

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**Motor Insurance and
Compensation of Motor
Accident Victims
in Developing Countries**



UNITED NATIONS

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Foreword

The Committee on Invisibles and Financing related to Trade has stated on several occasions that the creation and maintenance of a strong domestic insurance industry is a prerequisite for economic development. Owing to the rapid growth of the number of motor vehicles operating in developing countries and the obvious economic and social ramifications, motor insurance is becoming one of the services to which both Governments and the private sector are increasingly turning their attention.

In view of the growing importance of motor insurance in developing countries and the need to protect both operators of motor vehicles and victims of motor accidents as well as to address the social costs arising therefrom, the Committee, in its resolution 19 (IX) of 3 October 1980,^a requested the UNCTAD secretariat to prepare a study on third-party liability automobile insurance. Pursuant to this request two studies were prepared and submitted to the Committee at its tenth session, held in December 1982. The first study examined the problems facing insurers in this field and proposed various solutions within the legal framework governing the compensation of road traffic victims at the present time. The second study examined some of the advantages and drawbacks for the developing countries of different systems of compensation, especially those based on "no fault".

At its tenth session, the Committee adopted resolution 23(X)^b in which it requested the UNCTAD secretariat to prepare further in-depth studies on the alternative legal systems applicable to the compensation of motor accident victims, taking into consideration the social aspect of motor insurance, the responsibility of insurers and the interests of the insurance industry. In response to this request two other studies were prepared and submitted to the Committee at its eleventh session, held at Geneva in February 1985. The first study examined alternative legal systems for developing countries for the compensation of motor accidents and the second reviewed moves to reform the legal system governing compensation in a number of selected developing countries, and in particular the tendency in a number of developing countries to move away, totally or partially, from the concept of "tort liability" towards other systems.

In view of the importance of the above-mentioned studies and the close relationship between the issues dealt with in them, the four studies are being issued together in the present publication.

ALISTER MCINTYRE

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^a See *Official Records of the Trade and Development Board, Twenty-second Session, Supplement No. 2* (TD/B/833), annex I.

^b *Ibid.*, *Twenty-sixth Session, Supplement No. 3* (TD/B/937), annex I.

Document TD/B/C.3/176

PROBLEMS OF MOTOR INSURANCE IN DEVELOPING COUNTRIES

Study by the UNCTAD secretariat

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Introduction

1. In its resolution 19 (IX) of 3 October 1980 the Committee on Invisibles and Financing related to Trade requested the UNCTAD secretariat to prepare a study on third-party automobile insurance.¹ This study has been prepared pursuant to that request, which was predicated on the reported negative results being experienced by many developing countries in connection with this class of business. The study analyses the operational methods and practices of insurers in writing

motor insurance in general and motor liability insurance in particular, and suggests ways that they, in conjunction with insurance supervisory authorities, can improve performance and results.

2. The issues associated with motor insurance are complex, however, and involve more than insurers. The interests of motor vehicle operators and owners, of the victims of motor accidents, and of the public at large should be carefully considered. Given the nature of the Committee's request, this vast array of issues has been but touched upon lightly in this study. None the less, recognizing their importance, the secretariat commis-

¹ Official Records of the Trade and Development Board, Twenty-second Session, Supplement No. 2 (TD/B/833), annex I.

sioned a separate study by Mr. A.R.B. Amerasinghe that hints more broadly at some of the issues.²

3. Thus, this study should be considered as providing for insurers some solutions to the problems faced by them in writing motor insurance. This emphasis is

² See document TD/B/C.3/176/Supp.1, p. 11 below.

appropriate as, consistent with previous resolutions adopted by the Committee on Invisibles and Financing related to Trade, the creation (and maintenance) of a strong domestic insurance industry is a prerequisite for economic development. It appears that, for many developing countries, the negative results of the motor branch may pose a threat to the maintenance of that strong domestic insurance industry.

CHAPTER I

The motor vehicle environment in developing countries

4. The number of motor vehicles in developing countries has been increasing yearly. In 1970 the total motor fleet of developing countries represented 7.9 per cent of the total world fleet (excluding Eastern European countries). By 1980, with some 46 million vehicles on the roads, it reached 11.9 per cent. Unlike the situation in developed countries, the increase in the purchases of motor vehicles in developing countries represents more a real growth in the rate of motorization, rather than vehicle replacement.

5. In spite of the rapid growth in the number of vehicles in developing countries, the number of vehicles per capita is far below that of developed countries. In 1980 the number of vehicles per 1,000 inhabitants in Africa (excluding South Africa), Asia (excluding Japan) and Latin America was 11, 8 and 81, respectively. This compares with 687 in North America, 503 in Oceania, 324 in Japan, and 294 in Europe.³ The reason for this difference is the difficult economic situation in most developing countries. Also, many Governments in developing countries deliberately restrain car imports in an attempt to use foreign exchange in other areas.

