 21). Therefore, a partially disabled non-earner who had suffered an assessed loss of 50 percent of his earning capacity would receive a loss of earning capacity benefit of 50 percent x 80 percent x (50 percent of A.W.E.) (Vol. I, p. 216).
- partially disabled non-earners who obtain employment following the accident would receive compensation for a proportion of the loss of earning capacity sustained which would be higher than 80 percent of the loss of earning capacity (Vol. I, p. 232).
- as with totally disabled non-earners, partially disabled non-earners would not receive the loss of earning capacity benefit unless disabled for a period of not less than 104 weeks (Vol. I, p. 219).
- partially disabled non-earners who have sustained long-term incapacity would be eligible to apply for compensation for loss of earning capacity on the basis of potential for advancement, subject to the same requirements and conditions as set out above, for a totally disabled earner; see p. 108, supra (Vol. I, p. 216).
- post-accident earning capacity of non-earner will generally be nil; however Corporation may assess post-accident earning capacity for non-earner using other factors, i.e. capability of victim to undertake employment which is reasonably available, and to compete in the labour market at no significant disadvantage (Vol. I, pp. 217-218).
- apart from waiting period of 104 weeks, similar conditions regarding indexation of benefits, commencement and termination of benefits, and assessment of permanent incapacity apply to partially disabled non-earners as would apply to totally disabled earners; see pp. 108-112, supra.

(b) Analysis

There are two separate questions to be considered here. First, what compensation, if any, should be paid to non-earners in respect of loss of earning capacity? Second, what compensation (if any) should be paid to non-earners in respect of permanent partial incapacity?

We have already seen that the N.S.W. Report, the Victorian Scheme and the proposed amendments (i.e. Bill 92) to the Quebec Act recommend a waiting period in respect of which no compensation will be payable to non-earners in respect of loss of earning capacity. In New South Wales, the waiting period would be two years; in Victoria, the waiting period is 18 months; in Quebec the proposed amendments would allow compensation based on real lost income during the first six months following the accident (thereafter, compensation will be paid in respect of lost potential income).

The use of a waiting period cannot be justified in respect of payment for loss of earning capacity to non-earners. If these persons are eligible for this benefit, they should be eligible for it at the same time and on terms similar to those utilized in respect of earners (either totally or partially disabled). That is, for non-earners who have suffered a temporary partial incapacity or partial loss of earning capacity, compensation will be

payable immediately following the accident.

Comments and recommendations made with respect to both totally disabled non-earners and partially disabled earners also apply here. That is, compensation would be payable as follows:

- (1) A compensation benefit for loss of earning capacity should be paid to all partially disabled non-earners, regardless of category, on the basis of a floor level notional earning capacity determined in the same way as the N.S.W. Report's approach to this issue; the benefit would be calculated using the notional earning capacity of non-earner. This notional earning capacity would be expressed as percentage of compensation which would be payable to totally disabled non-earner, i.e. percentage of 80 percent of the non-earner's notional earning capacity of (base amount of benefit; will be a percentage of average weekly earnings for adult male full-time earners). Therefore, a partially disabled non-earner who had suffered an assessed loss of 50 percent of his earning capacity would receive a loss of earning capacity benefit of 50 percent x 80 percent x (base amount of benefit). However, the two year waiting period dictated by the N.S.W. Report is unnecessarily long, and should be shortened to the

same waiting period applicable in respect of totally disabled earners (this waiting period is to be determined according to the time deemed necessary for the Scheme to dovetail with other compensation schemes in Manitoba).

- (2) If partially disabled non-earner accident victim was embarking or about to embark on a clearly defined career or occupation, resort may be had to detailed Schedule listing numerous occupations and incomes in respect of those occupations; if the benefit thus derived would be higher than the percentage of the floor level notional earning capacity benefit, the accident victim would be able to elect the higher benefit.
- (3) where the victim suffers permanent partial incapacity, the recommendation of New Zealand's Law Commission should be followed.²⁴⁵ The Report recommends that this permanent partial loss of physical capacity be evaluated by reference to the A.M.A. Guides to the Evaluation of Permanent Impairment. The percentage of permanent disability obtained by the use of the Guides would (subject to a minimum eligibility requirement of 5% disability) be applied against the base figure set at 80 percent of the average weekly wage in

²⁴⁵ Law Commission Report, supra, n. 220.

the jurisdiction. The amount thus obtained would be payable as a periodic benefit in respect of permanent partial incapacity, and the benefit would be payable to both earners and non-earners alike.²⁴⁶

- (4) The Report also recommended two exceptions to the general rule that compensation for permanent partial incapacity be calculated using a base figure of 80% of the average weekly earnings in the jurisdiction:

(a) where the use of the average weekly earnings of persons in the jurisdiction as the basis for determining compensation produced an amount which was less than the actual loss of earning capacity due to the permanent partial incapacity (eg. a low percentage of impairment has had a disproportionately negative effect on the victim's ability to either continue in his/her old job or to find new work), the victim could receive compensation calculated as follows:

- the amount that would be payable to the victim in respect of total incapacity (at the time the Corporation determines that the partial incapacity is per-

²⁴⁶ Ibid., pp. 58 and 97, and cls. 25 and 47.

manent) less 85 percent of the highest amount (if any) that the victim would have been able to earn after the accident, if he or she were to engage in suitable work.²⁴⁷

- (b) the second exception to the general rule that compensation for permanent partial incapacity is to be calculated using a base figure of 80% of the average weekly wage is the exception which provides for the assessment of an increased degree of impairment where the victim has suffered severe facial or bodily disfigurement as a result of personal injury, or has suffered severe nervous shock or lasting emotional harm or psychiatric illness caused by homicide or intentional injury. In these situations, the medical practitioner shall take into consideration the extent to which the disfigurement, shock or emotional harm has permanently affected the victim's ability to lead a normal life.²⁴⁸

²⁴⁷ Ibid., pp. 97-98 and cls. 25(2) and 48 of Draft Bill (pp. 119 and 130).

²⁴⁸ Ibid, p. 98 and cl. 27 of the Draft Bill (p. 120).

e. Compensation for Permanent Incapacity and Non-Economic Loss

(1) Comparison

(a) Manitoba

(i) Part II Benefits:

- "impairment" is defined as "a permanent loss of a bodily function whether total or partial" (s.4).
- the impairment benefits are payable for a loss of a limb or the impairment of a bodily function, and are intended to compensate a victim for non-economic losses such as pain and suffering and loss of enjoyment of life.²⁴⁹
- each impairment which qualifies for this benefit is listed on Schedule A to Manitoba Regulation 290/88R [s.20(1)].
- in order to assess the amount of impairment benefit payable, each loss of limb or impairment of a bodily function listed in Schedule A is deemed to be a percentage of totally bodily impairment, as listed in column 2, of Schedule A [s.20(2)].
- the accident victim then receives that percentage of \$20,000 which is equal to the percentage of impairment that he has suffered, according to Schedule A [s.20(3)].
- for example, the loss of an entire hand is considered to be a 40 percent degree of impairment (according to Schedule A) and is therefore worth 40 percent of the maximum impairment benefit of \$20,000, i.e. \$8,000 [ss.20(3) and 22].
- the impairment must have resulted within 90 days of the accident (s.21).
- this 90-day period can be extended for up to one year from the date of the accident if at the beginning of each 30-day period after the first 90 days have expired (or at less frequent intervals

²⁴⁹ Kopstein Report, supra n. 1, Vol. 2, Position Paper No. 2, p. 41.

as specified by M.P.I.C.) a doctor's certificate is furnished which indicates that the victim is being treated for an injury which may eventually result in any of the impairments listed in column 1 of Schedule A (s.21).

- if the injury sustained in a motor vehicle accident renders the victim permanently incapable of engaging in any occupation for which there is a profit, he or she is entitled to the maximum \$20,000 benefit regardless of the percentages of impairment otherwise specified (s.23).
- this benefit is subject to the requirement, as above, that the total incapacity must result from injuries sustained in the accident within 90 days from the date of the accident, or within one year of the accident where the attending physician states that the victim is being treated for an injury which may eventually result in total incapacity (s.23).
- the payment of any impairment benefit under Section 20 of Manitoba Regulation 290/88R is subject to the requirement that the victim must live for at least 90 days after the accident (s.24).
- if the victim dies within this time, no impairment benefit is payable (s.24).
- the impairment benefit is also subject to the general time limit provisions of giving notice to M.P.I.C. within 30 days of accident (or as soon as reasonably practicable) and providing proof of claim within 90 days [ss.38(1), (2) and (3)].
- the 30 day time limit for providing Notice to M.P.I.C. would clearly not be practicable in most cases, and the Regulations provide for this situation [s.38(2)].
- impairment benefit is not indexed.
- the impairment benefit is not reduced by the receipt of disability payments under ss. 12-16 of Manitoba Regulation 290/88R (s.27).
- if the victim is eligible for Workers' Compensation, no impairment benefit is payable (s.34).

(ii) The Kopstein Report

- impairment benefit will be increased to maximum of \$200,000.00 (p. 80).
- both permanent and temporary impairment will be compensated, with temporary impairment receiving a percentage of the benefit payable for permanent impairment based on relative severity of the injury.²⁵⁰
- the average percentage compensation for temporary impairment is assumed to be ten percent of the compensation for permanent impairment.²⁵¹
- increasing the benefit eligibility to include persons suffering temporary impairment will have the effect of increasing the number of claimants by a factor of 5.778.²⁵²

(b) Ontario(i) The Standard Insurance Policy

- no specific provisions regarding compensation for permanent incapacity and/or non-economic loss; see the comments with respect to benefits payable to "Totally Disabled Earners," supra, p. 85.

(ii) The Osborne Report

- no specific provisions with regard to either compensation for permanent incapacity or compensation for non-economic loss, but recommended a long-term care benefit (to maximum of \$500,000.00) to permit the accident victim as much freedom of movement as can be built into the system (Vol. I, p. 573).
- the long-term care benefits should not exceed the monthly cost of a group residence which might reasonably accommodate the victim's needs, taking into account the nature of the injuries and other

²⁵⁰ Tillinghast Report, supra, n. 21, Exhibit E IV.3.

²⁵¹ Ibid.

²⁵² Ibid.

relevant factors (Vol. I, p. 573).

- benefit to be annexed once a year in accordance with changes in annual Consumer Price Index, subject to maximum of twice the stipulated benefit (Vol. I, p. 584).

(c) Quebec

(i) The Automobile Insurance Act

- Division III of the Quebec Act provides for lump sum indemnities (to a prescribed maximum amount) for accident victims who sustain injury, disfigurement, dismemberment, suffering or a loss of enjoyment of life due to an accident (ss.44-47).
- the maximum lump sum payable is (for 1988) \$41,059.61 (s.44).
- the conditions regarding the payment of these lump sum indemnities, and the Schedules which show how the indemnities are to be calculated, are set out in a Regulation.²⁵³
- the indemnities shall only be paid if the victim survives the accident for more than 24 hours (Que. Reg. c.A-25, r.6, s.2).
- if the victim survives the accident for more than 24 hours but dies within 20 days following the accident, the indemnity shall be one percent of the maximum amount of \$41,059.61 provided for in Section 44 of the Act, as revalorized in accordance with Section 49 of the Act (which indexes benefit in accordance with changes in the Quebec Pension Plan Index), for each complete day of survival which follows the day of the accident (Que. Reg. c.A-25, r.6, s.3).
- if the victim dies before the impairment or major disfigurement can be considered permanent, the percentage of the impairment or disfigurement is

²⁵³ A Regulation Respecting Certain Lump Sum Indemnities Referred to in Section 44 of the Automobile Insurance Act, Quebec Regulation c.A-25, r.6 (Hereinafter referred to as "Que. Reg. c.A-25, r.6". Future references will be in the text, in parentheses).

determined on the basis of the data available at the time of death (Que. Reg. c.A-25, r.6, s.4).

- the percentage is determined as if the victim was still alive, without taking the death into account (Que. Reg. c.A-25, r.6, s.4).
- the total of the amounts paid for permanent impairment, for disfigurement, for suffering or loss of enjoyment of life shall in no case exceed the maximum amount of (for 1988) \$41,059.61 provided for in Section 44 of the Act, as revalored by Section 49 (Que. Reg. c.A-25, r.6, s.5).
- the maximum amount paid for a permanent impairment corresponds to 80% of the amount provided for in Section 44 of the Act (Que. Reg. c.A-25, r.6, s.6).
- the maximum amount payable for permanent major disfigurement corresponds to 40% of the amount provided for in Section 44 of the Act (Que. Reg. c. A-25, r.6, s.10).
- the maximum amount payable for suffering or loss of enjoyment of life corresponds to 20% of the amount provided for in Section 44 of the Act (Que. Reg. c.A-25, r.6, s.13).
- to calculate the amount payable for either permanent impairment, permanent major disfigurement or suffering or loss of enjoyment of life, reference must be made to the Schedules in Que. Reg. c.A-25, r.6.
- Schedules list various impairments affecting different systems in the body, and each impairment is accompanied by a percentage of disability, disfigurement, or suffering or loss of enjoyment of life.
- the percentage of monies paid to a person for loss of enjoyment of life corresponds to the total amount paid for a permanent impairment and/or significant disfigurement (Que. Reg. c.A-25, r.6, s.14 and Schedule D).
- this computation is automatically revalued each year, due to the revaluation of the maximum benefit of \$41,059.61 (s.49).
- the correlation between permanent impairment,

permanent major disfigurement and suffering or loss of enjoyment of life is set out in Schedule D of Que. Reg. c.A-25, r.6.

- for example, where the total percentage of permanent impairment and permanent major disfigurement is more than 81%, the percentage of the maximum amount allowed for suffering or loss of enjoyment of life is 100% (see Schedule D).
- that is, to determine the percentage of the maximum allowed for suffering or loss of enjoyment of life, the percentages of permanent impairment and permanent disfigurement are added.
- the total thus calculated is correlated to the percentage assessed for suffering or loss of enjoyment of life.
- as stated above, the maximum amount allowed for suffering or loss of enjoyment of life corresponds to 20% of the amount provided for in Section 44 of the Act.
- therefore, the maximum amount payable (1988) for suffering or loss of enjoyment of life is 20% of \$41,059.61, or \$8,211.92.
- example:
 - person is involved in an automobile accident and suffers the loss of an entire hand
 - the benefit for permanent impairment payable is the percentage of degree of impairment attributed to the loss of a hand x the maximum amount payable for a permanent impairment (80% of the amount provided for in Section 44 of the Act, that is, 80% of \$41,059.61, or \$32,847.69)
 - therefore, victim is entitled to an impairment benefit of the percentage payable under Schedule A for the loss of an entire hand (55%) x the maximum permanent impairment benefit of \$32,847.69; that is, he is entitled to a permanent impairment benefit of \$18,066.23
 - the victim is also entitled to a lump-sum benefit for permanent major disfigurement; the maximum amount payable for permanent major disfigurement is 40% of the amount provided for in Section 44 of the Act, that is, 40% of \$41,059.61, or \$16,423.84
 - to determine the amount of the benefit

payable for permanent major disfigurement, reference must be had to Schedule B of the Regulations

- Schedule B correlates the percentages of the permanent major disfigurement benefit according to the degree of the permanent impairment; therefore, the accident victim, who has sustained a permanent impairment of 55% is also eligible for a permanent disfigurement benefit (according to Schedule B) of 50%
- 50% of the maximum amount payable for permanent major disfigurement is \$8,211.92
- finally, the victim is also eligible for a suffering and loss of enjoyment of life benefit
- the maximum amount payable for suffering or loss of enjoyment of life is 20% of the amount provided for in Section 44 of the Act; that is, 20% of \$41,059.61, or \$8,211.92
- the percentage of the benefit payable for suffering and loss of enjoyment of life is determined by reference to Schedule D of the Regulations
- Schedule D has two columns; the left hand column lists the total percentages of permanent impairment and permanent major disfigurement established in accordance with the other schedules of the Act, while the right hand column lists the percentage of the maximum amount established for suffering and loss of enjoyment of life
- in our example, the percentage payable for permanent impairment (55%) and permanent major disfigurement (50%) come to a total of 105%; according to Schedule D, the percentage of the maximum amount for suffering and loss of enjoyment of life payable where the left hand column exceeds 81% is the maximum amount payable for suffering and loss of enjoyment of life (i.e. \$8,211.92)
- so, if we add up all of the lump-sums payable to the victim, we find that he is entitled to a total benefit of \$18,066.23 plus \$8,211.92 plus \$8,211.92 equals \$34,490.07
- therefore, the total lump-sum indemnity payable to this victim in respect of permanent impairment, permanent major disfigurement and suffering or loss of enjoyment of life is \$34,490.07
- remember, the total of the amounts paid for permanent impairment, for permanent major

disfigurement, and for suffering or loss of enjoyment of life shall in no case exceed the maximum amount of (for 1988) \$41,059.61 provided for in Section 44 of the Act, as revalorized by Section 49 (Que. Reg. c.A-25, r.6, s.5).

(ii) Proposed Amendments

- it is in respect of compensation for non-pecuniary damage that Bill 92 would implement its greatest change.
- the proposed impairment benefit provision would pay a lump sum indemnity to a maximum of \$75,000.00 (emphasis mine) to accident victims who suffer permanent physical or mental impairment as a result of the accident (cl. 74).
- this maximum amount will be increased to \$100,000.00 from January 1, 1991 and to \$125,000.00 from January 1, 1992 (cl. 74).
- thereafter, it would be revalorized on January 1st of each subsequent year in accordance with changes in the Consumer Price Index in Canada [cls. 74 and 83.36(ff)].
- when one considers that the maximum amount payable (for 1988) as an impairment benefit is \$41,059.61, this is a staggering change.
- no compensation for non-pecuniary damage is payable if the victim dies as a result of the accident (cl. 76).
- the impairment will be evaluated in terms of a percentage determined on the basis of the schedule of permanent impairments established by regulation (cl. 77).
- the percentage will be in respect of the loss of enjoyment of life and other unpleasant consequences of the impairment, and it will not exceed 100 percent (cl. 77).
- the percentage thus derived will be multiplied by the maximum amount to calculate the lump-sum indemnity payable (cl. 78).
- the minimum compensation for non-pecuniary damage

will be \$500.00 (cl. 79).

(d) New Zealand

- lump-sum benefit not exceeding \$17,000.00 is payable for permanent loss or impairment of bodily function arising from injury (s.78).
- Schedule of physical impairment, which specifies percentages of the maximum figure (\$17,000.00) in respect of loss of bodily parts and other disabilities, is used [s.78(2)].
- no lump-sum benefit is payable where aggregate disability is less than five percent [s.78(6)].
- if victim sustains permanent loss or impairment of bodily function which is not listed on the Schedule, the Corporation shall assess and pay victim (having regard to medical and other evidence available to it) such lump-sum as it considers appropriate, not exceeding \$17,000.00 [s.78(4)].
- further sum of up to \$10,000.00 may be awarded for loss of amenities or capacity for enjoying life and pain and mental suffering (s.79).
- assessment is subjective, and loss, pain or suffering must be of sufficient degree (having regard to its nature, intensity, duration and other relevant circumstances) to justify payment [s.79(1)].
- "Scale" approach is not to be applied to awards in respect to loss of amenities or pain and suffering; i.e. if person has suffered serious loss of amenities or considerable pain, he or she should be properly compensated, subject to the limit (Corporation not to regard maximum as only payable to a small percentage of victims who have suffered incredible amount of pain).²⁵⁴
- victim must survive for at least 28 days following the accident, in order to qualify for "loss of amenities" benefit [s.79(6)].

²⁵⁴ J.L. Fahy, Accident Compensation Coverage (8th ed.), 1984 (Wellington: Accident Compensation Corporation), p. 91.

- totally and partially disabled earners, and totally and partially disabled non-earners who qualify for the loss of potential earning capacity benefit are also eligible for compensation in respect of permanent incapacity, as assessed under Section 60 of the Act (see comments with respect to this compensation at pp. 94-95, 158-59, supra).

(e) Victoria

- as discussed above, both earners (totally disabled and partially disabled) and non-earners (totally disabled and partially disabled) are eligible for a long-term impairment benefit, consisting of both the lump-sum payment and an annuity payment, after 18 months following the accident or the date upon which the disability first manifests itself (see pp. 100-101, supra).

(f) N.S.W. Law Reform Commission Report

- victim who suffers permanent mental or physical disability should receive compensation for that disability in the form of a lump-sum payment, based on degree of disability (Vol. II, p. 315).
- degree of permanent disability should be measured in accordance with the "Whole Person" approach of the A.M.A.'s Guide to the Evaluation of Permanent Impairment (Vol. II, p. 317).
- disability to be assessed 12 months after accident, subject to power of Corporation to assess disability at earlier time where disability is stable and permanent (Vol. II, p. 319).
- interim disability payments available where extent of disability cannot be finally assessed (Vol. II, p. 319).
- if degree of permanent disability increases, compensation should be increased (Vol. II, p. 319).
- maximum compensation for permanent disability should be 208 x the value of A.W.E. at date of payment (Vol. II, p. 329).
- where assessed degree of permanent disability is

four percent or less, no compensation for permanent disability will be payable (Vol. II, p. 330).

- person who reaches assessed level of permanent disability of 90 percent should be entitled to maximum level of compensation (Vol. II, p. 330).
- compensation for permanent disability to be adjusted according to victim's age, as follows:

Age of Victim at Accident Date	Percentage of Assessed Compensation Payable
0 - 25 years	100 percent
26 - 64 years	99-61 percent (reducing at rate of 1 percent per year of age)
65 years and above	60 percent (Vol. II, p. 331).

- no compensation payable where victim dies before assessment or before payment of compensation (Vol. II, p. 332).
- if victim is permanently unconscious after accident, no compensation should be payable unless victim has dependent spouse and/or children (Vol. II, p. 333).
- in assessing degree of permanent disability, Corporation should take into account any unreasonable refusal by victim to participate in rehabilitation program or to undergo medical treatment, where this may have reduced the degree of disability (Vol. II, p. 333).

(2) Analysis

It is interesting to note that the Woodhouse Report recommended that compensation for permanent partial incapacity and non-economic loss be combined, and calculated using the Schedule of incapacities. The percentage of incapacity so derived were to be applied against earnings (subject to certain limits) to arrive at a periodic

payment, not a lump sum. There would be discretion to depart upwards from this amount, but not to reduce it.²⁵⁵ In a paper delivered years after the original Woodhouse Report was published, the author had a chance to elaborate on his views. He stated:

The provision for lump-sum payments is not only an attempt to cling to the common law approach to damages for personal injury. It is also a serious departure from the general philosophy underlying the new Accident Compensation Scheme ... the non-economic component of compensation has no real significance except in the case of persons who suffer a permanent disability. In numbers they represent two percent or less of all injured persons. Yet as the result of the compromises made on their behalf every injured person is caught up in a difficulties and disruptions.²⁵⁶

It has been suggested that the two components of New Zealand's lump sum award, ie. loss or impairment of bodily function and loss of amenities, should be combined, and a proportion of the resulting sum of \$27,000.00 should be payable on the basis of the degree of current disability. This approach would reduce administrative time and effort but preserve a useful and significant benefit (particularly in respect to non-earners).²⁵⁷

Few issues create as much controversy or dispute as the question of compensation for non-economic loss. This type

²⁵⁵ Palmer, supra, n. 163, p. 412.

²⁵⁶ O. Woodhouse, "Aspects of the Accident Compensation Scheme," [1979] N.Z.L.J. p. 395 at pp. 401-402.

²⁵⁷ P.H. Osborne, supra, n. 189, p. 30.

of compensation is clearly the result of the common law's influence. Yet, as Geoffrey Palmer has pointed out, there appears to have been no record of an award of damages for pain and suffering in common law actions until 1763.²⁵⁸ In fact, claims for this sort of compensation do not appear to have been pleaded regularly until the nineteenth century.²⁵⁹ Some commentators have suggested that what is at stake is not an assessment of the actual "pain" suffered by the victim, but an evaluation of the dignitary aspects of the disability. That is, a person who loses a leg in an accident yet makes a rapid and successful recovery, is able to resume work and suffers no persistent pain would receive compensation for "pain and suffering" which is really an attempt to make up for the physical indignity he has suffered.²⁶⁰

Some of the objections to compensation for non-economic loss assessed on the basis of "pain and suffering" and/or "loss of amenities or loss of expectation of life" are as follows:

- The calculation of damages for non-pecuniary losses is very imprecise, because such losses do not lend themselves to mathematical calculation

²⁵⁸ Palmer, supra, n. 163, p. 216.

²⁵⁹ Ibid.

²⁶⁰ W.J. Blum and H. Kalven, "Public Law Perspectives on a Private Law Problem," cited in Palmer, supra, n. 163, p. 217.

and cannot objectively be translated into monetary terms.²⁶¹

- Payments for non-economic loss often result in disputes, which lead to litigation and expense, thus putting the Scheme's long-term financial viability at risk; it has been noted, for example, that much of the expense and many of the disputes resulting from the operation of the New Zealand and Quebec pure no-fault compensation Schemes have been in respect of the issue of compensation for non-economic loss.²⁶²
- An assessment procedure which concentrates on the degree of pain and suffering, rather than on the extent of permanent disability, has potentially adverse effects upon rehabilitation ("reward for complaint").²⁶³
- Resources for compensation should be directed to more seriously rather than less seriously injured people, and past experiences have indicated that the more seriously disabled victims receive

²⁶¹ M.L.R.C. Report No. 68, supra, n. 173, p. 18.

²⁶² J. O'Connell, "No-Fault Insurance for Australian? A Package of Possibilities," in Personal Compensation for Injury: Proceedings of a Seminar, (Canberra: Australian Government Publishing Service, 1985), pp. 10-11; P.H. Osborne, supra, n. 816, p. 29; Osborne Report, supra, n. 573, Vol. I, p. 460.

²⁶³ N.S.W. Report, supra, n. 110, Vol. II, p. 320.

proportionately less compensation for pain and suffering (and loss of enjoyment of life) than the less seriously disabled.²⁶⁴

- "Pain and suffering," "loss of amenities and loss of enjoyment of life" are terms which suffer from lack of definition and widely-differing judicial attitudes; it is impossible to accurately predict how two persons who suffer the identical disability may react or readjust to the changes of lifestyle resulting from the injury.²⁶⁵

It is submitted that the above disadvantages associated with compensation for non-economic loss justify the elimination of compensation of that kind. It has already been noted several times during the analysis of issues relating to compensation for disability, that the persons who developed New Zealand's comprehensive no-fault compensation Scheme (i.e. Geoffrey Palmer and Sir Owen Woodhouse) have recommended on numerous occasions that lump-sum compensation for non-economic loss be abolished. Instead, accident victims would be compensated for permanent partial incapacity by the use of a permanent pension, to be assessed by reference to the A.M.A. Guides to the Evaluation of Permanent Impairment, and paid (periodically) to both earners and non-earners. This approach has much to be

²⁶⁴ Ibid., pp. 321-322.

²⁶⁵ Ibid., p. 322.

said for it. Compensation is provided soon after the accident, it is provided in an efficient and (due to the comprehensiveness of the Guide) specific way, and it is payable to both earners and non-earners, on a permanent basis. The benefit for permanent incapacity or permanent impairment, once assessed, cannot be reduced (but it may be increased, if the disability worsens).

It has been recommended in the "Analysis" sections of both compensation for partially disabled earners and compensation for partially disabled non-earners that this approach (ie. the Law Commission's recommendations) should be incorporated into a comprehensive compensation Scheme for automobile accident victims in Manitoba. In view of the foregoing, it is submitted that Judge Kopstein's recommendation of a large increase in the impairment benefit should be reconsidered. It is far better (from a rehabilitative, cost-efficient and equitable) perspective, to provide benefits assessed in an efficient yet thorough manner, and subject always to the possibility of increase to guard against the risk that the initial payment benefit calculated may be insufficient. Accordingly, no compensation assessed on the basis of non-economic loss should be payable, due to the reasons stated above.

Compensation for permanent incapacity would (as recommended earlier) be payable on a periodic basis to both earners and non-earners. However, the benefits would not

consist of a percentage of a large (one-time) lump-sum payment, i.e. Judge Kopstein's recommendation would not be followed. Instead, a periodic benefit would be payable, as follows:

- totally disabled accident victims would receive a benefit assessed in accordance with the recommendations of the New South Wales Law Reform Commission in respect of compensation for permanent (total) incapacity (see p. 145-146);
- partially disabled accident victims would receive a benefit for permanent partial incapacity assessed with reference to the A.M.A. Guides to the Evaluation of Permanent Impairment (2d ed.), as recommended by New Zealand's Law Commission (see pp. 235-237).

Some persons may argue that the effect of the above recommendations is to deprive accident victims of compensation which even (pure no-fault) compensation Schemes (such as New Zealand and Quebec) provide to victims. However, it should be noted that the accident victim is really not being deprived of anything. Instead, the resources would be applied towards benefits which are not currently available to accident victims in Manitoba.

f. Medical Expenses and Rehabilitation Assistance(1) Comparison(a) Manitoba(i) Part II Benefits

- M.P.I.C. will pay for all medical, surgical, dental, hospital, ambulance, professional nursing, chiropractic, and other related expenses, including orthopedic and optical appliances, which are not covered by insured health services (emphasis mine) [s.9(1)].
- limit on medical expenses is \$100,000.00 [s.9(1)].
- funds available for rehabilitation are only that portion of the \$100,000.00 medical expense allowance which remains unexhausted after payment for medical treatment [s.9(2)].
- rehabilitation benefit (if available) is to be applied for occupational rehabilitation or re-training for victim who sustains injuries in an automobile accident by reason of which he or she has become incapable of engagement in a former trade, occupation, profession, or employment for wages or profit [s.9(2)].
- M.P.I.C. may, upon reasonable grounds, request victim to subject himself to treatment or to enroll in a program or course (at M.P.I.C.'s expense); M.P.I.C. may cease to pay Part II Benefits if victim refuses to undergo such treatment or to enroll in such a course [s.19(1)].
- victim must be given at least 120 days notice in writing by registered mail of cessation of benefits, and he or she may (within that 120 day period) apply to a judge of the Court of Queen's Bench for injunction against cessation of benefits [s.19(1)].
- benefits not indexed.
- the medical and rehabilitation benefits are also subject to the general time limit provisions of giving notice to M.P.I.C. within 30 days of accident (or as soon as reasonably practicable) and providing proof of claim within 90 days [ss.38(1), (2) and (3)].

(ii) The Kopstein Report

- medical expenses and rehabilitation assistance increased to maximum of \$200,000.00 (p. 80).
- no recommendation as to indexation of this benefit.

(b) Ontario

(i) The Standard Insurance Policy

- insurer required to pay "reasonable expenses incurred" within four years of accident, to limit of \$25,000.00 per person (Vol. II, p. 760).
- expenses must be incurred for the necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and other insured services under the Health Insurance Act (Vol. II, p. 760).
- rehabilitation provision requires insured to pay for services and supplies which are "essential for the treatment, occupational re-training or rehabilitation" of the victim (Vol. II, p. 760).
- rehabilitation expenses included in the medical expense limit of \$25,000.00 per person (Vol. II, p. 760).
- insurer not liable for payment of any expenses payable or recoverable under any medical, surgical, dental or hospitalization plan (except for similar insurance provided for under another automobile insurance contract or other insurance contract) (Vol. II, p. 760).
- benefits are not indexed.
- both victim's physician and insurer's medical advisor must agree that rehabilitation expenses are essential for the treatment, re-training or rehabilitation of victim (Vol. II, p. 760).

(ii) The Osborne Report

- rehabilitation benefit should be increased from \$25,000.00 to \$500,000.00 per claim, and time

limit should be increased from four years to ten years, or twenty years less the victim's age (whichever is longer) (Vol. I, p. 571).

- "rehabilitation" should be expansively and clearly defined in the Standard Insurance Policy in order to make clear the insurer's obligation to fund physical and vocational rehabilitation; the benefit should be paid for not on an expense-incurred only basis, but by giving the victim (and his or her medical advisors or rehabilitation counsellors) the benefit of the doubt, in order to prevent a delay or denial of rehabilitation (Vol. I, pp. 571-572).
- long-term care benefits should be separated from the rehabilitation provision (ie. it should be a separate benefit, so that the use of one does not reduce the amount of the other), and fixed at \$500,000.00, to permit the injured person as much freedom of movement as can be built into the system; the benefit should not be greater than the monthly cost of group residence which might reasonably accommodate the insured's needs (Vol. I, p. 573).
- benefits to be indexed once a year to annual Consumer Price Index, subject to maximum of twice the stipulated benefit (Vol. I, p. 584).

(c) Quebec

(i) The Automobile Insurance Act

- Section 45 of the Quebec Act provides as follows:

The victim is entitled, in every case, without limit of time and to the extent that they are not already covered by a social security scheme, to the reimbursement of reasonable expenses incurred by reason of an accident for medical and para-medical care, transportation by ambulance or other means for the purpose of receiving such care, the purchase of prostheses or orthopedic devices and replacement of clothing. The victim is also entitled to the reimbursement of such other expenses of a similar nature as may be authorized by the Regie.

No social security scheme may exclude from

its coverage of expenses, the expenses incurred by a victim.

The expenses referred to in the first paragraph may, at the request of the victim, be paid directly to the suppliers.

- Section 46 of the Act provides as follows:

The Regie may take the necessary measures and make the expenditures it considers expedient or advisable to contribute to the rehabilitation of victims, lessen or cure any disability resulting from bodily injury and facilitate the victims' return to a normal life and their reinsertion into society and onto the labour market.

- there is no financial limit to the rehabilitation and medical expenses which the Regie will pay.
- there is no time limit in respect of these payments.
- the Quebec scheme takes a much less restrictive approach to rehabilitation than the corresponding provisions in either Manitoba or Ontario.
- the details as to reimbursement of expenses referred to in Section 45 are set out in a Regulation to the Act.²⁶⁶
- this Regulation provides for coverage for reasonable expenses incurred as a result of an accident for health care administered in Quebec by a physician, dentist, denturologist or optometrist, or for care that is prescribed by a physician and administered by another health professional governed by the Professional Code (R.S.Q. c.C-26) (Que. Reg. c.[A-25, r.7.1], s.1).
- reimbursement is also provided for the purchase, rental, repair or replacement of clothing, prostheses, orthoses, orthopedic and other devices, medical equipment or equipment intended

²⁶⁶ A Regulation Respecting Indemnities Payable under Title II of the Automobile Insurance Act, Quebec Regulation c.[A-25 r.7.1], (hereinafter referred to as "Que. Reg. c.A-25, r.7.1"). Future references to this Regulation will be in the text, in parentheses).

for medical use, and the accessories thereof (Que. Reg. c.[A-25, r.7.1], s.2).

- expenses are also covered for glasses or contact lenses, where the victim did not wear any previous to the accident (Que. Reg. c.[A-25, r.7.1], s.5).
- other expenses covered include reasonable expenses incurred for return transportation for care or treatment required as a result of an accident (Que. Reg. c.[A-25, r.7.1], ss.11-17).
- in addition, expenses such as meals, motel accommodation and taxi or other transportation costs incurred as a result of treatment for an injury are reimbursed in accordance with rates set out in the Schedule, as amended (Que. Reg. c.[A-25, r.7.1], ss.19 and 20).
- the Regie has agreements with both public and private rehabilitation services; there are ten main rehabilitation programs, and approximately \$7-8 million dollars a year is spent on rehabilitation.²⁶⁷
- there are now some 35 rehabilitation specialists working for the Regie, handling about 70 patients each. These specialists deal with vocational rehabilitation, with the hospital side of rehabilitation being dealt with separately by the Quebec Hospital Plan.²⁶⁸
- the Regie has statutory authority to stop payments if a person refuses rehabilitation without just cause [s.69(2)(c)].

(ii) Proposed Amendments

- subject to certain eligibility requirements (to be prescribed by regulation) the actual expenses for personal home assistance may be reimbursed to any accident victim (other than victims who were unemployed and able to work or who worked part-time at the time of the accident) who (due to the

²⁶⁷ His Honour Judge Kopstein, Written notes of interview with Michel Roy and Denis Lesage of The Regie de L'Assurance Automobile du Quebec.

²⁶⁸ Osborne Report, supra, n. 6, Vol. 1, pp. 462-463.

accident) is unable to care for himself and to perform, without assistance, the essential activities of everyday life (cl. 80).

- the expenses will be reimbursed on presentation of vouchers, and they will not exceed \$220.00 per week (cl. 80).
- victims who had part-time jobs or were unemployed (and able to work) and who, as of the accident date, were responsible for children under the age of 16 or for people who (for any reason whatever) were ordinarily unable to hold any employment, are entitled to an indemnity for care and personal assistance expenses (cl. 81).
- the indemnity will be a weekly payment of (minimum) \$250.00 where the victim has the care of one person, increasing by \$30.00 (per additional person) to a maximum of \$340.00 per week (cl. 81).
- this indemnity shall continue for as long as the accident victim is unable to care for the person or persons for whom he or she is responsible (cl. 81).
- if the accident victim described in either of the provisions above needs continual attendance of another person, the amount of the reimbursed expenses (ordinarily subject to a \$220.00 per week maximum) may be increased to \$500.00 a week, according to regulation (cl. 82).
- these additional expenses require the presentation of vouchers, in order to be paid (cl. 82).
- victims who are responsible for the care of other persons may, after 180 days following the accident, choose to receive either the same indemnity that he or she is currently receiving, or an income replacement indemnity equal to that granted to a person who is unemployed (but able to work) at the time of the accident, upon the expiry of 180 days after the accident (cl. 83).
- accident victims who become unable to care for persons under 16 or for persons who are ordinarily unable (for whatever reason) to hold any employment are entitled to reimbursement of expenses incurred to pay for the cost of looking after children (or persons unable to hold any employment), provided that the accident victim(s):

- was a full-time earner or had temporary employment at the time of the accident; or
 - is 16 years of age or older and is a student; or
 - had a part-time job, or holds no employment, yet is able to work (as of the accident date) and has chosen to receive an indemnity equal to that granted to a person who is unemployed, but able to work i.e., as compensation for not being able to look after people (cl. 83.1).
- the reimbursement referred to in the provision immediately above will be paid on a weekly basis (subject to the presentation of vouchers), in accordance with the following amounts:
- \$75.00 where the victim has the care of a person under 16 or a person who is unable (for whatever reason) to hold any employment
 - \$100.00 where the victim has the care of two such persons
 - \$125.00 where the victim has the care of three such persons
 - \$150.00 where the victim has the care of four or more of such persons (cl. 83.1).
- the expenses listed immediately above will be reimbursed for as long as the accident victim is unable to care for these persons; however, if the accident victim has a spouse, no reimbursement will be available unless the spouse (due to illness, disability or absence for the purposes of work or studies) is also unable to care for these persons (cl. 83.1).
- accident victims working without pay in a family enterprise (at the time of the accident) who were unable to perform their regular duties are entitled (for 180 days following the accident) to reimbursement of expenses to cover their replacement (cl. 83.2).
- victim is entitled to reimbursement, subject to conditions prescribed by Regulation, of expenses incurred by reason of the accident (to the extent

that they are not already covered by a social security scheme) for:

- medical and paramedical care;
 - transportation and lodging for the purpose of receiving such care;
 - purchase of prostheses or orthopedic devices;
 - the cleaning, repair or replacement of clothing he was wearing and which was damaged in the accident;
 - other expenses determined by Regulation of the Regie (cl. 83.3).
- these medical, paramedical and other expenses will be reimbursed on the presentation of vouchers, subject to a deductible of \$100.00 (cl. 83.7).
 - Bill 92 contains general rehabilitation provisions that the Regie "may take any necessary measures to contribute to the rehabilitation of a victim, to lessen or cure any disability resulting from bodily injury and to facilitate his return to a normal life or his re-integration into society or the labour market" (cl. 83.8).