6. The increase in motorization in developing countries has accelerated development by facilitating the transport of people and merchandise. However, it has also produced a heavy toll in accidents. Such accidents have a negative impact on the economic and social life of the community. They result in wasted human, financial and material resources. Even if these losses are com-

pensated by insurance or other forms of indemnity, the society at large ultimately bears the full brunt of the losses.

7. A comparison of motor accident rates in developed and developing countries shows the unenviable situation of the latter.⁴ These high accident rates exist in spite of the fact that the number of vehicles per capita in these countries is very low. High motor accident rates in developing countries can be attributed to poor road conditions, inadequate traffic control, poor vehicle condition (due to inappropriate use, poor maintenance and old age), and inexperienced and sometimes careless drivers.

8. Besides the high frequency of motor accidents, there is a marked trend towards increased severity of losses. This is due to the high density of the population in urban areas, the introduction of heavier and more powerful vehicles, the insufficiency of first aid and ambulance facilities, increased costs of auto repair and the general inflationary spiral that has increased costs in all areas.

9. However, even under the best of conditions, motor accidents will continue to occur. It has, therefore, been deemed important to have a compensation system for innocent victims of motor accidents. As discussed below, most countries rely on a combination of tort law and liability insurance to provide this compensation.

³ *Sigma* (Zurich), April 1982, p. 5.

⁴ See International Road Federation, *World Road Statistics 1981* (Geneva).

CHAPTER II

The importance of motor insurance to insurers in developing countries

10. The motor insurance line is exceedingly important in developing countries.⁵ It represents for them the major source of premium income. The total non-life in-

⁵ This study focuses on the importance of motor insurance to insurers. However, one must recognize that motor insurance fundamentally is of greatest importance to individual insureds who are afforded protection by such coverage and claimants whose losses can be compensated.

surance premium income of insurers in developing countries was \$12.4 billion in 1980. Of this amount, one third or \$4 billion was generated by motor insurance branches. Moreover, this one-third figure likely understates the potential importance of motor business as premium levels in many countries are artificially depressed and as sizeable portions of motor fleets in developing countries are uninsured.

11. The importance of motor insurance stems not only from the fact that it occupies a dominant position in terms of total premium income; it is also the major source of insurers' cash flow. Motor insurance premium income is steady, with no specific periods or seasons. Thus, a continuous cash flow is provided, allowing insurers to meet their normal obligations and obviating the necessity of keeping all of their assets highly liquid. The cash flows from motor insurance also allow insurers to finance expansion in new fields of activity.

12. Another feature of motor insurance, making it of particular importance to insurers in developing countries, is the fact that, unlike most other classes of insurance, it does not require proportional reinsurance. This is because it enjoys a favourable "spread of risk". Only very high liability limits require excess of loss cover and the cost of such cover is small. Thus the major part of premiums generated by this class of business remains with the direct insurer, becoming its main source of investment earnings. This is not normally the case in other lines, which can require extensive reinsurance.

13. The motor insurance business often provides the essential underpinning for insurers' entire sales efforts in other lines of insurance. Sales persons rely on the steady commission generated by a constant flow of motor business to enable them to remain in business and to sell other types of insurance. Without this basic income source, they probably would not be able to persist

in insurance sales, resulting in a curtailment in the availability of other types of insurance.

14. The growth rates of motor insurance in developing countries have been greater than that experienced in other classes of business. In some developing countries, motor premium growth has exceeded 25 per cent per annum, whereas other classes have experienced growths of 10 per cent. Such growth rates normally reflect increased motorization rather than tariff adjustments.

15. Motor insurance premiums are derived from both compulsory (i.e., required by law) and voluntary motor covers. The relative importance of the two covers varies depending on whether both bodily injury and property damage liability insurance are compulsory (as is common in developing countries influenced by French legislation); or only bodily injury coverage is compulsory (as is common in those countries influenced by United Kingdom legislation).

16. The price of compulsory insurance has a decisive effect on the ability of insureds to purchase other covers. The higher the compulsory insurance premiums, the less the client is inclined to purchase other covers. However, the premium volume for non-compulsory covers generally increases more rapidly than that for compulsory insurance. This is due to the increasing values of vehicles, which mean higher sums insured and larger claims on first party physical damage covers; and more rating flexibility with voluntary than with compulsory covers.

CHAPTER III

Motor insurance performance in developing countries

17. Motor insurance performance in most developing countries apparently has not been favourable. This is in spite of the fact that motor insurance unlike many other lines of insurance in developing countries, has a sufficiently large number of insureds to permit the law of large numbers to operate successfully and to facilitate compilation of meaningful statistics and reliable loss predictions. The implication of this is that motor risks can produce a balanced account provided the rating faithfully reflects loss experience.

18. A second positive feature of motor insurance is that its underwriting expenses should be low. Most of the indicators of physical and moral hazards can be obtained from the proposal forms and there is seldom a need to inspect motor risks for rating.

19. Also, unlike many other lines, motor insurance does not require a highly specialized underwriting knowledge. It is sufficient for staff to receive firm underwriting guidelines coupled with a reasonable rating system. Further, acquisition costs in many countries should not be as high as for other forms of personal insurance since the purchase of liability cover is compulsory.

20. The large volume of premiums, the spread of risks, the ease of underwriting, the reduced reliance on

reinsurance, and the availability of investible funds from which additional income can be derived would lead one to expect motor insurance to be profitable. Yet, the facts are quite different. The motor insurance branch records large deficits in many, if not most, developing countries.⁶ In some developing countries, loss ratios of up to 180 per cent and higher are found.

21. Because of their dependence on motor insurance, the insurance companies of developing countries have been particularly hard hit by the poor results from this class of business. Some companies in these countries have experienced such large losses that they became insolvent. Others have abandoned or restricted their writing of motor business. If the trend continues, motor insurance experience could jeopardize the emerging insurance industry in many developing countries or, at best, hamper its growth.

22. The unhappy situation described above in developing countries persists for several reasons. Claims

⁶ To state that the motor insurance branch is unprofitable requires a definition for profit. As used in this study, total profit is defined as underwriting profit plus net investment income. Underwriting profit is found by subtracting incurred claims and underwriting expenses from premiums earned in a year. Net investment income is found by subtracting investment expenses from gross investment income.

control is sometimes lacking. Expenses are high. Investment yields are often artificially depressed. Finally, and most importantly, premium rates, especially as related to compulsory motor insurance, have often been held to insufficient levels by regulatory authorities. Each of these difficulties is discussed briefly below.

A. Claim payments

23. In most developing countries, losses arising from motor accidents are settled according to the liability system. To receive compensation, the victim must file a claim against the party causing injury (the tortfeasor) and the tortfeasor must be found to be at fault in causing the damage. Also, generally, the victim must not have contributed significantly to his or her own loss. Until recently, many persons living in developing countries either were not aware of their legal rights regarding compensation for death or bodily injury caused by another or did not believe it proper to file a claim for "blood money". Societal values are changing. People are becoming more claim conscious. It is becoming unusual not to make a claim for bodily injuries or property damage caused by motorists.

24. The trend in developing countries is to make the purchase of motor liability insurance compulsory. The required minimums vary from country to country, with many countries requiring unlimited protection for the bodily injury liability cover and some requiring it for the property damage cover. Making the purchase of motor liability insurance mandatory is deemed to be a sensible way of ensuring compensation to those who are harmed by a negligent motor vehicle operator.⁷

25. The method of establishing fault varies. In developing countries (in Africa and Asia) following British Common Law, the victim must prove the fault of the opposing party. In countries influenced by the French Civil Code (in Africa and the Pacific, as well as in some Latin American countries), a motor vehicle is presumed to be a dangerous object. Its operation on the road presents a danger to the public. Thus, if a motor vehicle causes injury, a presumption of liability attaches to the operator and proof of negligence is not required. The operator may, however, overcome the legal presumption by proving that he or she was not at fault.

26. Not unexpectedly, therefore, legal systems that are based on the French Civil Code tend to produce a greater number of successful claimants than does British law. The result is, other things being equal, insurance premiums must be higher for countries following the French approach.

27. Losses are classified as economic and non-economic. Economic losses include damage to automobiles and other property, medical expenses, loss of income and miscellaneous out-of-pocket expenses. Non-economic losses include "pain and suffering", personality deterioration and related general damages.

28. Economic losses are easier to quantify than non-economic losses. No uniform basis for establishing non-economic losses exists. Such losses are often exaggerated to obtain the maximum compensation. The discretionary rights exercised by judges in setting awards for such damages often lead to non-uniform awards for similar losses and, some say, to abuse. This affects motor insurance results negatively.

29. For settling third party property damage claims, the insurer normally relies on repair bills and expert appraisal. In most cases there is no litigation. The importance of property damage claims stems not so much from their severity as from their frequency. Such claims must be borne exclusively by the insurer as little, if any, reinsurance is typically involved.

30. Another problem associated with property damage claims is the escalation in repair costs. This escalation reflects the general world inflationary trend but is further aggravated by high custom duties on, and scarcity of, spare parts. Moreover, repair cost overpricing is widespread due to collusion of appraising experts and repair shops.

31. The percentage of claims in several developing countries which come before courts is high compared to that of developed countries. To an extent, this is attributable to the tort system. Insurers in these countries, however, are responsible to some degree for this tendency. They operate in an environment characterized by complicated claim settlement procedures and staff inexperience. The frequent resort to legal proceedings not only results in spending an inordinate portion of the premiums for legal costs, but also delays claim payment and this delay very often reduces the amount of the claim in real terms.