(d) New Zealand

- medical treatment required as a result of a personal injury by accident will be paid for under the Act provided that such treatment is not paid for under the Social Security Act 1964 and that the cost is reasonable by New Zealand standards [ss.75(1) and (2)].
- Accident Compensation Corporation is sole adjudicating authority as to what is a reasonable medical expense [s.75(1)(b)].
- dental treatment, repair to artificial limbs, aid or clothing and expenses of transportation for immediate medical attention are all covered under the Act, as are reasonable travelling costs incurred to obtain subsequent medical treatment (ss.73, 74, 76 and 77).
- the Act also covers loss of services of a domestic or household nature, where such services were

provided by the accident victim (before the accident); the Corporation has discretion to make weekly payments for not longer than could reasonably be expected [s.80(2)(a)].

- Corporation is required to take all practicable steps to promote a well-coordinated and vigorous program for medical and vocational rehabilitation of injured persons who are covered under the Scheme and are, for the time being, in New Zealand (s.36).
- rehabilitation programs are required to have the following objectives:
 - the restoration of the injured persons as speedily as possible to the fullest physical, mental and social fitness of which they are capable, having regard to their incapacity; and
 - their restoration to the fullest vocational and economic usefulness of which they are capable, where applicable; and
 - their reinstatement or placement in employment, where applicable [s.36(2)].
- rehabilitation officers work in cooperation with hospitals, rehabilitation agencies, government departments and health care professions, to refer injured persons to these services, where victims suffer injuries which will have a serious impact on their lives, or continue to be off work eight weeks after the accident.²⁶⁹
- rehabilitation officers monitor victims, arrange medical and paramedical services, provide counselling and attempt to reinstate or place the victim in the work force, and prepare recommendations for claims officers on providing rehabilitation aids, modifications to homes or cars, and necessary personal care.²⁷⁰
- Act emphasizes duties of Corporation in relation to promotion of rehabilitation (s.37).

²⁶⁹ P.H. Osborne, supra, n. 189, p. 35.

²⁷⁰ Ibid.

(e) Victoria

- compensation payable for reasonable cost of medical, hospital, nursing and ambulance services to persons injured or killed in transport accidents (s.60).
- "reasonable" determined by reference to a number of factors, including service or provision rendered, expense actually incurred, and the necessity of the service or provision in the circumstances [s.3(1)].
- "medical," "hospital," "nursing," and "ambulance" service are defined at length in the Act, and include examination for treatment by doctors, dentists, optometrists, physiotherapists, chiropractors, and chiropodists and also include provision or replacement of crutches, artificial members, eyes or teeth, spectacles or hearing aids and medicine [s.3(1)].
- psychological treatment (where referral has been made by a medical practitioner) is also covered [s.3(1)].
- the first (as of July 1, 1988) \$301.00 of medical expenses [this figure is indexed in accordance with the formula stipulated in Section 61(1) of the Act; see p. 98] is not covered under the Act [s.43(1)(b)].
- statute emphasizes rehabilitation [s.8(e)].
- compensation provided for aid, treatment, assistance, appliance, apparatus or any other service, including attendant care, household help, structural modifications to a home or vehicle [s.3(1)].
- these services must be approved by the Commission [s.3(1)].
- rehabilitation costs must be "reasonable" (see above) [s.60(1)(a)].
- compensation includes payment of the reasonable costs of employing a person to provide services of a domestic nature or services relating to nursing and attendance of the victim [s.60(1)(c)].
- if victim was engaged mainly in housekeeping duty

or child care for the period of one month preceding the accident, and did not receive a salary or wages in respect of those duties, compensation is payable for the reasonable costs incurred in employing another person to undertake such duties, during the first five years after the death or injury [s.60(1)(b)].

- reasonable travelling expenses for the parent or guardian of children injured in transport accidents are also covered [s.60(2)].

(f) N.S.W. Law Reform Commission Report

- necessary and reasonable medical, hospital and related services should be provided to all people injured in transport accidents (Vol. II, p. 366).
- victims should be entitled to receive hospital and medical services through the general health care system on the same basis as other sick and disabled members of the community (Vol. II, p. 386).
- where ancillary services, such as physiotherapy, occupational therapy, home nursing, chiropractic treatment and speech therapy is necessary for the victim and is not covered by Medicare, the Corporation should arrange for the provision of these services which are reasonably required by transport accident victims (Vol. II, pp. 389-390).
- victims should be granted a right to rehabilitation in the legislation (Vol. I, p. 257).
- Corporation should have broad powers to ensure provision of rehabilitation and support services, including power to:
 - make financial and other arrangement with government and private service providers for rehabilitation and support services;
 - monitor service provided to ensure satisfactory standards; and
 - provide services or assistance directly to transport accident victims (Vol. I, p. 259).
- a Rehabilitation Section should be created to administer the Scheme's rehabilitation functions

(Vol. I, p. 259).

- the Corporation is under a duty to provide rehabilitation services as soon as possible after the accident (Vol. I, p. 261).
- Corporation should pay necessary travelling and accommodation expenses incurred by victim in obtaining rehabilitation treatment (Vol. I, p. 263).
- Corporation should have power to encourage and support development of rehabilitation training programs for medical practitioners and other health care professionals (Vol. I, p. 264).
- as much as possible, rehabilitation facilities should be decentralized (e.g. through the use of mobile rehabilitation teams in remote parts of the jurisdiction), in order to allow rehabilitation of victims in or near to their home communities (Vol. I, pp. 265-266).
- compensation should include cost of necessary pharmaceutical supplies, prosthetic, orthotic and other corrective medical equipment needed for disabilities suffered in a transport accident (Vol. I, p. 266).
- victims should also be compensated for the cost of providing necessary aids and appliances and altering existing equipment used by disabled transport accident victims; to this end, borrowing pools of equipment should be established to be used by victims of transport accidents (Vol. I, p. 267).
- Corporation should have power to make grants for research into the needs of transport accident victims (Vol. I, p. 268).
- vocational training programs should be provided for accident victims and for the dependant spouses of persons killed in transport accidents (Vol. I, p. 268).
- reasonable work place modifications should be paid for, where a victim continues to be employed following the accident, and where modifications are necessary to enable the victim to work in or gain access to the work place (Vol. I, p. 269).

- in determination of what modifications are "reasonable," regard should be had to:
 - cost of modification;
 - benefit of modifications to employer and other worker or customer and contribution to cost by the employer; and
 - likely duration of employment of accident victim (Vol. I, p. 269).
- Corporation should have power, for a specified period, to contribute to cost of workers' compensation insurance incurred by employer of disabled accident victim (to assuage the fears of employers or the workers' compensation system that if victim aggravates disability at work, or sustains a second injury which is more severe due to the pre-existing disability caused by the transport accident, that liability may arise to pay workers' compensation) (Vol. I, p. 270).
- in order to assure that victim is not worried that by attempting to return to work, he or she will lose his or her loss of earnings capacity benefit, Corporation should have power to approve the entry into or resumption of employment by disabled accident victim on basis that, if employment does not continue beyond a specified period, persons should be entitled to compensation for loss of earning capacity without having to apply for such benefit again (Vol. I, p. 272).
- Corporation should have power to provide financial counselling or continuing financial assistance for loss of earning capacity for a specified person to an accident victim who embarks on a business venture following the accident (Vol. I, p. 273).
- rehabilitation program should include training for independent living, social rehabilitation and leisure counselling (Vol. I, p. 274).
- persons who perform substantial household services for either himself and/or his or her household family member and who, due to the accident, has suffered a significant impairment of the capacity to perform household services should be entitled to replacement household services for the maintenance and preservation of the household of which he or she is a member (Vol. I, pp. 283-284).

- in determining extent of household services benefit, Corporation should have regard to:
 - household services provided by victim before the accident, and extent to which he or she can provide such services after the accident;
 - number of household family members, their ages and need for such services;
 - household services that other family members could reasonably be expected to provide after the accident;
 - special factors affecting the need of the disabled person and other members of his family for household services;
 - services provided by other household family members or other family members before the accident;
 - need to avoid substantial disruption to employment or daily lives of household family members; and
 - other relevant circumstances (Vol. I, p. 284).
- after four weeks following the date of the accident, the Corporation should also have regard to the following additional criteria:
 - compensation and other benefits provided to disabled person or other household family members arising out of the accident;
 - earnings and other income of spouse of disabled person; and
 - resources (financial or otherwise) available to household family members to meet the need for household services (Vol. I, p. 285).
- where appropriate, a member of the disabled person's household or family may be hired to provide the replacement household services (Vol. I, p. 287).
- if accident victim is unable to provide adequately for his or her personal care, he or she should be

entitled to receive attendant care services, i.e. services (other than medical or nursing care) which provide for the essential regular personal care of the victim (Vol. I, p. 289).

- in assessing need for attendant care services, regard should be had to:
 - nature of disability and effect on victim's ability to provide for his or her own personal care;
 - medical and nursing services already being received by the accident victim, to the extent they provide for his or her personal care;
 - wishes of disabled person to live outside an institutional environment, to the extent that it is reasonable to meet these wishes;
 - extent to which such services are required to enable victim to undertake or continue employment;
 - assessment made by rehabilitation assessment team; and
 - standards developed by governments or private agencies in determining needs of disabled persons for such services (Vol. I, p. 290).
- Corporation should take into account the attendant care services that other household family members could reasonably be expected to provide (Vol. I, p. 291).
- services should be provided through existing government or private agencies, but costs should be met by the Scheme (Vol. I, p. 292).
- where appropriate, member of disabled person's family should be engaged to provide attendant care services; persons so engaged would be entitled to equivalent payment received by non-family providers of such care (Vol. I, p. 293).
- where necessary for spouse, parent or child of victim to attend that person continuously, the spouse, parent or child should be paid compensation as if he or she had been incapacitated by an injury sustained in a transport accident, to a

maximum period of four weeks (Vol. I, p. 294).

- reasonable and necessary travel and accommodation expenses incurred by spouse, parent or child of victim in order to provide care and attention to that victim should be compensated, for a period of four weeks from the date of the accident, or longer in exceptional cases (Vol. I, p. 295).
- Corporation should have power to make loans to disabled victims who have or would have difficulty borrowing money to purchase a home (Vol. I, p. 298).
- if victim suffers long-term physical disability which impairs his or her mobility or ability to live independently within her home or residence, such person should be entitled to reasonable cost of necessary modifications to his or her home or residence; Corporation should take into account whether they are required to allow victim to:
 - gain access to residence;
 - enjoy reasonable freedom of movement within;
or
 - live independently within the home or residence (Vol. I, p. 300).
- modifications should only be compensated if person intends to live in residence for a substantial period; but modification compensation should not be subject to condition that victim is owner or tenant of the premises to be modified (Vol. I, p. 300).
- where modification adds substantially to value of home or residence (whether or not the accident victim owns that residence), the Corporation should have power to impose a condition requiring payment (to Corporation) of increase in value of home on the sale of premises or on death of disabled person (Vol. I, pp. 301-302).
- Corporation should meet reasonable cost of victim who is required (due to his disability) to live in an institution (Vol. I, p. 302).
- compensation should be paid for cost of necessary modifications to a vehicle owned or regularly used by victim or member of his or her family (Vol. I,

p. 306).

- Corporation should have power to contribute to cost of purchasing motor vehicle where necessary, to avoid financial hardship to accident victim; subject to condition requiring repayment of such contribution on re-sale of vehicle or on death of accident victim (Vol. I, p. 307).
- mobility allowance equivalent to five percent of A.W.E. should be payable to persons unable to use public transport unassisted, and who incur expenses in travelling by reason of their disability; this compensation should not be paid during the six months immediately following the accident, unless the circumstances are exceptional (Vol. I, p. 308).

(2) Analysis

Some initial observations are appropriate concerning Manitoba's no-fault medical expense and rehabilitation assistance provision. Firstly, the funds available for rehabilitation are only that portion of the \$100,000 medical expense allowance which remains unexhausted after medical treatment. The Kopstein Report has noted that other jurisdictions which offer separate funds for medical expenses and rehabilitation expenses encourage rehabilitation, while the Manitoba Regulation does not. The Manitoba Regulation provides that only the unused portion of the medical expense benefit may be used for rehabilitation. Therefore, there is no separation of funds and monies are not available for rehabilitation purposes until the medical expenses have been satisfied (this does not encourage

rehabilitation).²⁷¹

In addition, the Manitoba provision restricts rehabilitation to occupational rehabilitation or retraining. The Kopstein Report noted that attempting to teach new occupational skills in the absence of rehabilitation of the psychological consequences of a crippling injury may be fruitless.²⁷²

To be fair to M.P.I.C., it has been observed that the Corporation has interpreted the rehabilitation provision referred to above liberally.²⁷³ M.P.I.C. has attempted to create a rehabilitation policy which exceeds what one might expect from the wording of the rehabilitation provisions in the Regulations. Money has been applied to the rehabilitation victims in several ways, including training and education, the provision of facilities to improve the quality of life, and through extended disability payments as an incentive and to enable victims to return to work. Included are other subsidies to salaries earned through employment.²⁷⁴ However, the Kopstein Report notes that between August of 1986 and June of 1988, rehabilitation assistance was rendered in only 28 cases. This led His

²⁷¹ Kopstein Report, supra n. 1, Vol. 2, Position Paper No. 2, pp. 45-47.

²⁷² Ibid., p. 47.

²⁷³ Ibid.

²⁷⁴ Ibid.

Honour Judge Kopstein to conclude that only the most obvious cases received rehabilitation support.²⁷⁵

It should be noted that by virtue of section 19(1) and section 19(2) of Manitoba Regulation 290/88R²⁷⁶ M.P.I.C. may, upon reasonable grounds, request an injured person to subject himself to treatment or to enroll in a program or course, at the cost of M.P.I.C., and the Corporation may cease to pay Part II benefits if the injured person refuses to undergo such treatment or to enroll in such a course. However, the insured must be given at least 120 days notice in writing by registered mail of the cessation of payment of benefits, and he or she may, within that 120 day period, apply to a judge of the Court of Queen's Bench for an injunction against the cessation of benefits. To M.P.I.C.'s credit, this procedure has apparently only been used once, and in that case the Corporation later withdrew the application to have benefits cut off (due to the particular facts of the case).²⁷⁷

As of June 1, 1988, there were 128 long-term disability claimants on file with the Corporation. Their injuries

²⁷⁵ Ibid., pp. 47-48.

²⁷⁶ Man. Reg. 290/88R, ss. 19(1) and 19(2).

²⁷⁷ C.B. Cramer and H.J. Armstrong, Potential Changes in Manitoba's Public Insurance Corporation Plan for Motor Vehicle Accident Injury and Death, July 1988 (unpublished Research Paper prepared for the Autopac Review Commission), Vol. 1, p. 159. This Paper will hereinafter be referred to as "Cramer and Armstrong."

have been categorized as follows:

Paraplegic	28
Quadriplegic	20
Brain Damage	44
Amputee	3
Comatose	4
Other	19 ²⁷⁸

The Kopstein Report notes that approximately half of the claimants on the Long-Term Disability Program have some potential for rehabilitation, ranging from remote to excellent.²⁷⁹ However, the Report also states that although the medical expense coverage was increased to \$100,000 on July 15, 1987, the increase has not resulted in much of a change in regard to the amounts of money utilized for rehabilitation purposes. No explanation is given for this failure to take advantage of the increased amount of the benefit.²⁸⁰

There is no single agency in Manitoba with a coordinated approach to the subject of rehabilitation.²⁸¹ The authors of the Research Paper prepared for the Autopac

²⁷⁸ Ibid., p. 156.

²⁷⁹ Kopstein Report, supra n. 1, Vol. 2, Position Paper No. 2, p. 48.

²⁸⁰ Ibid.

²⁸¹ Ibid.

Review Commission argue that a positive program of occupation counselling, adult education, special apprenticeship and work-related training programs, subsidized hiring programs in cooperation with employers and tailor-made programs are needed for each individual for whom rehabilitation is sought.²⁸² The authors state that these objectives cannot be made subordinate to an accident scheme which purposely undercompensates victims, in order to provide some "incentive" to self-sufficiency.²⁸³ An important step towards rehabilitation would be to provide incapacitated persons with the physical environment which is suited to their needs. This can be achieved through the modification of existing dwellings and automobiles, the provision of prosthetic devices, modified public transport, adapted places of work and other physical and structural accommodations.²⁸⁴ The Research Paper stresses concentration of effort in four main areas:

- individual assessment
- psycho-social counselling
- physical therapy
- career development/occasional rehabilitation²⁸⁵

The starting point for this effort would be to improve

282 Cramer and Armstrong, supra n. 277, Vol. 1, p. 160.

283 Ibid.

284 Ibid.

285 Ibid., p. 163.

the Corporation's record-keeping, with particular attention to strengthening the source of real information (data concerning the injuries suffered, efforts made towards rehabilitation, and the special needs of the victims), to facilitate more effective future inquiries.²⁸⁶

Judge Kopstein concluded that the current Manitoba provision is inadequate, and that M.P.I.C.'s rehabilitation program is limited in scope and does not appear to be proactive.²⁸⁷ He recommended that the rehabilitation provision in the Manitoba Regulations be amended to highlight the importance of rehabilitation, and that M.P.I.C. must develop a policy towards rehabilitation which will enable it to assist disabled accident victims to return (as much as possible) to a normal life.²⁸⁸

A major problem with Ontario's medical and rehabilitative provisions, as cited by Mr. Justice Osborne, was the looseness of the definition of "rehabilitation" in Section B of the Standard Insurance Policy, and in its interpretation by private insurers. Rehabilitation, as covered by Section B (practically-speaking) relates to out-of-hospital rehabilitation, i.e. vocational and physical rehabilitation (O.H.I.P. looks after in-hospital rehabilitation-related

²⁸⁶ Ibid., p. 166.

²⁸⁷ Kopstein Report, supra, n. 1, Vol. II, Position Paper No. 2, p. 101.

²⁸⁸ Ibid., p. 103.

expenses).²⁸⁹

Section B requires the insured to incur the rehabilitation expense before the insurer must pay for it. Many accident victims might not (understandably) want to incur rehabilitation expenses if they could not be sure that the expenses would be covered. This has led to the no-fault rehabilitation benefit being renamed the "no-pay rehabilitation benefit."²⁹⁰

A second major problem with rehabilitation is that the insurer's "medical advisor" has a sort of veto power over proposed rehabilitation (i.e. he or she must approve the program). The insured may still sue, but this is slow and expensive. The combination of this "veto power" with the "no-pay" problem cited above leads, in Mr. Justice Osborne's opinion, to ineffective provisions regarding rehabilitation.²⁹¹

In Quebec, the benefits in respect of medical expenses and rehabilitation assistance are unlimited by time and amount. The Regie will reimburse reasonable expenses incurred by reason of an accident for medical and paramedical care, transportation by ambulance or other means, the purchase of prostheses or orthopedic devices and replacement of clothing, to the extent that these amounts

²⁸⁹ Osborne Report, supra n. 6, Vol. I, p. 161.

²⁹⁰ Ibid., p. 162.

²⁹¹ Ibid., p. 163.

are not already covered by a social security scheme. Manitoba should adopt a similar provision (i.e. benefits would be unlimited by time and amount).

Regulations passed pursuant to the Quebec Act provide specific details of the expenses which will be reimbursed in respect of medical expenses and rehabilitation assistance. These include:

- the purchase, rental, repair or replacement of clothing, prostheses, orthopedic and other devices;
- glasses or contact lenses, where the victim did not wear any previous to the accident;
- reasonable expenses incurred for return transportation for care or treatment required as a result of an accident;
- meals, motel accommodation and taxi or other transportation costs incurred as a result of treatment for an injury.²⁹²

The proposed amendments to the Quebec legislation introduce specific provisions with respect to the reimbursement of expenses for personal home assistance, care and personal assistance expenses (where the victim looked after children or persons who are unable to care for themselves prior to the accident), reimbursement of expenses to cover the absence of a person who (at the time of the accident)

²⁹² Que. Reg. c.A-25, r.7.1.

was working without pay in a family enterprise and, after the accident, were unable to perform their regular duties (reimbursement is payable for 180 days following the accident).²⁹³

The proposed amendments can be seen as generous in that they introduce specific provisions for personal care assistance in various circumstances. However, certain aspects of the proposed amendments can be criticized. For instance, the separation of accident victims into different categories (i.e. classification of victims) can lead to injustices in the provision of necessary medical and rehabilitative assistance to these victims.