B. Expenses

32. A sizeable portion of total motor insurance premium income is spent on acquisition and management expenses. Most insurers in developing countries rely on insurance intermediaries to sell their policies. The main reason for this is that insurance companies often lack a sufficient in-house marketing network. To develop such a network may not be cost effective. Thus they appoint agents and brokers to sell for them and also to service the business. The commission for selling and servicing is normally higher than the commission for procuring the business only. This explains why motor commissions in developing countries often appear to be high. In many markets, the commission rates for compulsory and voluntary covers are the same, while in others the rate is lower for compulsory business.

33. Determining the responsibility for and the extent of injuries requires time and often legal proceedings. Many insurers in developing countries deliberately delay the settlement of claims because they believe that they will pay less if they pay later. Delays of all types, regardless of the reason, involve additional expenses.

⁷ Other compensation schemes are not based on tort law. See, for example, document TD/B/C.3/176/Supp.1, p. 11 below.

C. Investment returns

34. Investment returns in developing countries are often not large enough to affect greatly the technical results of the insurance business. This is because many developing countries have no organized money markets which could facilitate the buying and selling of securities and offer attractive returns. Moreover, government regulations often require insurers to invest certain proportions of their assets in low-yielding government bonds or other securities whose yields are often below the inflation rate.

35. Other factors explain insurers' poor investment performance. Because of the high claims frequency, some insurers keep sizeable amounts of cash to meet everyday claims. Secondly, many agents or intermediaries withhold the remittance of motor premiums for long periods, thereby reducing the periods during which insurers could be earning income on such funds.

D. Premium levels

36. Increases in accident frequency and claim severity warrant review of motor insurance rates so as to achieve a reasonable balance between motor premium receipts and disbursements. Most countries mandate rates or maximum rates for compulsory liability insurance. These rates are fixed by the Government or by the insurance supervisory authorities and are subject to change only by them. Companies or associations of companies may be required to provide basic information and loss statistics to help the authority establish rate levels, but the responsibility for fixing the rates remains with the authorities.

37. For the sake of expediency, resort is often made to a uniform and simple risk classification system. This hinders the development of a more refined rating system which may reflect the risk more accurately. Further, it ignores different insurer operating costs.

38. Unfortunately, the prevailing rate-making systems lead in most cases to long delays in adjusting rates to fit loss experience. The political and social pressures felt by the Government may also lead to the inappropriate freezing of rates or making an inadequate adjustment.

39. In several developing countries motor insurance availability has been adversely affected by the poor results. This is often in spite of the fact that liability cover may be compulsory and the insurer cannot refuse to accept anyone. Many insurers illegally cancel or fail to renew policies. Others may illegally refuse to write motor policies altogether. These measures mean that many drivers have no insurance. In some countries a black market for motor insurance has emerged where agents and brokers impose illegal surcharges to issue policies.

40. Unlike compulsory motor insurance, the writing of voluntary motor covers seems to be profitable. This situation is due to the non-mandatory nature of these covers, which permits more insurer flexibility in selection, pricing and establishing policy conditions. The fact that voluntary covers yield adequate profit induces insurers to write them on a large scale in an endeavour to make good their losses under compulsory insurance. Some Governments oppose rate increases on compulsory business on the grounds that voluntary covers are profitable and may compensate for losses from the compulsory business.

41. In summary then, the existence of a generally unprofitable major line of insurance, such as motor insurance, means that the insureds of the branch are receiving a subsidy, either from other branches or from other sources (e.g., insurer surplus). If insurer surplus is the source of the subsidy and if the situation persists, the insurer is doomed to insolvency. The deficits recorded by motor insurance may be particularly harmful to national insurers in developing countries because they cannot rely on other markets for profits. On the other hand, if foreign insurers are allowed to write any type of business and abstain from writing unprofitable lines, this will place national insurers in an even worse position.

CHAPTER IV

Measures to improve the performance of motor insurance in developing countries

42. The generally negative results achieved by insurers in writing motor insurance can be attributed to both external and internal factors. External factors, such as accident frequency and severity, vehicle repair costs, the legal system of indemnification, etc., are typically beyond the direct control of insurers and insurance supervisory authorities. Insurers and their supervisory authorities can merely urge that measures be taken to improve the motor vehicle environment. Further, such changes often take a long time to im-

plement.⁸ This study focuses attention on internal factors; i.e., those that are within the direct control of insurers and insurance supervisory authorities. These factors include measures related to pricing and underwriting, claim payments, expenses and investment returns.

⁸ Document TD/B/C.3/176/Supp.1 (see p. 11 below) provides one view of changes needed in certain external factors.

A. Measures related to pricing and underwriting

1. THE PREMIUM LEVEL

43. With some exceptions, the chief problem for insurers writing motor insurance unprofitably is the establishment by governmental authorities of inadequate premium levels. It is of the utmost importance that such authorities realize that motor insurance rates should reflect claim experience accurately (or other appropriate recognition be made). Too often this is not the case, with the result that the very objective of compulsory insurance is defeated and a country's insurance market is threatened.

44. Governmental authorities understandably do not wish to raise premium levels. Motor vehicles have become an essential part of life for many citizens. An unaffordable premium in a country that requires motor liability protection means that the person either must not operate the motor vehicle or must violate the law and operate it without purchasing the required insurance.

45. This places the Government in an awkward position. If the Government continues to hold motor insurance rates to unreasonably low levels, the country's insurance market is jeopardized. If it permits rates to rise to acceptable levels, citizens who are already financially constrained are harmed.

46. Of course, each Government must decide for itself how best to deal with this problem. The following observations may be of some assistance in this difficult decision-making process.

47. First, it should be determined whether, in fact, insurers are writing motor insurance unprofitably. Often documentation that purports to prove that some insurers are suffering losses in the motor branch is not conclusive. It is sometimes unclear, for example, whether proper reserving techniques have been followed. An overly liberal assessment of incurred but not reported (IBNR) and other loss reserves could mean that an insurer showed a "paper" loss whereas, in fact, profits could emerge. A conservative assumption could mean the opposite: that losses were being suffered unknowingly. Other areas are subject to similar types of error.

48. A careful analysis of filings for rate increases and rating categories is therefore essential. The mere fact that an insurer owns large amounts of assets (e.g., in the form of real estate, bonds, stocks, and other securities) in no way means that the insurer is financially sound and should play no part in decisions as to whether changes in premium levels are needed. Insurers, for their part, should undertake a detailed review of all the components of their rate increase petition to ensure that they are reasonable. Integrity and utmost fairness by both insurers and governmental authorities are a necessary ingredient. Insurers must attempt to understand more fully the position and responsibilities of governmental authorities. The authorities, in turn, must not permit short-sighted, popular decision-making to cloud seasoned judgement as to what is in the long-term best interests of the country.

49. After rendering a careful, unbiased review of results, the authorities may find that, in fact, insurers' financial results can be improved through altering internal factors other than the premium level or that only a minor increase is needed. Several minor increases over time are often more socially and politically acceptable than delaying needed increases, only to make them all at once. Alternatively, one may find all that is needed is to develop a more refined system of rating, making adjustments in some categories only.

50. On the other hand, the review may reveal that a major premium increase is justified. If so, the Government may conclude that the increase will, none the less, not be granted as the deficit can be recouped from other insurance lines. Such an approach may distort the market for insurance products and shift the cost burden from one group of insureds to another via the insurance mechanism. Although loss sharing is at the heart of insurance theory, class subsidy is not. This distinction should be borne in mind.

51. Experience in many countries has shown that, as a general rule, it is best for each line of insurance to be judged on its own merits. Subsidies by one line to another are best avoided. If the Government determines that, for public policy reasons, a line of insurance is deserving of support, that line probably should either be run by Government as a social insurance scheme, drawing subsidies from general tax revenues, or be provided explicit, identifiable government subsidies in the form of special tax deductions, credits, rebates or other considerations to insurers.

52. Worth noting is that motor insurance rates in some countries are not regulated at all or only indirectly controlled by regulatory authorities. For example, some states in the United States permit insurers flexibility in rate-making and classification by allowing them to charge whatever rates they wish, subject to review by the regulatory authority to ensure that rates are not inadequate, that they are equitable and that they are not excessive. The insurers may be required to document the need for a rate revision and no single, mandated tariff exists.

53. There is no inherent logic for requiring all insurers to charge the same premium if their experience and solvency would permit flexibility in this regard and if an adequate regulatory system exists to exercise oversight.

2. THE RATING SYSTEM

54. Closely related to the review process discussed above is the problem of not having adequate statistics. An adequate rating system must be carefully formulated and necessarily relies on adequate statistics. Many insurers in developing countries have not maintained data with sufficient detail to permit anything other than gross analyses. For example, fleet discounts in many developing countries appear to be too high in relationship to claims and expenses. A closer analysis would reveal whether the discount is fair. Insurers should begin immediately to compile this and other types of information by the various parameters which are believed to be statistically relevant. From this compilation will flow not only the justification for any needed rate ad-

justments but also justification for a more refined rating system, which could permit supervisory authorities greater flexibility in granting any needed rate changes. For example, it may demonstrate that rate increases are justified in a few categories only (e.g., commercial vehicles).