Consider the provision which provides for the reimbursement of actual expenses for personal home assistance. This is applicable to victims other than those who are unemployed and able to work, or who work part-time, or who worked without pay in a family enterprise (at the time of the accident). That is, non-earners are excluded from the benefit for personal home assistance, unless (emphasis mine) they can show that as of the accident date, they were responsible for either children under the age of 16 or for people who (for any reason whatsoever) were ordinarily unable to hold any employment. In this situation such victims are entitled to an indemnity for care and personal assistance expenses.

²⁹³ Bill 92, cls. 81, 82, 83.1 and 83.2.

Why should persons who are unemployed or who only worked part-time (when the accident occurred) be subject to this additional requirement of having to be responsible for children or persons who are unable to look after themselves? The provision is unjust; the personal home care assistance should be extended to all accident victims (subject to circumstances which depend on the victim himself, i.e. availability and willingness of family members to look after him or her etc.). Specific provisions should be modelled on the New South Wales Law Reform Commission approach (to be discussed below).

In New Zealand, problems with the rehabilitation program include inadequate staffing levels and the need for better training of rehabilitation officers.²⁹⁴ The Corporation has appointed rehabilitation officers who work in cooperation with other institutions such as hospitals, rehabilitation agencies, government departments and health care professions. These officers refer all injured persons to various rehabilitation services, where the victims have suffered injuries which will have a serious impact on their lives, or continue to be off work for eight weeks.²⁹⁵ Rehabilitation officers monitor victims, arrange medical and para-medical services, provide counselling and attempt to reinstate or place the accident victim in the work

²⁹⁴ P.H. Osborne, supra, n. 189, p. 36.

²⁹⁵ Ibid., p. 35.

force.²⁹⁶ The officers also prepare recommendations for claims officers on providing rehabilitation aids, modifications to homes or cars, and necessary personal care.

A recent Report on the Accident Compensation Scheme in New Zealand concluded that a national policy of rehabilitation was needed, since the Corporation was concerned with only a small proportion of the disabled and, in particular, with those people requiring rehabilitation of the kind referred to in the Act.²⁹⁷

The N.S.W. Report contains the most comprehensive provisions with respect to the benefits for medical expenses and rehabilitation assistance. Some of the provisions which should be adopted into a comprehensive compensation Scheme for Manitoba include:

- administrators of the Scheme should arrange for the provision of services such as physiotherapy, occupational therapy, home nursing, chiropractic treatment and speech therapy where such services are necessary for the victim and are not covered by Medicare;
- a right to rehabilitation should be explicitly provided for in the legislation;
- administrators of the Scheme should have broad

²⁹⁶ Ibid.

²⁹⁷ New Zealand. Law Commission. Report No. 4, Personal Injury: Prevention and Recovery (Wellington: The Commission, 1988), pp. 41 and 44.

powers to ensure the provision of rehabilitation and support services, including:

- make financial and other arrangements with government and private service providers for rehabilitation and support services;
- monitor services provided to ensure satisfactory standards, and
- provide services or assistance directly to the victim;
- rehabilitation facilities should (as much as possible) be de-centralized to allow rehabilitation of victims in or near their home communities;
- vocational training programs should be provided for accident victims and (emphasis mine) for the dependent spouses of persons killed in automobile accidents;
- reasonable work place modification should be paid for, in the following circumstances:
 - modifications are necessary to allow the victim to work in or gain access to the work place,
 - modification costs are reasonable (see pp. 266-267),
 - administrators of Scheme should have power to contribute to cost of workers' compensation insurance to assuage fears of employers or of

the workers' compensation system that if victim aggravates disability at work or sustains second injury which is more severe due to the pre-existing disability (originally caused by the automobile accident), that liability may arise to pay workers' compensation, and

- administrators of Scheme should have power to approve the entry into or resumption of employment by the accident victim on the basis that, if the employment does not continue beyond a specified period, the victims would be entitled to compensation for loss of earning capacity without having to apply for such a benefit again (this is a "return to work" provision which is highly useful, because it helps an accident victim to gain the confidence to return to work, without fear of thereby losing his or her benefits);
- program should include training for independent living, social rehabilitation and leisure counselling;
- household services benefit should be available to persons who (prior to the accident) performed substantial household services for either himself

- and/or his or her household family members;
- in determining the extent of the household services benefit, Corporation should have regard to a number of circumstances (see pp. 267-268);
 - if victim is unable to provide adequately for his or her personal care, he or she should be entitled to receive attendant care services, i.e. services (other than medical or nursing care) which provide for the essential regular personal care of the victim;
 - in assessing the need for attendant care services, regard should be had to a number of circumstances (see pp. 268-269, supra);
 - administrators of Scheme should take into account the attendant care services that other household family members could reasonably be expected to provide;
 - where appropriate, a member of the victim's family should be engaged to provide such attendant care services (these family members would be entitled to the same payment as that received by non-family providers of such care);
 - administrators of Scheme should have power to make loans to victims for the modification or purchase of a home, subject to the following conditions:
 - regard should be had to whether modifications

are necessary for victim to gain access to his or her residence, enjoy reasonable freedom of movement within, or live independently within the home or residence,

- modifications should only be compensated if the person intends to live in residence for a substantial period (victim need not be owner or tenant or premises to be modified),
- if modification adds substantially to value of home or residence, administrators of Scheme should be able to require payment to them of increase in value of home on sale of premises;
- compensation should be paid for the cost of necessary modifications to a vehicle owned or regularly used by the victim or members of his or her family.

If the above provisions were incorporated into a compensation Scheme for automobile accident victims in Manitoba, it will be observed that many of the concerns and suggestions raised in the Kopstein Report would be satisfied.

The institutional structure of rehabilitation can make a significant difference to the overall success (or failure) of the rehabilitation efforts.²⁹⁸ One observer

²⁹⁸ Ison, supra n. 177, p. 630.

has noted that, in workers' compensation schemes, there are several advantages to the provision of clinical rehabilitation. They are as follows:

- because rehabilitation is perceived as a way of saving vast sums of money in compensation, it is also perceived as something on which money should be spent. Therefore, clinics run by workers' compensation schemes sometimes have equipment in other facilities beyond those that are available elsewhere;
- accident victims are commonly classified in compensation systems and by employers in arbitrary and extreme ways, such as "unfit for work" or "fit for work," often with an intermediate classification, such as "fit for light work." These classifications can be counter-productive in relation to a worker who wishes to return to work but is worried as to whether or not he will be able to adjust. A disabled worker may like to feel his way back to full employment, perhaps beginning with a little, being able to rest or quit at a time of his own choice and without being subject to a pre-determined level of performance. This graduated return to work is, however, often unattainable in the work place. Clinics run by boards such as the Workers' Compensation Schemes

can, if they work well, help to overcome this problem;

- the administration of clinical rehabilitation by a compensation board might create a sense of urgency that is crucial to the momentum of rehabilitation.²⁹⁹

However, board clinics may have certain negative effects on the recovery of patients:

- admission to a board clinic can increase the number of doctors by whom a patient is examined and may also result in the disorientation of the accident victim (if patient normally lives beyond daily travelling distance of the clinic, he or she may be removed from the support of family life);
- administration of a clinical facility by an administrative board can also increase anxiety in other ways, i.e. patients sometime assume that success in treatment will be measured by the termination of compensation payments, and that consequently incentives or pressures might exist for the clinic staff to be unduly hasty and classify patients as recovered (if this fear occurs, the victims may react by trying to avoid or deny partial success therapy or by otherwise striving to prove their disabilities);

²⁹⁹ Ibid., p. 631.

- if the administrative structure of the clinical rehabilitation aspect of the compensation Scheme is perceived as a form of benefit control, this could lead to a reduction in candour by accident victims, which could aggravate the difficulties of diagnosis and the prescription of treatment;
- clinics run by administrative boards or schemes have a captive clientele, and the quality of their output is not monitored by market movements. They are relatively immune from market pressures which might require sensitivity to client satisfaction or to client perceptions of the quality of treatment. This problem, however, can be dealt with by allowing market mechanisms to operate (to some extent) in the administrative scheme, i.e. the board could allow the patient to seek treatment elsewhere, at a clinic of the victim's choice.³⁰⁰

It is submitted that an approach to medical and rehabilitation assistance, based on the Quebec (unlimited benefits) and New South Wales (specific and detailed provisions with respect to assistance available) Schemes would adequately deal with many of the concerns raised above. However, this conclusion is subject to the caveat that many of the problems which have been noted in ad-

³⁰⁰ Ibid., pp. 631-632.

ministrative schemes which offer clinical rehabilitation (such as workers' compensation) can be traced directly back to the attitudes of the Schemes' administrators. Therefore, as much as possible, the legislation should emphasize in a detailed and specific manner, the assistance to be offered and the benefits available (see recommendations on pp. 281-285 and 291-293).

Another important issue dealing with rehabilitation of accident victims is social rehabilitation. This term refers to assistance to victims to help them to readjust to employment, family, recreational and community life. Administration of rehabilitation services by boards or schemes specifically charged with compensation of accident victims can have substantial advantages compared with separate structures. In particular, this administration tends to create a sense of urgency that is crucial, if damaging delays to rehabilitation are to be avoided. If the claims adjudicator and the rehabilitation consultant are working under a common direction for the same organization, this can promote consistency in communications, and minimizes the risk of anxieties being created where the adjudicator and the rehabilitation consultant have different expectations of the patient (i.e. should use a unified approach to compensation).³⁰¹

However, such Schemes can have significant problems.

³⁰¹ Ibid., p. 633.

The major problem is timing. If there is a delay in adjudication of a claim, there may also be a consequential delay in commencement of rehabilitation until the administrators of the Scheme decide whether the disability is compensable under that Scheme. For example, in relation to disability insurance, cases arise in which the insurer delays provision of equipment to see what government services will be provided, and vice versa.³⁰²

The opposite problem may arise near the end of a claim. That is, the recovery of a patient and the termination of compensation benefits (or the assessment of a permanent pension) do not as a matter of law terminate eligibility for rehabilitation services, but they often have that effect in practice. Another problem is that this single structure may restrict a patient's ordinary freedom of choice as to the supply of rehabilitation services.³⁰³

It has also been noted that vocational rehabilitation is sometimes pursued to the exclusion of other social goals. This approach tends to exclude other aspects of social rehabilitation (i.e. recreational activity or domestic adjustment) either as independent goals, or as a prelude to employment. There is also the possibility that the administrators of the Scheme will overlook the potential risk of the pre-injury employment as a cause of

³⁰² Ibid., pp. 633-634.

³⁰³ Ibid., p. 634.

further injury (i.e. the administrators will not consider whether or not some alternative employment might be healthier for the claimant in the long run).³⁰⁴

Commentators have noted the difficulties which have arisen where disability insurers seek involvement in rehabilitation programs, even to the extent of arguing that they should be part of the "rehabilitation team." Any such role for the disability insurer would create an obvious conflict of interest, and the claim of the insured to such a role might cause anxiety to the victim (especially where his or her attending physician appears to go along with the recommendations of the insurer). This problem can be dealt with by ensuring the proposed rehabilitation programs are likely (where possible) to result in employment income of a relatively generous amount, for a certain and significant period of time.³⁰⁵

The problem cited immediately above really is in respect of compensation for partial disability. In compensation schemes which allow benefits for partial disability, this provision (combined with a provision which allows the victim to attempt a "return to work" without impairing his or her right to benefits) can significantly reduce the concerns of the accident victim that efforts towards rehabilitation are really only designed as a means

³⁰⁴ Ibid., pp. 634-635.

³⁰⁵ Ibid., p. 635.

of quickly cutting off the compensation payable.

A comprehensive automobile accident compensation Scheme for Manitoba should contain appropriate provisions (based on the New South Wales approach) which deal with the concerns raised above. These can include conditions which:

- allow the victim to return to work without impairing his right to compensation (for a defined period of time);
- provide for benefits which take advantage of existing government services in respect to rehabilitation (so that the administrators of the Scheme do not wait to see if rehabilitation will be provided through some other Scheme or branch of government);
- direct the administrators of the Scheme to place emphasis on goals such as recreational activities or domestic adjustment which is equivalent to the emphasis placed on vocational rehabilitation;
- direct the administrators of the Scheme to specifically consider whether or not the victim's pre-injury activity could be a cause of further injury, or aggravate the existing injury, and whether or not some alternative employment should be sought for the victim;
- ensure that persons charged with the administration of different components of the Scheme (i.e.

those who adjudicate upon the eligibility for and the amount of benefits, and those who are responsible for the rehabilitation of the accident victim) have unified goals, underscored by the need to provide adequate and reasonable compensation as well as the need to (as much as possible) rehabilitate the accident victim.

g. Death Benefits

(1) Comparison

(a) Manitoba

(i) Part II Benefits

- M.P.I.C. will pay actual funeral expenses of up to \$2,500 (this level has been recently raised from the previous level of \$1,500) where:
 - (a) an insured suffers loss of his or her life by reason of an injury arising out of an accident for which coverage is provided under Division II, whether that loss of life is immediate or occurs subsequent to treatment; and
 - (b) that loss of life is directly attributable to that injury, which is the primary cause thereof... (s.10).
- no time limit is imposed in relation to the funeral expense benefit; it would appear, however, that the injury sustained in the accident must be the primary cause of the victim's death (ie. there is a causation requirement).
- section 11(1)(a) provides for payment of \$10,000 to the "primary dependant."
- "primary dependant" includes:
 - (i) surviving wife or husband of an insured who died as a result of

injuries sustained in an accident
...

- (ii) the dependent child or children of a deceased insured, if the wife or husband ... predeceases the insured, or is for any other reason prevented from qualifying as a primary dependant under clause (a); or
 - (iii) the dependent or dependent parents of an insured, if the insured is not survived by [a wife, husband, child or children] (s.4).
- where there are more than one primary dependants, only one of them will be treated as a primary dependant, and the others will be regarded as secondary dependants, but the total amount payable to all such persons shall be divided equally among them [s.11(2)].
 - for example, suppose a man dies in an automobile accident, and his wife has predeceased him. There are three surviving dependent children. Each of these persons would clearly qualify as "primary dependants."
 - however, only one of them will (for the purposes of calculating the amounts payable) receive the primary dependant benefit of \$10,000.00. The others will each receive (for calculation purposes) the secondary dependant benefit of \$2,000.00 [s.11(1)].
 - the total amount of death benefits payable is \$10,000.00 plus (2 x \$2,000.00) equals \$14,000.00. Therefore, each of these three people will actually receive one-third of \$14,000.00, or \$4,667.00 [s.11(2)].
 - the definitions of "wife," and "husband" under the Regulations include common-law spouses who have lived and cohabited in the same dwelling with one person (the insured) to the exclusion of all others, continuously for at least two years (s.4).
 - other dependants to be considered are the dependent child(ren) and dependent parent(s) of the insured:
 - "Dependent" child is:

- (i) a child who is under the age of 18 years and who is dependent upon an insured; or
 - (ii) a person of 18 years of age or over, who, by reason of mental or physical infirmity, is unable to provide himself or herself with the necessities of life; or
 - (iii) a person who is enrolled, and in full-time regular attendance, at a university, technical or professional training school, or other recognized institution of learning, and who is dependent upon an insured (s.4).
- the child or person referred to above must be a child of the insured, or someone to whom the insured stands in loco parentis (s.4).
 - "dependent parent" is one who is unable to provide himself or herself with the necessities of life without the assistance of the insured (s.4).
 - it is clear from the definition of "primary dependant" set out above, that a dependent child or dependent parent of the insured may indeed be considered a primary dependant.
 - in this case, the parent or child would receive primary dependant benefit of \$10,000.00 [s.11(1)].
 - if the dependent parent or child does not qualify as a primary dependant, he or she would be classed as a "secondary dependant" (s.4).
 - in this case, he or she would be eligible for the secondary dependant benefit of \$2,000.00 [s.11(1)].
 - as indicated above, if there is more than one primary dependant (i.e. several dependent children or parents) then, for the purposes of determining the amount of benefits payable, only one of these persons would be regarded as a primary dependant [s.11(2)].

- the others will be classed as secondary dependants; however, the amount payable to all these persons shall be divided equally between them [s.11(2)].
- where there is a surviving spouse of the accident victim, and the surviving spouse qualifies as a "primary dependant" under the Regulations, he or she will be regarded as the primary dependant and the dependent children or parents of the insured will be regarded as "secondary dependants" of the accident victim (s.4).
- therefore, the problem of several primary dependants would not arise in this situation.
- when the insured and his or her spouse are both killed within seconds of each other, the spouse is also regarded as an "insured" for the purposes of the death benefit, and the dependent children (if any) will receive death benefits in respect of both deaths, i.e. the children will be treated as dependants of both the insured and the spouse.³⁰⁶
- if no spouse, parents, or children qualify as primary or secondary dependants, Section 11(3) of the Regulations comes into play.
- in this case, M.P.I.C. shall pay \$4,000.00, to be divided equally among the parents, children over eighteen, brothers or sisters of the insured, who were receiving some financial support from the insured at the time the accident occurred [s.11(3)(a)].
- if an infant child dies as a result of an injury sustained in a motor vehicle accident, and no benefits are otherwise payable in respect of his or her death, the parents with whom he or she usually lived are entitled to \$2,000.00 [s.11(3)(b)].
- if a person who is over 18 years of age is killed in an automobile accident, and leaves no surviving spouse, and no benefits are otherwise payable under Section 11 in respect of his or her death, the deceased's parents are entitled to \$2,000.00 [s.11(3)(c)].

³⁰⁶ Re Public Trustee of Man. and M.P.I.C. (1974), 46 D.L.R. (3d) 762 (Man. Q.B.).

- the death benefits in respect of deceased children do not apply to stillborn children whose death in the womb is the result of an automobile accident.³⁰⁷
- death benefits payable to survivors will be reduced to the extent of any amount previously paid by M.P.I.C. under Section 20 as an impairment benefit (s.28).
- death benefits are not reduced by reason of prior payment of disability benefits to the victim, ie. while victim was still alive (s.26).
- benefits are not indexed.
- even if accident victim is/was eligible for or receives workers' compensation, dependants are still eligible for the death benefits under Section 11 (Section 34).

(ii) The Kopstein Report

- funeral expenses to be increased to maximum of \$3,500.00 (p. 80).
- death benefits payable to survivors to be modelled on Quebec Scheme:
 - death benefit will be annuity based on percentage of the weekly disability benefit that the deceased would have received had he or she survived, and will vary according to the number of dependants:
 - one dependant: 55 percent of permanent weekly disability benefit
 - two dependants: 65 percent of permanent weekly disability benefit
 - three dependants: 70 percent of permanent weekly disability benefit (this increases to a maximum of seven dependants or 90 percent of the permanent weekly disability benefit) (pp. 80-81).

³⁰⁷ Mathison v. Hofer, [1984] 3 W.W.R. 343 (Man. Q.B.).

- as benefit is to be based on annuity which will be otherwise payable to accident victim, it is assumed that the benefit is subject to indexation in accordance with the annual growth rate in the Average Industrial Composite Index of Wages, and that the benefit would be offset by U.I.C., C.P.P. and workers' compensation, where any amounts are payable to the victim (or his/her estate) from these sources (p. 82).

(b) Ontario

(i) The Standard Insurance Policy

- insurer is liable for payment of funeral expenses actually incurred up to a maximum of \$1,000.00 in respect of the death of any one person (Vol. II, p. 760).
- there are also lump-sum death benefits payable to surviving relatives, only if death occurs within 180 days of the accident, or within 104 weeks (if the insured was continuously disabled throughout that period) (Vol. II, p. 760).
- amount of death benefit depends on status of the deceased and eligible beneficiaries at the time of the accident:
 - if deceased was head of the household, or spouse of deceased was head of the household, the death benefit is \$10,000.00;
 - if there is one dependant other than the surviving head of the household or spouse of the head of the household, that other dependant receives \$2,000.00;
 - if there are other dependants beyond the first, those dependants are entitled to \$1,000.00 each, but only in the event that the deceased is the head of the household (Vol. II, p. 760).
- "spouse" means either of a man and woman who are married to each other and includes either of a man and woman who are not married to each other but have cohabited continuously for a period of not less than five years or have cohabited continuously for the preceding year, where there is a child born of whom they are the natural parents (Vol.