55. Too often in developing countries drivers who, because of loss characteristics, should pay different rates, are charged the same rate. In the absence of overriding public policy considerations, a fair rating system would charge each insured a premium that is commensurate with the risk he or she presents to the group of insureds. Thus, a person who constantly drives recklessly and is involved in many accidents should pay more than another person who exercises great driving care. The compilation and analysis of data based on driving experience, at fault accident record, use and type of vehicle, location of vehicle and other factors can provide the basis upon which a more equitable system of rating is formulated.

56. Establishment of a more refined system need not involve quick, sweeping changes. Indeed, a gradual change would be preferred. Further, a balance must be struck among actuarial equity, public policy considerations and practicality.

57. In some multiple company markets, no individual company may have sufficient exposure to permit a meaningful data analysis of the type discussed in paragraphs 48-56 above. Thus, the combining of experience from several insurers may be desirable. Having obtained these analyses, rates for each category should be reviewed periodically to match the loss experience.

3. THE SALES AND UNDERWRITING PROCESS

58. Clearly established guidelines and instructions to be followed in the sales and underwriting phases are essential prerequisites for any well-run company. These are essential not only for insurer employees but, importantly, for intermediaries as well.

59. In some instances insurers do not receive completed proposal (application) forms for each applicant. This failure can lead to abuses, misunderstandings and rating errors. Insurers are urged to require a fully completed form for each applicant prior to policy underwriting and issuance.

B. Measures related to loss payments

1. CLAIMS CONTROL

60. Adequate claims control is essential. Unfortunately this is lacking in many developing countries. This is often caused by inadequately trained staff. This results in delays in claim settlement and disenchantment of victims and insureds. A good claims procedure should seek a minimum of documentary evidence consistent with a reasonable level of care. Expert advice is often required for large claims only. If an insurer has inadequately trained in-house personnel to settle claims quickly, fairly and reasonably, professional adjustment services may be sought. However, it is often to the in-

surer's advantage to develop fully its own claims adjustment staff.

61. Negotiation and settlement methods vary with the nature of the claim. If it is reasonably clear that one of its insureds was at fault in causing an accident, the insurer should attempt to negotiate a quick and fair settlement with the victim. Litigation should be avoided. Often the responsibility of its insured is not clear even after a reasonable investigation. In such cases, it is often less costly for the insurer to negotiate a compromise settlement than to litigate the case. Too often the investigation of claims seems to become a goal in itself, with sight being lost of the fundamental purpose of the investigation: to make a quick, fair settlement.

62. Property damage claims are settled by cash payment or by undertaking the repairs. An advantage of cash settlement is that the insurer is immediately discharged and can no longer be held responsible for hidden damages that may later be discovered. However, many insurers find it more convenient and less costly to have damaged cars repaired in accredited garages.

63. Many insurers in developing countries seem to opt for litigation even when it is unnecessary. Apparently, employees responsible for claim settlement often feel compelled to litigate so as to remove themselves from any responsibility for the claim settlement amount. In doing so, no one could hold them responsible for paying either "too much" or "too little". This results in much wasteful litigation, costing the insurance company, the victim and the courts valuable time and money.

64. However, one probably should not blame the individual employee handling the claim for this unhappy situation. Rather, the employee's attitude and actions probably are rational responses to management failings. The blame, in other words, starts at the top. Upper management sets the tone for subordinates. Although a degree of conservatism in claim settlement is sound policy, it can result in massive inefficiencies when taken to an extreme. Great care should be exercised to avoid such excesses.

65. In some developing countries, an intermediary may accept a clients' premium payment, issue the government required certification (attestation) that liability insurance has been purchased but not write the policy immediately. Instead, the policy will be issued and premium forwarded to the insurer only if there is a loss. Otherwise the premium payment will be illegally kept by the intermediary.

66. Such practices can be discouraged by reasonable quality control of the certification forms. A requirement to use only insurer authorized and provided pre-printed and pre-numbered certification forms (or another equally effective control device) coupled with a register would greatly minimize the opportunities for fraud.

2. ACCURATE RESERVING

67. Another area that deserved greater attention by insurers relates to the establishment of reserves. The calculation of unearned premium reserves does not normally raise any difficulties. However, the loss reserve

situation is different. It may be several years after a loss before a court decides who is liable and for how much. In these cases the insurer must estimate the amount which must be paid. This liability is represented on the insurer's balance sheet by loss reserves and must be carried forward until the claim is settled. The insurer should review such estimates from time to time, not only to reflect the development of the case, but also to recognize any changes in money values. Also, reserves can be established initially to reflect inflation and other external factors.

68. Reserves for outstanding claims discussed above represent estimated liabilities for losses that have been reported but not yet settled. Each year, however, a certain number of losses are not reported. Reserves must be established for these incurred but not reported (IBNR) losses also. In some countries the IBNR reserve is set at a fixed percentage of the outstanding loss reserve. However, the best method for estimating the yearly IBNR reserve is to undertake an analysis of previous years' IBNR losses not only to have a reasonable idea of the current year's amount but also to detect any trends. Such study should be a continuing one.