II, p. 760).

- "dependant" means
 - spouse of head of the household who resides with the head of the household;
 - person under the age of 18 who resides with and is principally dependent upon the head of the household or spouse of the head of the household for financial support;
 - person 18 years of age or older who because of mental or physical infirmity, is principally dependent upon the head of the household or the spouse of the head of the household for financial support; or
 - person 18 years of age or over who, because of full-time attendance at school, college or university is principally dependent upon the head of the household or the spouse of the head of the household for financial support; or
 - parent or relative of the head of the household or his or her spouse who resides in the same dwelling premise and is principally dependent upon the head of the household or his or her spouse for financial support (Vol. II, p. 760).
- no death benefit is payable if no head of the household or dependant survives the victim by at least 30 days (Vol. II, p. 760).
- benefits are not indexed.

(ii) The Osborne Report

- funeral benefits should be increased to \$3,000.00 (Vol. I, p. 581).
- death benefit for survivor should not be linked to the deceased's income, but should provide modest, reasonable, short-term financial assistance to survivors (Vol. I, p. 580).
- benefit should be \$25,000.00 for death of head of the household or death of spouse of head of the household; additional \$10,000.00 shall be paid for

each dependant of the head of the household or spouse (Vol. I, p. 581).

- if dependent child is killed, death benefit would be \$10,000.00 (Vol. I, p. 581).
- death benefit should not be indexed (Vol. I, p. 584).

(c) Quebec

(i) The Automobile Insurance Act

- the surviving spouse of an accident victim is entitled for life to an indemnity equivalent to 55% of the income replacement indemnity to which the accident victim would have been entitled to (had he or she survived and been rendered unable to hold any employment by reason of the accident) [ss.37(1) and 37(2)].
- however, if the surviving spouse is under 35 years of age, childless and not disabled, he or she is no longer deemed a dependant five years after the death of the victim [s.37(6)].
- if there is no surviving spouse but there are surviving dependants, the weekly indemnity is paid as follows:
 - 1 dependant 55% of income replacement indemnity victim would have been entitled to had he/she survived (minimum: \$164.24 per week)
 - 2 dependants 65% of indemnity (minimum: \$184.78 per week)
 - 3 dependants 70% of indemnity (minimum: \$205.32 per week)
 - 4 dependants 75% of indemnity (minimum: \$225.86 per week)
 - this continues up to 90% of the income replacement indemnity [s.37(3)].
- "dependant" is defined in the Act as:
 - (a) a spouse;

- (b) a person who is, or, as the case may be, was, married to the victim, and
 - (i) is separated from him ... or whose marriage has been dissolved by a final judgment of divorce or declared null ... and
 - (ii) at the time of the accident, was entitled to receive an alimentary pension from the victim pursuant to a judgment or agreement;
- (c) a person related to the victim by blood or adoption, and any stranger who stood in loco parentis to the victim or to whom the victim stood in loco parentis, who, at the time of the accident, was wholly or substantially maintained by the income of the victim [s.1(20)].
- the phrase "to be wholly or substantially maintained by the income of the victim" means that at the time of the accident the victim was providing, from his or her income or earnings from all sources, for more than 50% of the basic needs and maintenance costs of that dependant (Que. Reg. c.[A-25, r.7.1], s.29).
- a child is presumed to be wholly or substantially maintained by the income of the accident victim if the child has no spouse, is unemployed and:
 - (1) is a minor; or
 - (2) is between 18 and 25 years of age and has been attending a university, college or secondary or post-secondary establishment on a full-time basis ever since his or her 18th birthday; or
 - (3) is over 18 years of age and has been an invalid ever since his or her 18th birthday (Que. Reg. c.[A-25, r.7.1], s.30).
- where an accident victim who had no surviving

spouse or dependants dies, and his or her contribution of work ensured the viability of a family enterprise whose principal owner was related to him or her by blood or adoption, the owner is entitled to the minimum indemnity provided for a dependant (s.38).

- it is possible for a person to become a dependant of the victim after the accident occurred, where:
 - (1) he marries the victim and cohabits with her;
 - (2) where the person and the victim live together as husband and wife;
 - (a) if the person and the victim reside together for 3 years, or for 1 year and if a child issues from their union; and
 - (b) if they are publicly represented as spouses;
 - (c) where the person is or has been married to the victim; and
 - (i) is separated from her ... or
 - (ii) ... his marriage to the victim has been dissolved by a final judgment of divorce or declared null ...
 - (iii) if the person is entitled to receive an alimentary pension from the victim pursuant to a judgment or agreement;
 - (iv) where the person:
 - (1) is related to the victim by blood or adoption, or
 - (2) stands (in loco parentis) to the victim or

- (3) is a person to whom the victim stands (in loco parentis) and
 - (4) if the victim provides for more than 50% of the basic needs and maintenance costs of that person (s.26.1 and Que. Reg. c.[A-25, r.7.1], s.30.1).
- where an accident victim dies leaving no surviving spouse or dependants, a Lump-Sum Payment totalling \$8,400.54 (for 1988) is divided equally among the accident victim's surviving parents (s.39).
- where there is only one parent, that entire amount goes to that parent (s.39).
- if there are no surviving parents or dependants, the estate of the victim is entitled to a Lump-Sum Payment (for 1988) of \$4,200.27 (s.39).
- the death of an accident victim entitles his estate to a lump sum indemnity (for 1988) of \$2,800.18 for funeral expenses (s.47).
- where the death benefit is paid in the form of a pension, it is reduced by the amount of the surviving spouse's pension and orphan's pension payable by reason of the accident under the Quebec Pension Plan or an equivalent plan of another jurisdiction (s.41).
- benefits payable in the form of a pension are paid once every other week (s.43).
- death benefit payable in form of pension is revalorized annually, by multiplying the amount that would have otherwise been payable for that month by the ratio that the Quebec Pension Index for that following year bears to the Pension Index for the year preceding that following year (s.48).

(ii) Proposed Amendments

- the spouse of a deceased victim is entitled to a lump-sum indemnity which is calculated by multiplying the gross annual income (which would have been used as the basis for calculating the income replacement indemnity payable to the accident victim) by the factor appearing in Schedule I opposite the age of the victim (as of the date of death) (cl. 64).
- the amount of the lump-sum indemnity payable will not be less than \$40,000.00; even where the accident victim would not have been entitled to an income replacement indemnity, the lump-sum indemnity payable to his or her surviving spouse will be \$40,000.00 (cls. 65 and 66).
- the dependants of a deceased accident victim (aside from his or her spouse) are entitled to a lump-sum indemnity in the amount listed in Schedule III opposite the age of the victim (as of the date of death); if the dependant is disabled on the date of death of the victim, he or she is entitled to an additional lump-sum indemnity of \$16,500.00 (cls. 67 and 68).
- if the surviving spouse is disabled on the date of the victim's death, the lump-sum indemnity to which he or she is entitled is computed according to the factors appearing in Schedule II, which is attached to the Bill (cl. 64 and Schedule II).
- the Schedules referred to contain two columns. The left-hand column states the age of the victim in years, while the right-hand column has a factor which varies from 1.0 to 5.0. This is the "multiplying factor" referred to above.
- for example, consider the lump-sum indemnity payable to a spouse of a deceased accident victim (assume the spouse is not disabled). Also assume that the accident victim is 40 years of age. If we examine Schedule I, we find that opposite 40 years of age is the factor 4.0. This means that the surviving spouse would be entitled to the following lump-sum benefit:

[gross annual income which would have been used as basis for computing income replacement indemnity payable to victim, as of the date of his death, had he survived but been totally disabled] x 4.0 = [lump sum indemnity payable to surviving spouse]

- the "factors" begin at 1.0 (the lowest factor) for an accident victim who is 25 years of age or less, increase to a maximum of 5.0 (for an accident victim who is 45 years of age), and then decrease to a minimum of 1.0 (for accident fatalities who are 65 years of age or older) (Schedule I).
- the Bill also provides for an additional indemnity payable where the accident victim dies and has no surviving spouse, but is survived by a child who meets the definition of "dependant" as set out in clause 2(3) of the Bill:
 - a person related to the victim by blood or adoption and any stranger in blood who stands in loco parentis to the victim or to whom the victim stands in loco parentis and whose basic needs and maintenance costs are, at the time of the accident, borne by the victim to the extent of over 50%.
- this child is entitled (in addition to the lump-sum benefit payable under Schedule III and the possible additional lump-sum of \$16,500.00 payable to disabled dependants) to a further (emphasis mine) lump-sum indemnity in an amount equal to the indemnity which would have been paid to a surviving spouse (if there was one); if there is more than one child who meets this eligibility requirement, the further lump-sum indemnity will be divided equally between them (cl. 69).
- if the accident victim has no spouse and no dependants who survive him, his mother and father are entitled to equal shares of a lump-sum indemnity of \$15,000.00; if one parent dies (or has abandoned the victim or been deprived of parental authority), his or her share goes to the other parent (cl. 70).
- the estate of the accident victim is entitled to a lump-sum indemnity of \$2,800.00 for funeral expenses (cl. 71).

- the Bill makes provision for a dependant who is entitled to a death benefit indemnity to apply to have that indemnity paid in periodic installments over a period not longer than twenty years. In fact, an accident victim's surviving spouse or dependants who are currently entitled to the present death benefit of a life annuity may apply for its replacement by an amount of equivalent value, to be payable in periodic installments (according to terms and conditions prescribed by regulation) (cls. 72 and 73).
- despite the fairly generous lump-sum benefits payable according to the Bill, one can see that there are several negative considerations:
 - the lump-sum amount may not be as substantial as the life annuity which is currently payable to the victim's surviving spouse and/or dependants (ie. survivors may end up receiving less than they are currently receiving);
 - the lump-sum payment may generate greater interest than the annuity payments currently being made (depending, of course, on how the lump sum is disposed of), thus having negative tax implications for the surviving family;
 - the lump-sum payments have been found to be subject to imprudent management.³⁰⁸
- all death benefits (except for the funeral expense payable to the estate of the victim) will be revalorized on January 1st of each year, by multiplying the amount to be revalorized by the ratio between the Consumer Price Index for the current year and that for the preceding year (cls. 83.36 to 83.41).

(d) New Zealand

- reasonable funeral expenses are covered (s.81).
- lump-sums are payable to widows and widowers (including common law spouses) and children who

³⁰⁸ Osborne Report, supra, n. 6, Vol. I, p. 422.

are either partially or totally dependent on the deceased:

- for a totally dependent spouse, the lump-sum is \$4,000.00 (and is reduced according to the degree of dependency on the deceased), and
- for totally dependent children, the lump-sum is \$2,000.00 (reduced according to degree of dependancy) per child, subject to a maximum of \$6,000.00 (if the maximum is reached, each child receives equal share of the \$6,000.00) (s.82).
- E.R.C. is also payable to dependants of a deceased earner.
- the surviving spouse (including a common law spouse) is entitled to a weekly payment of up to $\frac{3}{5}$ of the amount of earnings-related compensation that would have been payable to the deceased person, had he survived (but been totally incapacitated); if the surviving spouse was only partially dependent on the deceased, the benefit will be reduced accordingly [ss.65(1) and (2)].
- a dependent child is entitled to weekly payments of up to $\frac{1}{5}$ of the amount of earnings-related compensation that would have been payable to the deceased person, had he survived the accident (and been totally incapacitated); if the dependent child was only partially dependent on the deceased, the benefit will be reduced accordingly [ss.65(1) and (2)].
- maximum weekly compensation for dependent child is (as of June, 1987) \$163.40 (ss.60 and 65).
- the total amount of E.R.C. payable cannot exceed the maximum which would have been payable to the deceased had he survived, but suffered a total loss of earning capacity; this amount would usually be 80 percent of the deceased's pre-accident earnings [s.65(7)].
- rate of E.R.C. payable to a dependent child of a victim shall be increased to up to $\frac{2}{5}$ of the E.R.C. that would have been payable to the victim (had he survived, but been totally incapacitated), where the surviving parent of the dependent child also dies (i.e. is either killed in the accident or dies subsequent to the accident) [s.65(4)].

- E.R.C. is also payable to other persons who were partially or totally dependent on the accident victim immediately before the time of the accident, at such rate and for such period as the Corporation thinks fit [s.65(2)(c)].
- no E.R.C. shall be payable where the victim is not an earner, unless the accident victim would have been eligible for compensation for loss of potential earning capacity (i.e. was a student or young person about to enter work force, etc.) in accordance with Section 63 of the Act [s.65(9)].
- as E.R.C. is calculated on basis of relevant earnings (which are increased in accordance with changes in the average weekly wage of earners in New Zealand), it would appear that the E.R.C. payable to dependants of the victim would increase as well.
- the surviving spouse's weekly indemnity is usually payable until age 65, or until his or her death, marriage or re-marriage (whichever is sooner), but may be extended past age 65 if the accident occurs after the surviving spouse attains the age of 60 years. E.R.C. will cease one year after the date of the accident, if the accident occurs after the surviving spouse attains the age of 69 years [s.66(2)].
- a dependent child is entitled to receive E.R.C. for as long as it would have been payable to the victim under Section 60 of the Act (if the victim had survived, but suffered permanent and total incapacity); the Corporation has discretion to extend payment of compensation to any child of the deceased person after the expiration of the period for which it is payable or to pay E.R.C. to any children over the age of eighteen, if and to the extent that the Corporation considers that such payments are necessary for the education of the child or (in special circumstances) for the maintenance of that child [s.65(6)].

(e) Victoria

- Where an earner (emphasis mine) dies as a result of a transport accident, his or her surviving spouse is entitled to a lump sum payment (s.57).

- "surviving spouse" is defined as a dependent spouse of the accident victim; however, the term "dependent spouse" is defined generally, as a person who would be wholly, mainly or in part dependent on the accident victim; [s.3(1)].
- the amount of the Lump-Sum Benefit depends on the age of the accident victim at the time of death: the younger the victim, the greater the payment. The maximum benefit of (as of July 1, 1988) \$79,850.00 would be payable if the accident victim was 25 years of age or younger. The formula is:

$$[\text{maximum amount of benefit}] \times \frac{[125 - A]}{100}$$

The value of A is as follows:

- for earners 75 years of age or older, 75;
- for earners 25 or under, 25;
- if the earner was over 25 years but under 75, the age of the earner at the date of the accident [s.57(2)].
- it should be noted that any Lump-Sum Death Payment is reduced by the value of the Lump-Sum Impairment Benefit (described above, at p. 100) that may have been paid to the accident victim prior to his or her death [s.57(2)].
- the Act also prescribes a special formula to be used if there is more than one surviving spouse. Each surviving spouse will receive the amount calculated as follows:

$$[\text{maximum amount of benefit}] \times \frac{B}{(\$79,850.00) \quad B + C}$$

- B is the number of years during which the surviving spouse was a dependent spouse of the earner.
- C is the sum of years during which each other surviving spouse of the earner was a dependent spouse of the earner [s.57(3)].
- it will be seen from this formula that the surviving spouse who has been dependent on the accident victim for the greater number of years, will receive a larger lump sum benefit than the

other surviving spouse(s).

- as if this formula wasn't complicated enough, the Act prescribes another formula to be used in the following circumstances:

- (a) there is more than one surviving spouse; and
- (b) the deceased leaves a "dependent child" ("dependent child" is defined at p. 313) whose surviving parent is not a dependent spouse of the accident victim or who does not wholly, mainly or in part provide economic support for the "dependent child"; in this situation, the "dependent child" would be eligible for the so-called "orphan's benefits" (these benefits are described below, at p. 313) of a lump-sum payment, a weekly periodic payment and an "education allowance" [s.59(1)]; but
- (c) the poor "dependent child" described above is rendered ineligible for the lump-sum component of the "orphan's benefit" because of the operation of s.59(9) of the Act; s.59(9) provides that where the Commission is liable to make payments to the accident victim's surviving spouse, no lump-sum benefit is payable to the "dependent child" of the accident victim (see p. 314).

- if all three of the above circumstances occur, two things happen:

- (a) "dependent child" of the accident victim, who would have been entitled to a death benefit under Section 59 of the Act but for the operation of Section 59(9), will now be eligible for (where there is a surviving spouse who is also eligible for a Lump-Sum Death Benefit) an equal share of a lump-sum amount (that is, an equal share along with all other dependent children of the victim who are in the same situation). However, this lump-sum amount is reduced according to the following formula:

$$\frac{\$79,850.00 \text{ (as of July 1, 1988)}}{S + 1}$$

- S is 1 or, if there is more than one surviving spouse the number of the

surviving spouses [s.57(4)].

- (b) where the above formula is used (i.e. where a dependent child qualifies for a share of the lump-sum amount calculated as above), the maximum amount of the lump-sum used to calculate the lump-sum death benefit payable to surviving spouse(s) of the accident victim will be reduced, according to the formula:

[maximum amount of lump-sum
benefit payable; this is
\$79,850.00 as of July 1, 1988] minus

[maximum amount of lump-sum
benefit payable, ie. \$79,850.00] equals
$$\frac{\quad}{S + 1}$$

the amount of the maximum lump-sum benefit to be used in place of \$79,850.00 in the formula for calculating the lump-sum benefit payable to each surviving spouse (see above).

- S is 1 or, if there is more than one surviving spouse the number of the surviving spouses [s.57(4)].
- it is apparent from the above formulas, that where there is both a surviving spouse and a dependent child entitled to a share of the lump-sum benefit, the maximum amount of the benefit used in the calculation of the lump-sum death benefit payable to the surviving spouse will be reduced by at least 50 percent (if there is one surviving spouse) and by more than 50 percent (if there is more than one surviving spouse).
- that is, what the Act gives with one hand, it takes away with the other:
 - the "dependent child" who would, by virtue of s.59(1), be entitled to a lump-sum death benefit, is denied this by s.59(9);
 - but, where s.59(9) cruelly denies that dependent child the usual lump-sum benefit payable to dependent children, the child becomes eligible for a share in another lump-sum death benefit [s.57(4)];
 - but, where the Act has generously allowed that dependent child a share in another lump-

sum death benefit, it simultaneously employs a new formula for the calculation of a new maximum amount to be used in the calculation of the lump-sum death benefit payable to surviving spouses of the accident victim (ie. the formula ordinarily used when there are more than one surviving spouses is altered, by the insertion of a new, reduced maximum lump-sum benefit) [s.57(4)].

- it should be emphasized that no Lump-Sum Death Benefit is payable to either a surviving spouse or a dependent child of an accident victim, if the surviving spouse or dependent child receives an award or makes a settlement of damages in respect of the death [s.57(5)].
- the payment of the Lump-Sum Death Benefit is contingent upon the death by transport accident of an "earner." Therefore, the families of non-earners would appear to be ineligible to receive the Lump-Sum Benefits described above [s.57(1)].
- the surviving spouse of an earner (emphasis mine) is also entitled to a periodic payment [s.58(1)].
- the amount of the weekly payment is eighty percent of the accident victim's "assessed earnings," subject to a maximum (as of July 1, 1988) of \$481.00, and a minimum payment (as of July 1, 1988) of \$236.00, with additional payments of \$66.00 for one dependent child and \$21.00 for each subsequent dependent child [ss.58(1),(2) and (3)].
- the term "the earner's assessed earnings" is defined with reference to the amount that the earner, but for the death, would have had the capacity to earn in employment reasonably available to him or her in view of the earner's training, skills and experience [s.58(6)].
- once again, there is provision in the Act for payments of the weekly benefits to several surviving spouses. The formula used is similar to that set forth above at p. 309 (i.e. for Lump-Sum Payments to several surviving spouses), with the difference that it is the weekly payment which is multiplied by the reducing fraction, not the lump-sum amount [s.58(4)].
- these periodic payments will cease after the expiration of a five-year period following the

victim's death, or once the surviving spouse is eligible to receive an old age pension. However, if the surviving spouse has a dependent child, the weekly payments will continue until the dependency ceases [s.58(5)].

- the Act defines a "dependent child" as:
 - a child who is dependent on a surviving spouse, and is a child (whether a dependent child or not) of the earner or is a dependant of the earner; and
 - who:
 - is under the age of 16 years; or
 - has attained the age of 16 years but is under the age of 25 years and is a full-time student;
 - but does not include a child who has a spouse [s.58(6)].
- as with the Lump-Sum Payment, the Commission is not responsible for the weekly periodic payments to a surviving spouse of an earner who dies as a result of a transport accident, for any period after an award or settlement of damages is made in respect of the death [s.58(7)].
- there are special provisions for dependent children who are rendered orphans as a result of a transport accident, or whose surviving parent is not a dependent spouse of the accident victim or who does not wholly, mainly or in part provide economic support for the dependent child; these are the so-called "orphans' benefits" [s.59(1)].
- included in these "orphans' benefits" (as of July 1, 1988) are:
 - a lump-sum payment of \$79,850.00, to be divided by the number of dependent children,
 - periodic weekly payments of \$66.00 for each dependent child, and
 - an education allowance of \$1,270.00 per year for each dependent child [ss.59(3), (4) and (6)].
- in order to be eligible for the periodic payment

and the education allowance, the child must be:

- under the age of 16 years, or
- (if he or she is a full-time student) until the child attains the age of 18 years or ceases to be a full-time student, whichever happens first [ss.59(3) and (6)].
- the Lump-Sum Benefit is payable to children who are either under the age of 16 or (if full-time students) under the age of 25 [s.59(4)].
- note that the orphans' benefits are payable regardless of whether the person killed in the transport accident was an earner or not.
- there is also provision for payments to dependent children of the surviving spouse, where the surviving spouse dies after the accident (but not as a result of the accident) and was a dependent spouse of the accident victim.
- in this case, the Commission is liable to pay dependent children of the surviving spouse both the weekly payments and the education allowance, but not the lump-sum payment [s.59(2)].
- there are three exceptions to the requirement that the Commission pay benefits to the dependent child of the accident victim (or, in certain situations, of his or her surviving spouse). These three exceptions are as follows:
 - the Commission is not liable for the weekly payment or for the education allowance where the Commission is liable to make payments to a surviving spouse of the accident victim, and the child is a dependant of that surviving spouse [s.59(8)].
 - the Commission is not liable to pay the lump-sum benefit to the child of an accident victim, if the Commission is liable to make payments to the accident victim's surviving spouse [s.59(9)]. Note, however, that (as discussed above, on p. 310) if this exclusion applies, each such child is entitled to a share of a lump-sum benefit in accordance with Section 57(4) of the Act. Therefore, it would seem that what the Act takes away with one hand, it returns with the other.

- no payment need to be made to a dependent child if an award or settlement of damages has been made in respect of the accident victim on whom the child was dependent [s.59(10)].
- the maximum amount used in calculation of the lump-sum death benefit, the minimum and maximum amounts used in the calculation of the periodic payment death benefit and the lump-sum death benefit and education allowance payable to each dependent child of the victim are all indexed in accordance with the formula:

$$D \times \frac{E}{F}$$

- D is one of the amounts referred to above (ie. the maximum amount used in calculation of the lump-sum death benefit, or the minimum and maximum amounts used in the calculation of the periodic payment death benefit or the lump-sum death benefit and education allowance);
- E is the All Groups Consumer Price Index for Melbourne as at June 15th in the preceding financial year last published by the Australian Statistician in respect of the December quarter of that financial year.
- F is the all-groups Consumer Price Index for Melbourne as at June 15 in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that June 15 [s.61(2)].

(f) N.S.W. Law Reform Commission Report

- "dependant" should be defined as person who, at date of accident resulting in victim's death, was dependent upon, or interdependent with, the victim; dependence or interdependence must be material, e.g. financial support where deceased was an earner, or household services where a deceased was a non-earner, and must be of a significant and continuing nature (Vol. II, pp. 342-343).
- only members of the victim's family should be

entitled to death benefits (Vol. II, p. 343).

- "spouse" includes a de facto partner of the victim who was living with the victim at the date of death; "de facto relationship" is one between a man and a woman who, although not legally married, live together as husband and wife on a bona fide domestic basis (Vol. II, p. 344).
- "child" includes child to whom the deceased stood in loco parentis (Vol. II, p. 345).
- "child" means a child who has not attained the age of 16 years or, where the child is a full-time student or physically or mentally handicapped, 21 years, at the date of the death of the victim (Vol. II, p. 345).
- where the child was a member of the deceased's household at the date of death, dependence of that child on the deceased should be conclusively presumed (Vol. II, p. 345).
- "member of the family" should mean "spouse, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother and half-sister" (Vol. II, p. 346).
- spouses and other relatives (except for children) are eligible for death benefits provided that they prove dependency; children coming within a definition of "child" who are living in the household of the deceased at the time of the accident, will be presumed to be dependent on the deceased (Vol. II, p. 346).
- dependent spouse, children and other members of the family of the victim (whether the deceased was an earner or not) shall be eligible to claim a lump-sum payment to a maximum of 130 x A.W.E. (Vol. II, p. 347).
- if there is more than one claimant, the lump-sum should be apportioned among them, according to the degree of dependence (Vol. II, p. 347).
- if other members of the victim's family (in addition to the spouse and/or children) were dependent on the deceased, those other members should be able to claim a share of the lump-sum,

but their share should not exceed 1/3 of the lump-sum unless circumstances are exceptional (Vol. II, p. 348).

- if, however, there are no surviving spouse nor children, the dependent family members should be entitled to claim the whole or part of the lump-sum depending on the degree of dependency (Vol. II, p. 348).
- a child of the deceased who is dependent on the deceased should be entitled to periodic compensation at the rate of eight percent of A.W.E., whether the deceased was an earner or not (Vol. II, pp. 348-349).
- periodic compensation payable to the child should continue until he or she:
 - attains age of 16 years, or (in the case of full-time student, or mentally or physically handicapped child) 21 years;
 - marries or enters into a de facto relationship; or
 - becomes self-supporting (Vol. II, p. 349).
- periodic compensation payable to a child should not be affected by his or her earnings from part-time employment, nor should it be affected by the marriage or entry into a de facto relationship by the child's surviving parent (Vol. II, p. 349).
- where victim was an earner, and surviving spouse was a dependant of the victim, and has care and control of a child, spouse should be entitled to claim compensation by way of periodic payments in his or her own right for loss of support, regardless of his or her earnings (Vol. II, p. 351).
- benefits payable to surviving spouse should be paid by installments at the rate of fifty percent of the net "after-tax" earning capacity of the victim, up to a maximum of 75 percent of the after-tax equivalent of A.W.E., for a period of five years from the date of the victim's death, or until the youngest child in the claimant's care and control attains 16, whichever occurs first (Vol. II, p. 352).
- if after five years from the death of the victim,

the surviving spouse has the care and control of a child, has a combined income and earning capacity which is less than fifty percent of the earnings of the deceased (as indexed) or fifty percent of the A.W.E., whichever is less, periodic compensation should be paid to that spouse and it should supplement the combined income and unused earning capacity (if any) of the spouse to bring that capacity to fifty percent of the earnings subject to a maximum of fifty percent of the A.W.E. (Vol. II, p. 352).

- this additional compensation (the post-five year compensation) should cease when the youngest child in the care and control of the surviving spouse attains 16 years or the surviving spouse no longer has care and control of the child, whichever occurs first (Vol. II, p. 353).
- periodic compensation should also be paid to a spouse whose earning capacity and/or income is impaired due to poor health, or the fact that he or she is over fifty years of age and lacks relevant work skills, or the spouse cares for an aged or impaired family member or member of the deceased's family, where such care was undertaken at the date of death of the victim (Vol. II, p. 353).
- compensation paid to spouse in this category should supplement his or her combined income and earning capacity to bring him or her up to fifty percent of the earnings of the deceased, subject to a maximum of fifty percent of A.W.E.; this compensation should cease five years from the date of the victim's death or at the cessation of the surviving spouse's impairment of earning capacity, whichever occurs first (Vol. II, p. 353).
- earning capacity of surviving spouse should be assessed on same principles used to assess post-accident earning capacity of an injured person; see p. 109, supra (Vol. II, p. 354).
- where the accident victim performs substantial household services for members of his or her household, surviving family members should be entitled to replacement household services, taking into account
 - services provided by the deceased before the accident;

- the number of dependants, their ages and need for household services;
 - household services that other family members can reasonably be expected to provide;
 - any new relationship formed by a surviving spouse of the deceased;
 - any special factors affecting the need of the dependants for household service (Vol. II, p. 355).
-
- after four weeks from the date of the death of the victim who provided household services, the Corporation should have regard to additional criteria including the earnings, and other resources (financial and non-financial) available to household family members to meet the need for household services. Services should not be provided after two years from the date of the death, except in special cases (Vol. II, pp. 355-356).
 - after end of two years, Corporation should have power to continue services for a further period not exceeding three years (Vol. II, p. 356).
 - benefits paid or provided to the accident victim prior to his or her death should not be set off against benefits available on death (Vol. II, p. 357).
 - death benefit should not be payable after five years following the accident (Vol. II, p. 357).
 - person eligible to claim death benefits must survive the accident victim for a period of not less than thirty days (Vol. II, p. 357).
 - where compensation is paid by way of periodic benefits to surviving spouse with care and control of children during the first five years after the death of an earner/spouse, total weekly payments to spouse and children should not exceed 65 percent of the victim's earnings, subject to a ceiling on the victim's earnings of 150 percent of A.W.E. (Vol. II, p. 358).
 - where compensation is paid to spouse in above category after five years, or is paid to spouse

whose earning capacity has been reduced (during the first five years after the death of the victim), total weekly payments to spouse and children should not exceed 65 percent of either the victim's earnings or A.W.E., whichever is less (Vol. II, p. 358).

- where periodic compensation is payable to children only, the total weekly compensation payable to all such children should not exceed 32 percent of A.W.E. (Vol. II, p. 358).
- periodic compensation payable to the spouse or child should cease on that person's death (Vol. II, p. 359).
- periodic compensation payable to surviving spouse should cease on that spouse's remarriage (Vol. II, p. 359).
- where surviving spouse was receiving periodic compensation and remarries within four years of the victim's death or up to one year before his or her youngest child attains 16, that spouse should receive a lump-sum payment equivalent to one year's installments of compensation; if the remarriage occurs in the fifth year after the death or within one year of the youngest child attaining 16, the lump-sum payment should be equivalent to the remaining compensation which would have been paid periodically, had the marriage not occurred (Vol. II, p. 359).
- reasonable funeral expenses of people killed in transport accidents should be met (Vol. II, p. 359).

(2) Analysis

The death benefits currently available under Manitoba Regulation 290/88R include modest lump-sum payments payable to primary and secondary dependants of the victim, or (where there are no primary and secondary dependants) payments to other relatives of the victim, and reimbursement of actual funeral expenses up to a maximum of

\$2,500.00.³⁰⁹

Are the above payments appropriate compensation for the surviving family members of automobile accident victims?

The Kopstein Report recommends that death benefits for surviving family members be modelled on the Quebec Act. The benefits would be payable as follows:

- death benefit will be annuity based on percentage of the weekly disability benefit that the deceased would have received had he or she survived, and will vary according to the number of dependants:
 - one dependant: 55 percent of permanent weekly disability benefit
 - two dependants: 65 percent of permanent weekly disability benefit
 - three dependants: 70 percent of permanent weekly disability benefit (this increases to a maximum of seven dependants or 90 percent of the permanent weekly disability benefit).³¹⁰

It is assumed that these death benefits will be subject to indexation in accordance with the annual growth rate in the Average Industrial Composite Index of Wages.³¹¹

³⁰⁹ Man. Reg. 290/88R, ss. 10 and 11.

³¹⁰ Kopstein Report, supra n. 1, Vol. II, Position Paper No. 2, pp. 80-81.

³¹¹ Ibid., p. 82.

The Kopstein Report has recommended an approach towards the calculation of the disability benefit which is similar to that used by most of the systems we have surveyed. That is, death benefits will usually be based on a percentage of the income replacement indemnity or weekly disability benefit which would have been payable to the accident victim (had he survived, and been permanently and totally disabled).

The problems involved in the assessment of compensation payable upon death of the accident victim stem from trying to reconcile the "needs" approach of the social welfare system with the "level of support" principle of the common law. Also, changing attitudes towards the role of women in society have led to the evolution of a benefit which does not assume that a woman who is widowed will be unemployed (and thus need support) for the rest of her life.³¹²

The 1967 Royal Commission on Personal Injury in New Zealand (Woodhouse I) recommended the following compensation:

- a small (\$300.00) sum for each widow;
- periodic benefit of 50% of the amount which the deceased would have received if he had survived, but been totally incapacitated;
- periodic benefit of 1/6 of the compensation which would have been payable (had he survived, but been

³¹² Palmer, supra n. 163, p. 301.

totally incapacitated) will be paid to each dependent child;

- de facto wives and divorced wives would receive compensation subject to the same limits as the compensation payable to widows, but this compensation would be based on the extent of actual dependency;
- other dependent relatives would be compensated to the extent of their dependency on the deceased;
- the compensation actually paid out to surviving relatives could not be greater than the compensation which would have been payable to the deceased had he survived, and been totally incapacitated.³¹³

We have already seen that the New Zealand Act provides compensation of up to 3/5 of the amount of E.R.C. that would have been payable to the deceased victim (had he survive but been totally incapacitated) to the surviving spouse, and also provides compensation of up to 1/5 of the amount of E.R.C. that would have been payable to the victim to each dependent child. However, in both cases, compensation is reduced where the surviving spouse or dependent child were only partially dependent on the accident victim.³¹⁴

³¹³ Ibid., pp. 303-304.

³¹⁴ Accident Compensation Act 1982, ss. 65(1) and (2).

New Zealand also provides small lump-sum amounts of \$4,000.00 (for a totally dependent spouse) and \$2,000.00 (for each totally dependent child). Again, these amounts will be reduced according to the degree of dependancy of the surviving family members on the deceased.³¹⁵

The issues in respect of compensation payable to the surviving spouse upon death of the accident victim can be set out as follows:

- (a) Should surviving spouses be regarded as potential members of the work force upon the death of the accident victim, and if so, to what extent?
 - (i) should the need or the desire of the surviving spouse to care for the dependent children of the accident victim make any difference?
 - (ii) should the age of the surviving spouse be a factor?
 - (iii) should it make a difference as to whether the surviving spouse is an earner or not?
 - (iv) should the availability of work for the surviving spouse be a factor?
- (b) How should the rate of benefit be determined?
 - (i) should the factors listed in (a), above, be taken into account?
 - (ii) should the benefit be related to the actual financial support that had been received from

³¹⁵ Accident Compensation Act 1982, s.82.

the deceased?

- (iii) should the benefit be related to the deceased's legal obligation of support?
- (iv) should the benefit be related to the deceased's earnings?
- (v) should surviving spouses in different circumstances be treated differently?
- (vi) are the means of the surviving spouse relevant to the determination of how much compensation should be payable, and if the means are relevant, to what extent should they be relevant?

- (c) Should we be choosing a fact other than the status of the surviving spouse as a matter relevant to determining the compensation, i.e. would it be better to use the family unit, children or some other fact to which compensation could be attached (e.g. large benefits to dependent children could be payable to the person who looks after them)?³¹⁶

The age of the surviving spouse is an important variable. Three main categories are relevant here:

- ages 16 to 30;
- ages 31 to 50 (approximately);
- ages 50 (approximately) to 65.³¹⁷

³¹⁶ Palmer, supra, n. 163, p. 310.

³¹⁷ Ibid.

Other factors to be considered include whether or not the surviving spouse is caring for dependants and whether he or she is an earner.³¹⁸

Proponents of an earnings-related approach argue that if compensation paid to those who are injured (but do not die) in motor vehicle accidents is designed to be used to maintain the victim's pre-accident living standards, shouldn't the level of support payable to the victims' family be on a comparable level, if the victim dies? That is, it is anomalous to use a social welfare approach based on needs in one part of the compensation Scheme (i.e. the provision dealing with dependants of the victim) and benefits based automatically on an earnings-related approach in another part of the Scheme (i.e. provisions dealing with disability benefits payable to victims who survive the accident).³¹⁹

There are, however, arguments in support of a social welfare approach to determining compensation for dependants of a victim killed in a motor vehicle accident. These arguments may be summarized as follows:

- how the deceased disposed of his earnings before death play an important part in the common law damages action for the determination of the level of economic loss suffered by the victim's depen-

³¹⁸ Ibid.

³¹⁹ Ibid., p. 311.

dants. As it cannot necessarily be assumed that the bulk of the victim's earnings went to his or her family, to determine compensation payable to survivors on an earnings-related basis could lead to surviving dependants receiving more from the accident compensation Scheme than they received from the victim in the first place;

- to relate the dependants' benefit to the victim's pre-accident earnings may be to use a measure that bears no relationship to the level of support provided by the deceased during his or her lifetime; therefore the benefit and level of benefit should be determined on the basis of the level of actual support provided by the victim to his or her dependants prior to the accident.³²⁰

The second point listed above (i.e. that benefits should be determined by level of actual support) is subject to the following criticisms:

- such an approach requires a complex individual investigation in every case of fatality;
- the approach assumes that the pre-accident situation which existed with respect to the victim and his or her family would be likely to continue for so long as the victim might otherwise have

³²⁰ Ibid., p. 312.

lived.³²¹

Therefore one must weigh the administrative complications caused by the "degree of dependency" approach against the fact that the assumption concerning level of support inherent in the "earnings-related compensation" approach will not be appropriate in some cases.³²²

The above discussion is concerned with the question of how compensation for surviving dependants of the accident victim should be calculated (i.e. should it be based on actual dependency, or should it be earnings-related). There is, however, an important related question to be considered here. That is the question of who are the accident victim's dependants?

The current Manitoba provisions define a "primary dependant" as:

- (i) surviving spouse of victim
- (ii) dependent child or children of victim (where spouse has predeceased the victim or is for any other reason prevented from qualifying as a primary dependant)
- (iii) the dependent parent(s) of victim, if victim is not survived by (spouse or children).³²³

A "dependent" child of the victim is one who is under the age of 18 (and dependent on the victim) or is over the

³²¹ Ibid.

³²² Ibid.

³²³ Man. Reg. 290/88R, s.4.

age of 18 but (by reason of physical or mental infirmity) is unable to provide himself or herself with the necessities of life, or is a full-time student at a University, training school, or other recognized institution of learning (and is dependent upon the victim). Note that "child" includes someone to whom the victim stands in loco parentis.³²⁴

A "dependent parent" is a parent of the victim who is unable to provide himself or herself with the necessities of life without the victim's assistance.³²⁵

It will be observed immediately that the Manitoba provisions determine eligibility for the death benefits payable to surviving family members by the use of specific provisions which set out the persons eligible for these benefits. Virtually all of the persons who qualify as either "primary" or "secondary" dependants must show some degree of dependency upon the accident victim. If this dependency is established, the benefits are then payable (there is no provision for reduction of benefit based on degree of dependency).

The provisions of the Quebec Act with respect to benefits payable to surviving dependants of the accident victim establish more detailed guidelines for the determination of who is eligible for the benefits. These

³²⁴ Man. Reg. 290/88R, s.4.

³²⁵ Man. Reg. 290/88R, s.4.

include the surviving spouse of the victim, persons related to the victim by blood or adoption and any stranger who stood in loco parentis to the victim or to whom the victim stood in loco parentis. Note that persons other than surviving spouses must have been wholly or substantially maintained by the victim's income (at the time of the accident) to qualify for the survivor's benefits.³²⁶

There are specific provisions dealing with the phrase "to be wholly or substantially maintained by the income of the victim." This phrase means that at the time of the accident, the victim was providing, from his or her income or earnings from all sources, for more than 50% of the basic needs and maintenance costs of the dependant in question.³²⁷ However, a child will be presumed to be "wholly or substantially maintained by the income of the victim" if the child has no spouse, is unemployed and:

- is a minor, or
- is between ages 18 and 25 and has been attending a university, college, or secondary or post-secondary establishment on a full-time basis since his or her eighteenth birthday, or
- is over 18 years of age and has been an invalid

³²⁶ Automobile Insurance Act, R.S.Q. Cap. A-25, s.1(20).