69. Every year some closed claims will, for various reasons, be reopened. When this happens, loss reserves fall short. Reserves, therefore, should be established to meet these reopened claims. Again, a trend analysis will aid in this process. Contingency reserves, catastrophe reserves and other non-technical reserves also often do not receive enough attention.

3. COVERAGE AMOUNTS

70. As mentioned earlier, some countries require the purchase of motor vehicle liability policies that provide for unlimited liability coverage. From a social viewpoint a requirement that policies have no maximum limit may seem desirable. However, a deeper analysis could reveal that doing so increases the propensity to sue for exaggerated amounts and forces many persons to purchase liability protection far out of proportion to their net worth or income potential. Providing "unlimited" coverage raises the cost of insurance to everyone.

71. Governments may wish to consider establishing a requirement that each motor vehicle operator must be covered by at least some stated minimum liability protection and permit the optional purchase of amounts in excess of the statutorily mandated minimum. This would lower liability premiums for the average person while permitting those who need very high coverage limits to purchase it. This is the approach followed successfully in many developing and developed countries.

72. The required minimum should be established to bear a reasonable relationship to the country's economic and social development and should be subject to periodic revision.

73. Claim payments on both compulsory and voluntary covers can be minimized by the judicious use of deductibles. This can avoid small claim payments, which, according to good risk management, should be absorbed by the insured anyway and can also avoid expenses that are disproportionate to their importance.

74. In some countries the use of deductibles for liability coverages is not permitted or is not feasible owing to the practical difficulties of co-ordinating insurer and insured actions.

4. UNINSURED MOTORISTS

75. An unfortunately large proportion of motor vehicle operators in developing countries are and will remain uninsured, even though the purchase of insurance may be mandatory. As a result many victims of traffic accidents who otherwise would be entitled to compensation from a negligent motor vehicle operator will collect little or nothing.

76. Consideration may be given to permitting (or requiring) insureds to purchase uninsured motorist coverage on an optional basis. This coverage permits the innocent victim to collect from his or her own insurer amounts which would otherwise have been collected from the (uninsured and if desired also underinsured) tortfeasor's insurer or from a driver of a "hit and run" accident. Alternatively, an insurer sponsored or government sponsored fund could be established from which to pay such claims.

5. EXTERNAL LOSS FACTORS

77. Insurers and regulatory authorities should also take an active role in loss prevention and minimization. Motor accidents are complex occurrences. They result from a combination of three factors: the environment, the vehicle and the human being. Any attempt to improve road safety must recognize these factors. This involves a vast field of measures ranging from road construction, to the establishment of standards for motor vehicle condition, to the enforcement of traffic rules and the licensing of drivers. Most of the burden for such improvements rests with the government. However, insurers have an important role here also. With government approval, insurers can rate drivers and automobiles according to the likelihood of loss. This can serve as an incentive for insureds to purchase automobiles that are the least susceptible to damage and for them to operate motor vehicles safely. Insurers can sponsor driver education and training programmes. They can bring to the attention of government officials the importance of seeking improvements in all aspects of the three factors discussed above.

C. Measures related to expenses

78. Insurers must constantly search for ways to minimize management and acquisition expenses. Of course, expense control must not be practised at the sacrifice of acceptable sales and services.

79. With respect to acquisition costs, insurers may want to examine carefully the commissions paid to intermediaries. One can argue that commission rates on compulsory business should be lower than that for voluntary lines, as the intermediary acts more as an "order taker" than a sales person in such cases. Also, commission rates should justifiably be less for group and fleet policies than for individual policies.

80. As insurers' classification systems become more refined, insurers may want to consider having a sliding commission scale. The fact that one insured is required to pay twice as much as another for basic liability coverage (because, for example, the insured has a poor driving record) does not mean that the intermediary should be entitled to twice the commission. The work the intermediary must perform in each case is much the same. Hence, the higher the premium for compulsory coverages, the lower can be the commission rate or, alternatively, consideration may be given to paying intermediaries a flat fee for writing such coverages.

81. To hold underwriting and management expenses to the minimum necessary for smooth operation, care should be taken to ensure that duplication of effort between the work of intermediaries and the home office is minimized. Internal underwriting, policy issuance and policy renewal procedures should be subject to constant analysis. Employees should be encouraged and rewarded for making suggestions for improving operational efficiency.

82. To the extent feasible, internal specialization should be encouraged and the benefits of computerization and other modern technology should be recognized and used.

83. To minimize the number of bad debts and the expenses of premium collection, insurers should, where practical, require that the premium be collected before the policy is placed in force. Also, where feasible, insurers may want to consider the "direct bill" approach. Under this approach the insurer bills the insured directly for the premium due, and the premium is paid directly to the insurer by the insured. This not only involves a more efficient use of premium receipts for the insurer but also minimizes opportunities for mistakes and fraud by intermediaries and can involve less expense.