³²⁷ Que. Reg. c.[A-25, r.7.1], s.29.

ever since his or her eighteenth birthday.³²⁸

It is immediately apparent that the Quebec provisions do require some actual degree of dependency for persons who are neither the surviving spouses nor children of accident victims.

The approach of the New Zealand Act with respect to determining who is eligible for the survivor's benefits is two-fold:

- the general definition section of the Act defines "dependant" as a person whom the victim had a legal duty to support in whole or in part at the time when the dependency has to be determined; this includes any other person who the victim might then have reasonably regarded as being owed a moral duty to support in whole or in part, and whom the victim was then supporting in whole or in part;
- the "dependency rules" presume that, in the absence of proof to the contrary, the female spouse (this includes common law spouses) is totally dependent on the male spouse, and any child under the age of 16 years living in the household is totally dependent on each of its parents; in all other cases, dependency shall be a

³²⁸ Que. Reg. c.[A-25, r.7.1.], s.30.

matter of fact.³²⁹

Therefore, the Act raises a rebuttable presumption of dependency in certain situations (i.e. surviving female spouses and children who are living in the same household and are under the age of 16), and provides that in other cases, dependency must be demonstrated.

One observer has noted that there is a conflict between the definition of "dependant" in the Act and the rules for determining dependency. Take the case of a husband and a wife living together. If the husband is killed in an accident, the wife is presumed (by the dependency rules) to be dependent on the deceased husband. However, this presumption can be displaced. Yet, the definition of "dependant" states that a person is a "dependant" where there is a legal duty of support (either in whole or in part) owed by the victim to that person. The surviving female spouse is a person to whom the accident victim would have owed a legal duty to support, therefore she is a "dependant" within the meaning of the definition section of the Act. However, although the dependency rules presume the surviving spouse to be dependent on the victim, that presumption may be displaced by evidence to the contrary. The conflict is obvious; according to the definition section of the Act, the surviving female spouse is a

³²⁹ Accident Compensation Act 1982, ss. 2, 65(1) and 85.

"dependant," but according to the dependency rules, it may be shown that that surviving spouse was not dependent on the accident victim.³³⁰

This conflict between the "definition" section and the "dependency rules" of the Act has led to some unusual decisions concerning who is eligible for the survivor's benefits. Cases have held that:

- non-financial support (i.e. domestic services rendered by wife for her husband and children) does not make the recipient of this non-financial support a dependant of the accident victim;
- surviving family members cannot seek an award of earnings-related compensation where the support that the family members receive from the victim did not come from the earnings upon which earnings-related compensation would be based;
- a parent who receives support from his child in the form of low cost services was not a dependant of that child.³³¹

The Victorian Government has pointed out that although the benefits payable to the dependants as a result of the death of the accident victim should be parallel to those payable to a person who has been totally incapacitated,

³³⁰ J. Miller, "Fatal Claims Under the Accident Compensation Act 1972," [1979] N.Z.L.J. 173 at 175.

³³¹ Ibid., pp. 178-182.

there are three differences between the death benefits and those payable to someone who has been totally incapacitated. The differences are:

- (1) For a deceased person, there is no distinction between income adjustment and longer term benefits, so only the counterparts of long-term impairment and Loss of Earnings Capacity benefits are relevant (no point in waiting eighteen months to see if the condition improves).
- (2) Due to the immediacy of the loss, and the frequent need for capital adjustments which often confront the surviving spouse, a larger lump sum is payable on death to the deceased's spouse than to a fully-incapacitated person.
- (3) Since the survivor has an opportunity to build a new life and there is the availability of other benefits, the Loss of Earnings Capacity benefit is to continue for five years after the accident or until the surviving spouse reaches retirement age (whichever is earlier).³³²

Therefore, the principal benefits available in Victoria on the death of an accident victim are the lump-sum payment and the Loss of Earnings Capacity Benefit.

So far, then, we have examined two major issues with respect to the death benefits. The issues are:

- (i) Should benefits be payable as a percentage of the earnings-related compensation which would have otherwise been payable to the accident victim, or should the benefits be based on the actual financial support which the victim was providing to the surviving family members before his or her

³³² Government Statement, supra n. 102, p.95

death?

(ii) Who should be eligible for these death benefits?

That is, should certain persons be defined as "dependants" of the accident victim, and thus eligible for whatever death benefits are available? Or, should we consider an approach which attempts to determine whether or not there was any dependency in fact upon the accident victim (and if so, what the degree of this actual dependency was)?

Of course, the above questions are inter-related. We have examined arguments both for and against how the death benefits should be assessed, and we have noted the problems of attempting to determine whether or not there is actual dependency upon the accident victim in every case (clearly to attempt such determination would be an administrative nightmare). The question then becomes: what should we do?

The approach of the New South Wales Law Reform Commission was to define a "dependant" as a person who, as of the accident date, was dependent upon, or inter-dependent with the accident victim. Dependence or inter-dependence must be material (e.g., financial support where deceased was an earner, or household services where deceased was a non-earner) and must be of significant and continuing nature.³³³

³³³ N.S.W. Report, supra n. 110, Vol. II, pp. 342-343.

Only members of the victim's family would be eligible for the death benefits, however, this would include common law spouses and persons to whom the deceased stood in loco parentis.³³⁴

Only a "child" of the victim who was a member of the victim's household as of the date of death should be conclusively deemed to be dependent on the victim ("child" means a child under the age of 16 years, or a full-time student or physically or mentally handicapped child, up to the age of 21).³³⁵ Spouses and other relatives would have to prove dependency upon the accident victim.³³⁶

It is submitted that an appropriate balance between the competing demands of requiring the demonstration of actual dependency and of requiring administrative efficiency would be as follows:

- the following persons would be conclusively deemed (i.e. no rebuttable presumption) to be "dependants" of the victim and therefore eligible for the death benefits:
 - spouses (including common law spouses)
 - children who are living in the victim's household as of the date of death (or who are principally supported by the victim),

³³⁴ Ibid., Vol. II, pp. 344-345.

³³⁵ Ibid., p. 345.

³³⁶ Ibid., p. 346.

provided that they are

- under the age of 18, or
 - between the ages of 18 and 25, and in full-time attendance at a University, community college, or other post-secondary or secondary educational institute, or
 - are physically or mentally handicapped.
- other "family members" (see N.S.W. definition on p. 316) would be eligible for the death benefits where they can establish that they are "wholly or substantially maintained by the income of the accident victim" as of the accident date (the phrase "to be wholly or substantially maintained by the income of the accident victim" means that at the time of the accident, that the victim was providing, from his or her own income of earnings from all sources, for more than 50% of the basic needs and maintenance costs of that dependant);
- benefits for surviving spouses and children will be based on percentages currently specified by the Quebec Act (i.e. percentages of benefit which would have been payable to victim, had s/he lived) (see p. 321);
- same conclusions as to commencement of benefits, indexation, form of payment, commutation of

benefits, assessment of loss of earnings capacity (including definitions of "pre-accident weekly earnings" and "post-accident earning capacity") as were stated for totally disabled earners (see pp. 112-152) will be applicable (subject to necessary modification) here;

- family members (apart from surviving spouses and children of the accident victim) who establish dependency upon the victim by showing that he or she was wholly or substantially maintained by the income of the victim should be entitled to a benefit of 1/6 of the earnings-related compensation or income replacement indemnity which would have been payable to the accident victim had he survived, but been totally incapacitated;
- as there may be a need for a sudden injection of financial support immediately following the death of the accident victim, surviving spouses of the accident victim should be eligible for a lump-sum payment (payable immediately after death) in addition to the periodic payments recommended above. The amount of this payment would be established by the formula:

$$\frac{\text{[maximum amount to be determined by administrators]}}{\text{by administrators}} \quad \times \quad \frac{125-A}{100}$$

the value of A is as follows:

- for victims 75 years of age or older, 75

- for victims 25 or under, 25
- if the victim was over 25 years but under 75, the age of the victim at the date of the accident;
- this lump-sum payment should be payable to the surviving spouses of both earners and non-earners; if there are no surviving spouses, the benefit should be divided equally amongst all of the dependent children of the accident victim;
- periodic compensation payable to a child of the victim should continue until he or she:
 - attains age of 18 years, or (for student) 25 years
 - becomes self-supporting (whichever occurs later)
 - the above age restrictions do not apply to physically or handicapped children;
- the provisions in respect of when benefits payable to a surviving spouse should cease are modelled on the N.S.W. Report's recommendations (with some modifications), as follows:
 - the general rule is that the periodic benefit payable to the surviving spouse of an accident victim should cease five years from the date of the victim's death, or until the youngest child in the spouse's care and control attains age 18, whichever occurs first;
 - if, after five years from the death of the victim, the surviving spouse has the care and control of a child (under the age of 18), and has a combined income and earning capacity which is less than 80% of the earnings of the deceased (as indexed) or 80% of the A.W.E. (whichever is less), further periodic

compensation should be paid to that spouse and it should supplement the combined income and unused earning capacity (if any) of that spouse; the objective is to bring the total of the income, unused earning capacity and periodic benefit payable to 80% of the earnings of the deceased (subject to a maximum of 80% of the A.W.E.);

- this additional compensation (the post-five year compensation) should cease when the youngest child in the care and control of the surviving spouse attains 18 years or the surviving spouse no longer has care and control of that child, whichever occurs first;
- where the surviving spouse has the care and control of a physically or mentally handicapped child, the above age limit of 18 years will not apply (benefits will continue as long as s/he has care and control of the child);
- periodic compensation payable to surviving spouse should cease on that spouse's remarriage;
- where surviving spouse was receiving periodic compensation and remarries within four years of the victim's death or up to one year before his or her youngest child attains the age of 18, that spouse should receive a lump-sum payment equivalent to one year's installments of periodic compensation; if the remarriage occurs in the fifth year after the death, or within one year of the youngest child attaining age 18, the lump-sum payment shall be equivalent to the remaining compen-

sation which would have been paid to the spouse periodically, had the marriage not occurred;

- the reasonable funeral expenses of persons killed in motor vehicle accidents should be met.

h. Exclusions from Coverage

(1) Comparison

(a) Manitoba

(i) Part II Benefits

- the following persons and their dependants are not eligible for any Part II Benefits:
 - non-Manitoba residents riding in or on vehicles not registered in Manitoba;
 - Quebec residents;
 - persons driving, riding in or on, struck down by, or getting in or out of vehicles which are not required to be registered under the Highway Traffic Act of Manitoba;
 - persons who drive or ride in a vehicle that, at the material time, is engaged in any illicit or prohibited trade or transportation;
 - persons who drive or operate a vehicle that, at the material time, is engaged in a race or speed test;
 - persons who are spectators or are working in an area that, for the time being, is being used by a spectator or spectators to view vehicles engaged in a race or speed test, and are struck down by such a vehicle;
 - persons who are hit by or operating a tractor or snowmobile, unless in collision with another motor vehicle which is required to be registered in Manitoba (s.33).
- if carriage of stolen goods is merely incidental to the journey and not its main purpose (e.g. not for the purpose of transporting stolen goods to the place of sale), the "illicit or prohibited

trade" restriction will not apply.³³⁷

- person who is driving a vehicle which is being chased by police is not involved in a "race or speed test" because a race involves a "contest" and no one would regard the police as engaging the driver in a race.³³⁸
- except for the funeral expenses and death benefits payable under the Regulations, no Part II Benefits shall be paid to:
 - any person who operates any class of motor vehicle which he or she is not qualified and authorized by law to do so; or
 - a passenger of a person mentioned in the above clause unless that passenger believes, upon reasonable and probable grounds, that the driver is so qualified and authorized (s.6).
- all Part II Benefits, except for the payment of funeral expenses and death benefits, will also be denied to persons who breach the following conditions:
 - an insured who is ordinarily resident in Manitoba shall not operate a motor vehicle unless he is named in a valid and subsisting driver's certificate;
 - the vehicle must be designated in a valid and subsisting owner's certificate;
 - any trailer being towed must be properly registered;
 - insured must not hold onto or attach himself to a portion of the vehicle which is not designated for carrying a load of passengers;

³³⁷ Royal Insurance Co. v. Nelson, [1986] I.L.R. 1-2040 (N.S.C.A.).

³³⁸ Thomas v. Wawanesa Mutual Insurance Co., [1982] I.L.R. 1-1473 (N.S.S.C.) revd. [1982] I.L.R. 1-1559 (C.A.) on grounds that damage caused while fleeing from police is not accidental and that claim is barred by public policy; Blackstock v. I.C.B.C., [1983] I.L.R. 1-1630 (B.C.S.C.).

- the insured is not to operate any vehicle while under the influence of intoxicating liquor or drugs to such an extent that he is incapable of proper control of the vehicle, or is in a condition for which he is convicted of an offence under Sections 237(a) or 237(b) of the Criminal Code (Canada);
- an insured who is the owner or other person in charge of the vehicle should not allow the operation of the vehicle by any person contrary to the conditions stated above (s.36).
- Section 23(1) of the Manitoba Public Insurance Corporation Act provides that where it is material, in any action or proceeding under the Act, to establish that a person operating a motor vehicle was doing so while under the influence of intoxicating liquor or drug to the extent of being incapable of proper control of the vehicle, proof of convictions under Sections 237(a), 237(b) or 238(5) of the Criminal Code shall be conclusive proof that the person so convicted was (at the time of the commission of the offence) using or operating the motor vehicle while his ability to properly do so was impaired by alcohol or drugs.³³⁹
- claim of applicant or insured, and every other person claiming through or on behalf of him, shall be rendered invalid and the benefits forfeited where:
 - applicant for an owner's certificate falsely describes the motor vehicle or trailer in the application; or
 - an applicant for an owner's or driver's certificate knowingly misrepresents or fails to disclose in the application a fact which is required to be stated; or
 - an insured violates a term or condition of any plan; or
 - an insured commits a fraud in respect of this Act; or

³³⁹ R.S.M. 1987, c.P215, s.23(3) (hereinafter referred to as the "M.P.I.C. Act").

- an insured makes a wilfully false statement with respect to a claim under any plan.³⁴⁰
- there is "relief from forfeiture" of such benefits as the Corporation deems equitable, where an insured suffers a loss of mind or body function (due to the accident) which renders him permanently incapable of engaging in any occupation for wages or profit, or is killed in the accident.³⁴¹
- M.P.I.C. Act, s.22, contains a general "relief from forfeiture" provision where there has been imperfect compliance with the terms, conditions as to proof of claim or proof of loss, or as to any other matter or thing required to be done or omitted by an insured or other claimant with respect to the loss.³⁴²
- this relief from forfeiture is permitted where the insured has an otherwise valid claim, but has failed to process the claim in perfect compliance with the Regulations; Section 22 does not apply where by virtue of a breach of the statutory conditions, there is no right to make a claim.³⁴³
- relief from forfeiture may be granted for a "pre-loss" breach on the basis of Section 63, Rule 7 of the Queen's Bench Act, where the breaches are of a technical, and not significant nature.³⁴⁴
- "general compliance" provision which requires insured to comply with every provision of the Act or Regulations is imprecise, and does not forfeit the victim's insurance benefits for every and any breach of the Regulations (if a penalty such as forfeiture is intended, provision must make this penalty clear).³⁴⁵

³⁴⁰ M.P.I.C. Act, s.37.

³⁴¹ M.P.I.C. Act, s.37.

³⁴² M.P.I.C. Act, s.22.

³⁴³ Ferreira v. M.P.I.C., [1980] I.L.R. 1-1207 (Man. Q.B.).

³⁴⁴ Bonne v. Irvine, [1985] I.L.R. 1-1884 (Man. C.A.).

³⁴⁵ Damour v. M.P.I.C., [1981] I.L.R. 1-1402 (Man. Q.B.).

(ii) The Kopstein Report

- persons whose injuries are caused by their own conduct for which they are convicted of a criminal offence should be denied coverage for impairment benefit and should be barred from receiving disability benefits for one year from the date of the accident unless, on application to Court by the victim, it is established that the responsibility for the accident was not primarily that of the victim (p. 103).
- where M.P.I.C. is bound to pay no-fault benefits to a victim injured in an accident which was caused by an insured driver who is convicted of a criminal offence arising from the accident, M.P.I.C. should be accorded the right to sue and recover from the driver the amount of any compensation paid to the insured party, where the accident was caused primarily by the insured driver (pp. 103-104).

(b) Ontario

(i) The Standard Insurance Policy

- the following persons are not eligible to receive any of the no-fault injury benefits (nor are their dependants):
 - persons who have suffered bodily injury or death as a result of the suicide or attempt thereat of such a person, whether sane or insane; or
 - persons who are entitled to receive the benefits of any workers' compensation law or plan; or
 - persons who have suffered bodily injury or death caused directly or indirectly by radioactive material;
 - (exclusions do not apply to Ontario residents injured in automobile accidents in Quebec, and thus eligible for benefits in accordance with the Quebec Scheme) (Vol. II, pp. 761 and 763).
- except for the lump-sum death benefits payable to

survivors, the no-fault injury benefits will not be payable to any person:

- who is convicted of drunken or impaired driving or driving while under the influence of drugs at the time of the accident; or
 - who is driving the automobile while not for the time being either authorized by law or qualified to drive the automobile (Vol. II, p. 763).
- no-fault injury benefits also subject to the following Statutory Conditions:
- insured named in contract must promptly notify insurer in writing of any change material to the risk of the contract (within the insured's knowledge), such as any sale or assignment of the vehicle, any mortgage, lien or encumbrance affecting the automobile, and any other insurance of the same interest;
 - insurer may terminate contract by giving fifteen days' notice of termination by registered mail, or five days' written notice of termination which is personally delivered (Vol. II, pp. 765-766).
- general exclusion clauses applicable to the Policy as a whole include:
- persons who are occupants of any automobile which is being used without the owner's consent are excluded from coverage;
 - persons engaged in the business of selling, repairing, maintaining, storing, servicing or parking automobiles while operating or working upon the vehicle in the course of that business are excluded;
 - persons who are renting or leasing the (insured) automobile are excluded;
 - persons using the vehicle to carry explosives or radioactive material or using it as a taxi-cab, bus or for carrying passengers for compensation or hire are excluded (Vol. II, pp. 764-765).

(ii) The Osborne Report

- all persons injured in motor vehicle accidents (including pedestrians) should be given access to the no-fault benefits; the Standard Automobile Insurance Policy should be expanded to provide no-fault accident benefits without exclusions related to driving conduct (Vol. I, p. 570).

(c) Quebec

(i) The Automobile Insurance Act

- no compensation for personal injury is payable in the following cases:
 - (a) if the injury is caused, while the automobile is not in motion on a public highway, by a device that can be operated independently that is incorporated with the automobile, or by the use of such a device;
 - (b) if the accident occurred in a place other than a public highway and it was caused by the following vehicles: a snowmobile, a farm tractor, a farm trailer, a specialized vehicle, drawn-machinery, or vehicle intended for use off of a public highway; the preceding provisions do not apply if an automobile other than the vehicles mentioned in this subparagraph is involved in the accident;
 - (c) if the accident occurred as a result of an automobile race or a speed contest, on a track that is temporarily or permanently closed to all other automobile traffic, whether or not the automobile that caused the injury was engaged in the race or the contest, and whether the victim was a participant or a spectator (s.17).
- the following terms are defined in the Regulations:
 - "Snowmobile" is defined as a self-

propelled motor vehicle built primarily for travel on snow or ice, having or not having a steering ski or runner and driven by an endless track in contact with the ground.

- "Farm trailer" is defined as a vehicle that is not motorized, equipped with a space for loading, whether or not the loads are carried independently when drawn by a vehicle, used principally for the transportation of farm products or materials required for their production and belonging to an individual or company that is the owner or lessee of a farm and whose principal occupation is farming or that is a member of an association certified under The Farm Producer's Act (R.S.Q., c.P-28).
- "Drawn-machinery" is defined as a vehicle that is not motorized, equipped with a space for loading ... and:
 - (i) is used to carry equipment or machinery ... and is used to dispose of the said loads; or
 - (ii) that is used exclusively to carry equipment which is a permanent part thereof.
- "Farm tractor" is that which is equipped with tires and generally used for farming purposes ... belonging to an individual or company that is the owner or lessee of a farm and whose principal occupation is farming ...
- "Self-propelled machinery" is an automobile ... that is self-propelled, has no space for loads, and is designed basically to perform work independently and equipped for such purpose with machinery that is a permanent part thereof.
- "Vehicle intended for use off a public highway" is an automobile used exclusively on private lands or roads and not authorized to operate on public highways excluding buses, mini-buses, and

taxis and public commercial vehicles.³⁴⁶

- where, by reason of bodily injury caused by an automobile, a person is entitled to both indemnity under The Automobile Insurance Act and to compensation or pecuniary benefit under The Act Respecting Industrial Accidents and Occupational Diseases (Cap. A-3.001) or another Act relating to compensation of certain persons who are victims of industrial accident, in force in or outside Quebec, that person shall claim the compensation or pecuniary benefit provided for under the said Act or such other Act (s.18).
- if there is any excess above such compensation provided by The Automobile Insurance Act, the accident victim may avail himself of that excess (s.18).
- indemnity may be refused or suspended where a claimant files false or untruthful information or refuses new employment (without valid reason) or leaves an employment that he could continue to hold, or refuses or neglects to avail himself of rehabilitation measures put forth by the Regie, or refuses or neglects to furnish information required under the Act (s.69).

(ii) Proposed Amendments

- payment of income replacement indemnity suspended where victim is being held in detention by reason of an indictable offence which he has committed while driving an automobile, from the month following the month of his admission to a detention centre; suspension shall remain in force until victim is released or found not guilty of the offence, but his or her dependants are entitled, during the suspension, to an indemnity equivalent on a yearly basis to a percentage of what would have been paid to the victim, as follows:
 - 55 percent for one dependant;
 - 65 percent for two dependants;

³⁴⁶ A Regulation Defining Certain Words and Expressions for the Purposes of the Automobile Insurance Act, Que. Reg. c.A-25, r.3, s.9.

- 70 percent for three dependants, plus five percent for each additional person, up to 90 percent of the indemnity which would have been payable to the victim (cl. 83.32).

(d) New Zealand

- deliberately self-inflicted injuries are excluded from coverage, as are diseases, unless the disease is a physical consequence of personal injury by accident (s.2).
- tourists are not eligible for earnings-related compensation (s.34).
- no death benefits payable to survivor convicted of murder or manslaughter of victim (s.91).
- Corporation may decline to pay all or part of compensation to person injured while committing a crime and sentenced to a term of imprisonment (s.92).

(e) Victoria

- no compensation for loss of earning capacity where victim receives common law award or settlement for pecuniary losses resulting from the injury, and no impairment benefits (either lump-sum or annuity) payable where the victim has received pain and suffering damages at common law [s.53(2)].
- no loss of earning capacity benefits and/or impairment annuity benefits payable once three years following the manifestation of the injury has expired (with qualifications for minors) or the total of the loss of earnings, impairment annuity, and loss of earning capacity benefits equals (as of July 1, 1988) \$76,740.00 [s.53(3)].
- the restrictions listed immediately above do not apply to persons who have had his or her degree of impairment determined at a level of 50 percent or more [s.53(4)].
- no loss of earning capacity benefits and/or long-term impairment benefits (i.e. the "post-18 month" benefits) payable to victim, if victim was driving motor vehicle at time of accident, and:

- is convicted, in respect of driving the motor car at that time, of an offence under s.318(1) of the Crimes Act 1958 (i.e. culpable driving); or
 - is convicted of driving without a licence or driving while suspended; or
 - is convicted, in respect of driving the motor car at the time of the accident, of an offence under s.49(1)(a) of the Road Safety Act 1986 (i.e. driving motor vehicle while under influence of drugs or intoxicating liquor and as a result is incapable of having proper control of the motor vehicle); or
 - is convicted of driving a motor vehicle, at the time of the accident, with a blood alcohol content of .24 (or more) grams per 100 ml. of blood [ss.39(2) and 39(3)].
- the exclusions related to impaired driving (listed above) will not apply if the accident victim is able to satisfy the Commission that the intoxicating liquor or drug or the percentage of alcohol in the blood, as the case may be, did not contribute in any way to the accident [s.39(3)].
 - no compensation of any kind payable (unless Commission decides otherwise) to persons who are also eligible for compensation from various other statutory schemes (s.37).
 - the Commission is not liable to pay any compensation where an accident occurred involving a motor vehicle (other than a recreational vehicle) and the victim did not report the accident to the police [s.39(1)(a)].
 - if the Commission determines that the failure to report the accident should be excused, compensation will be payable [s.39(1A)].
 - no compensation payable to persons eligible for workers' compensation (s.38).
 - loss of earnings benefits payable within the first 18 months after the accident are reduced, proportionately, where victim was the driver of the vehicle and had a blood-alcohol content of between .05 and .24 at the time of the accident (s.40).
 - loss of earnings benefit may be denied to impaired drivers, unless driver can show intoxication did

not contribute in any way to the accident [s.39(4)].

(f) N.S.W. Law Reform Commission Report

- no compensation of any kind available in respect of intentionally self-inflicted death or bodily injury (Vol. II, p. 443).
- no compensation of any kind available in respect of bodily injury or death sustained by a person in furtherance of or incidental to the commission of a crime involving an intention to inflict serious violence or substantial damage to property, for which the injured person is convicted or against whom the offence is proven (Vol. II, p. 443).
- all benefits under the Scheme should be suspended while a person who is otherwise eligible for benefits is imprisoned pursuant to conviction or sentence for any crime (Vol. II, p. 446).
- subject to the discontinuation of benefits during imprisonment (listed immediately above), there should be no further exclusions from the Scheme on public policy grounds. However, consideration should be given to revising sentencing procedures to empower or require judges and magistrates to take into account entitlements to benefits under this Scheme when sentencing for offences related to transport accidents. Consideration should also be given to the establishing of mechanisms for the enforcement of penalties against entitlements under the Scheme (Vol. II, p. 445).

(2) Analysis

Some initial observations are appropriate concerning this issue. First of all, the question of exclusions from benefits is not to be confused with the related issue of denial of benefits when compensation is available from other schemes or systems. This issue of compensation from other schemes was discussed earlier, in the "Analysis" section under "Compensation for Earners: Total Disability"

(see pp. 149-150).

It was submitted that, with respect to compensation from other schemes, provisions similar to those recommended by the New South Wales Law Reform Commission be implemented in Manitoba. The recommendations were as follows:

- if a person is entitled to benefits both from the automobile accident compensation Scheme and is also entitled to compensation or damages under the law enforced in the province or under the laws of Canada or of any other Canadian province or territory in respect of the same death or bodily injury, the person should be given a period of three months from the date of the accident or from the onset of the symptoms (whichever is later) to elect between the compensation offered by the automobile accident compensation Scheme and the other sources of compensation;
- this period of three months may be extended by the administrators of the automobile accident compensation Scheme, where undue hardship to the victim would otherwise be caused;
- if a person receives compensation under a law enforced in the province or under the laws of Canada or of any other Canadian province or territory, such compensation should be set off against benefits otherwise payable or available

under the automobile accident compensation Scheme.³⁴⁷

The problem of collateral benefits was also dealt with earlier in this thesis. The following provision was recommended:

- benefits under the automobile accident compensation scheme should not be reduced or affected where the accident victim receives ex gratia payments, accident insurance, retirement pensions, superannuation or pensions or benefits under Canadian legislation (see p. 150).

The provision regarding the set-off of benefits payable under other Canadian laws must be read in light of the recommendation that benefits payable under the automobile accident compensation Scheme should not be reduced or affected by ex gratia payments, accident insurance, retirement pensions, or other social insurance benefits. That is, the latter recommendation acts as a limitation on what amounts may be set off against benefits payable under the automobile accident compensation Scheme.

The analysis of "exclusions from coverage" is really concerned with exclusions based on the conduct of the accident victim. In this regard, several comments (and criticisms) may be made with respect to the current

³⁴⁷ See the N.S.W. Report, supra n. 110, Vol. II, pp. 432-433.

exclusion clauses in the Manitoba Regulations.

The Manitoba provisions would deny any coverage to persons:

- who are non-Manitoba residents riding in or on vehicles that are not registered in Manitoba;
- who drive or ride in a vehicle that, at the material time, is engaged in any illicit or prohibited trade or transportation;
- who are driving, riding in or on, struck down by, or getting in or out of vehicles which are not required to be registered under the Highway Traffic Act of Manitoba.³⁴⁸

The exclusion with respect to non-Manitoba residents has already been criticized in this thesis (see pp. 79-80). The recommendation made with respect to such victims was that they should have a right to elect between compensation which might otherwise be available to them (i.e. from insurers in their own jurisdiction) or compensation available under a comprehensive automobile accident compensation Scheme in Manitoba. If the non-resident victims chose compensation from the Manitoba Scheme, the administrators of the Scheme would then have the right to seek subrogation of compensation which that victim might have recovered from other sources (up to the amount of benefits actually paid out to that victim).

³⁴⁸ Man. Reg. 290/88R, s.33.

The other exclusions listed above also merit criticism. The exclusion dealing with persons getting in or out of vehicles which are not required to be registered under the Highway Traffic Act should be reconsidered in light of the recent enactment of the Off-Road Vehicles Act,³⁴⁹ which requires owners of off-road and all-terrain vehicles (including snowmobiles) to acquire third party liability coverage in respect of these vehicles. If such third party liability coverage is mandatory, then there is no reason why persons injured by such vehicles should be excluded from a comprehensive automobile accident compensation Scheme. The rationale for mandatory third party coverage is that victims will not be left without compensation; therefore, compensation should be provided to such victims under the Scheme (registration premiums in respect of these vehicles would be paid to the Scheme's administration).

The third comment which may be made with respect to the Manitoba exclusions is that the clause which denies compensation to persons who drive or ride in a vehicle that is engaged in illicit or prohibited trade or transportation may operate unjustly against passengers who unknowingly ride in vehicles being used for such purposes. The provision (if it is to be retained at all) should be at least re-worded to provide that such persons must unknowingly drive or ride in a vehicle that is engaged in any

³⁴⁹ R.S.M. 1987, c.031.

illicit trade or transportation (subject to a provision that knowledge of the illegal purpose may be inferred from the circumstances).

Section 6 of the Regulations³⁵⁰ provides that except for the funeral expenses and death benefits payable under Divisions IV and IV of the Regulations³⁵¹ no Part II benefits shall be paid to:

- (a) any person who operates any class of motor vehicle if he or she is not qualified and authorized by law to do so; or
- (b) a passenger of a person mentioned in clause (a) unless that passenger believes, upon reasonable and probable grounds, that that person is so qualified and authorized.

The term "authorized by law" has generally been defined as holding a valid driver's licence or permit which has not been suspended and complying with any condition attached to it (ie., if a person has a conditional licence, he or she must obey those conditions).³⁵² "Qualified" means competent to drive, ie. capable of driving.³⁵³

There is, however, case law which suggests that the term "authorized to drive" means more than simply holding a valid licence. In fact, one case suggests that where a

³⁵⁰ Man. Reg. 290/88R, s.6.

³⁵¹ Man. Reg. 290/88R, ss. 10 and 11.

³⁵² See Brown, supra n. 3, p. 55, and the cases cited therein.

³⁵³ Ibid.

person is driving while intoxicated, he is neither "qualified" nor "authorized" to drive. That is, the driver is drunk, so he clearly can't be said to be "qualified" to drive (ie. capable of driving), nor can he be "authorized" to drive, because he is driving in violation of the law.³⁵⁴ Perhaps we may conclude that a person will not be "authorized to drive" where s/he is either driving without a valid licence or is committing a serious offence by driving (eg. driving while impaired).

In the case of Sutcliffe v. I.C.B.C.³⁵⁵ the claimant was licensed to drive cars and trucks, but not motorcycles. He was driving a motorcycle when involved in an accident. Was Sutcliffe driving a vehicle which he was not "qualified and authorized" to drive?

Mr. Justice Melvin stated that if a claimant was qualified and authorized by law to drive a motor vehicle by virtue of his licence, I.C.B.C. was not exempt by reason of the fact that he was not qualified and authorized by law to drive another type of motor vehicle not covered by his licence. Had the legislation referred to the vehicle in which the accident occurred, the result would have been different.³⁵⁶

³⁵⁴ MacDonald v. Employees' Mutual Liability Co. of Wisconsin, [1977] I.L.R. 1-888 (N.B.Q.B.).

³⁵⁵ (1984), 11 C.C.L.T. 200 (B.C.S.C.).

³⁵⁶ Ibid. at 213.

The central issue in considering this Section is whether the words "qualified and authorized" should be read conjunctively or disjunctively. That is, must M.P.I.C. show that at the time the accident occurred, the claimant was both driving in violation of the law and that he or she was also incapable of driving the particular vehicle?

In a case which we have already examined, MacDonald v. Employees' Mutual Liability Co. of Wisconsin,³⁵⁷ the Court found that a claimant who had been drinking prior to the accident was impaired, and therefore neither qualified nor authorized to drive.³⁵⁸ However, the relevant clause in that case provided that the insured must be "for the time being either authorized by law or qualified to drive or operate the automobile."³⁵⁹ This is a highly specific wording which is not duplicated in our Regulations.

Note that the Kopstein Report states that where an insured purchases "extension coverage" under Part V of the Regulations³⁶⁰ the Part II benefits will not be denied as long as the driver of the vehicle is either qualified or authorized.³⁶¹ However, this point is arguable as the

³⁵⁷ [1977] I.L.R. 1-888 (N.B.Q.B.).

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Man. Reg. 290/88R, ss.127-136.

³⁶¹ Man. Reg. 290/88R, s.127(2). Also see the Kopstein Report, supra n. 1, Vol. 2, Position Paper No. 2, p. 36.

"extension coverage" provision in Section 127(2) refers only to Parts III (all-perils coverage for damage to own vehicle) and IV (third-party liability coverage) of the Regulations, not the Part II no-fault injury benefits.

Finally, passengers in a car driven by a person who is not authorized and qualified to drive will be denied Part II benefits unless a passenger believes on reasonable and probable grounds that the driver is qualified and authorized.³⁶²

The provision in the Manitoba Regulations which denies compensation (except for the funeral expenses and death benefits payable to survivors) to persons who operate any class of motor vehicle which they are not qualified and authorized by law to do so (and to persons driving with these drivers) is subject to the criticism that it would deny compensation to persons who unknowingly operate motor vehicles while not qualified and authorized by law to do so (e.g. person did not receive notice of suspension and was not aware that his driving privileges had been affected). Therefore, if this or a similar exclusion clause is to be retained (and I submit that it should not be), it should at least be re-worded to provide that compensation will be denied to any person who knowingly operates any class of motor vehicle which he or she is not qualified and author-

³⁶² Man. Reg. 290/88R, s.6(b).

ized by law to do so.³⁶³

Do exclusion clauses have a place in comprehensive compensation Schemes?

One commentator has stated:

The inclusion of any provision under which benefits may be excluded, limited or reduced may be criticized for a number of reasons. No-fault benefits should be of a strictly no-fault variety. A disabled individual, in need of compensation for loss of earnings, impairment, loss of earnings capacity and medical expenses should not be penalized under a Scheme where the issue of fault should not have any import.³⁶⁴

It has also been stated that although intentionally self-inflicted injuries should be excluded from payment, the definition of intention ought to be structured so as to make eligible for payment those guilty of gross negligence. Otherwise, the problem of separating the grossly negligent from ordinary negligent conduct becomes highly intractable. For the same reasons, it arguably makes sense to make eligible for payment even those guilty of drunken conduct. Fault-related exclusions under a no-fault Scheme should be kept to an absolute minimum. However, fault-related conduct should be retained as a factor in determining a payee's own insurance premiums.³⁶⁵

There are two fundamentally different views on ex-

³⁶³ See Man. Reg. 290/88R, s.6.

³⁶⁴ I. Malkin, supra n. 106, p. 266.

³⁶⁵ J. O'Connell, supra n. 262, p. 10.

clusions from benefit in a no-fault compensation Scheme. The first view is that broad exclusions from the Scheme conflict with its basic purpose, because denying benefits on the grounds of criminal or other improper conduct is a return to fault. The arguments in favour of exclusions (the second view) usually contend that the community's "sense of justice" would be offended if a person whose criminal conduct had caused the accident were to be compensated on exactly the same basis as the innocent victim. In the second view, the Scheme should not compensate those whose injuries resulted from their own misconduct, since they are authors of their own misfortune. Accordingly, public resources should not be used to compensate them, at least, should not provide compensation higher than basic social security benefits.³⁶⁶

Furthermore, the limited scope of a proposed Scheme which covers only motor vehicle accidents makes it especially difficult to justify compensation under such a Scheme to persons whose criminal conduct is the cause of their own injury and possibly injury and even death to others. That is, why should a drunk driver who causes a horrible accident receive compensation from an automobile accident compensation Scheme, while perfectly innocent members of society who suffer serious disabilities (not

³⁶⁶ N.S.W. Report, supra note 110, Vol. II, pp. 440-441; also see the discussion of the Osborne Report at p. 35 of this thesis.

caused by automobile accidents) receive only basic social security benefits?³⁶⁷

However, there is an argument which can be raised against the "fairness" and "deterrence" arguments made above. The point is that the clear distinction between compensation for incapacity and punishment for criminal conduct ought not to be compromised, especially in a no-fault Scheme. The objectives of effective rehabilitation and of providing financial security to the victim and his or her family are no less, simply because the person injured or killed was guilty of a crime. Sanctions in respect of criminal or other improper conduct should be imposed by the criminal law. It is not the duty of the compensation system to impose a penalty; this is not a task for which it is equipped. The use of the compensation system as a means of punishment for criminal conduct is especially inappropriate, where the Corporation or Scheme's administrators have to determine the nature and extent of the benefits to be excluded.³⁶⁸

Without a doubt, the most important benefits to retain are those related to treatment and rehabilitation. However, denying compensation for permanent impairment and/or for loss of earning capacity will also present difficulties. These denials would have the greatest effect

³⁶⁷ N.S.W. Report, supra n. 110, Vol. II, p. 441.

³⁶⁸ Ibid., pp. 441-442.

on the most seriously injured persons, and it is difficult to justify penalizing only this class of wrongdoer. However, self-inflicted injury stands apart from the other grounds for exclusion, due to its association with possible abuse of the compensation Scheme. No earnings-related compensation Scheme can ignore the need to guard against cases of injury deliberately inflicted in order to obtain benefits.³⁶⁹

Probably the most difficult issue with respect to exclusion of coverage is that concerning driving offences. Should the act of the offence itself, even where it has materially contributed to the accident, be sufficient to overcome the fundamental objection to denying compensation through the Scheme? A blanket exclusion clause may impose restrictions or limitations which are clearly unjust. The quadriplegic whose blood alcohol level is marginally above the prescribed limit would stand to lose extensive benefits over a lifetime, while a driver guilty of manslaughter who escaped with only minor injuries would be basically unaffected by exclusion from the compensation Scheme.³⁷⁰

In view of the foregoing discussion, it is felt that exclusions in a comprehensive automobile accident compensation Scheme for Manitoba should be kept to a minimum. The following exclusions should be employed:

³⁶⁹ Ibid., pp. 442-443.

³⁷⁰ Ibid., p. 444.

- no benefits under the Scheme should be payable in respect of intentionally self-inflicted death or bodily injury;
- benefits should not be available under the Scheme in respect of bodily injury or death sustained by a person in furtherance of or incidental to the commission of a crime of serious violence, for which that person is convicted;
- the only exclusion related to driving conduct should be based on the proposed amendments to the Quebec Act; that is, payment of earnings-related compensation will be suspended where the victim in question is being held in detention by reason of an indictable offence which he has committed while driving an automobile (but the victim's dependants are entitled, during the suspension, to an indemnity equivalent on a yearly basis to a percentage of what would have been paid to the victim - see p. 349, supra).

It is submitted that only the above exclusions should be incorporated into a comprehensive compensation Scheme for automobile accident victims in Manitoba.

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