84. Where legal and practical, all coverage related to the motor vehicle (i.e., both compulsory and voluntary covers) should be provided within a single policy. Similarly, if an insured has more than one motor vehicle, only one policy covering the multiple exposure should be issued, again, if feasible. Further, if more than one named insured is to be covered, they should be included within a single policy only. All these techniques save on issue expenses.

85. As regards claims expenses, many of them are directly related to the claim settlement procedure, such as the cost of assessing damages, legal fees, etc. Insurers can reduce the costs involved in the settlement of claims through a reduction of the administrative procedures involved and the prompt settlement of small claims. Also insurers could establish agreements wherein subrogation rights between them are waived for claims below an agreed upon amount. These "knock for knock" agreements can avoid costly inter-insurer disputes and litigation. Moreover, insurers can avoid litigation and speed the settlement of claims by agreeing to arbitration, particularly for minor losses. Insurers also could agree to make advance payments to victims when the question of responsibility is reasonably clear.

86. Although reinsurance protection may not be as important in connection with motor vehicle insurance as

with other forms of insurance, some is usually a necessity and, therefore, represents an expense to insurers. Where several small or medium-size insurers operate in a market, it may be desirable to set up a pooling arrangement. Members of the pool would automatically cede business to the pool, which could then purchase excess of loss cover for common account. Reinsurance costs for the pool would probably be lower than similar coverage bought separately by each company. Also, since the business is pooled, litigation between insurers would be lower.

D. Maximizing investment return

87. The financial position of insurers writing motor insurance can be enhanced if their investment returns can be increased. Of course, the necessity to invest in reasonably secure assets and to maintain a fair level of liquidity must be recognized in all investments. Even so, many insurers can improve their investment return. For example, some insurers hold too much of their assets in cash or in accounts earning little or no interest. An analysis of the insurer's cash flow needs would indicate whether more efficient use could be made of these assets by placing them in perhaps a less liquid form. Idle, excess cash is a sign of poor investment management.

88. Insurers can further increase their investible funds by establishing a procedure whereby intermediaries must post funds to the insurer on a more frequent basis, if possible daily, as premiums are received. The object should be to get premium receipts to the insurer as quickly as feasible. Direct billing also would accomplish this.

89. Once funds are received by the insurer, they should be promptly put to use. Since the motor business provides a reasonably steady stream of receipts, adequate advance investment and cash flow planning is possible to make optimum use of the funds.

90. Some portion of the assets held by the insurer must, of course, be highly liquid. However, some portion could be less so, resulting in a higher rate of return. The key to establishing this optimum balance lies in a sound analysis of past and projected cash flow needs.

91. Most developing countries have laws governing the types of securities that may be purchased for investment. Often the dual objective of these laws is to protect the solvency of insurers and to promote some government policy. These objectives may be in conflict, even to the point of possibly endangering insurers' solvency and thereby causing them to fail to meet promptly their obligations. Motor claims can take several years to settle. Most insurers contemplate that the assets standing behind loss reserves should earn sufficient interest to cope with any inflation-induced increase in the cost of claims. Thus the ability of insurers to meet their claims often depends on the adequacy of these earnings. Yet Governments sometimes require insurers to invest heavily in certain securities (e.g., government bonds) whose yields are artificially depressed. This can have

serious negative effects on insurers' overall financial condition and ability to meet commitments. Governments are encouraged to examine such limitations critically so that they do not place an inequitable development burden on insurers, and ultimately on policyholders.

92. Government investment restrictions should take into consideration whether the country has an organized securities market. If one does not exist, consideration might be given to liberal limits for real estate investments and for loans for residential, commercial and industrial construction.

CHAPTER V

Conclusion

93. Motor insurance is an integral part of most countries' motor vehicle accident reparations system. Because it occupies this central position, motor insurance results are vulnerable to changes in the environment in which it operates. Thus, the recent increases in accident frequency and loss severity experienced in many developing countries have a direct and immediate negative impact on results. Moreover, insurers have been far from immune to inflation-induced increases in operating costs.

94. Insurers can probably do more themselves to improve overall results. The present study has discussed ways of minimizing expenses, increasing investment yields and cash flow and holding the line—to an extent—on claim costs. It has highlighted the important role that can be played by regulatory authorities in securing and promoting adequate premium levels and equitable rating systems for compulsory insurance. This course of action can yield positive results for a country's national insurance industry (particularly when it is in the initial stages of development) as the motor insurance

branch often provides the necessary underpinning for the other areas of non-life insurance. Several proposals were made in this study to develop a more equitable rating system which would permit a fairer distribution of costs among insureds and allow authorities more flexibility in granting necessary rate changes.

95. It is believed that the adoption by insurers and insurance supervisory authorities of the proposals made in this study should result in the more efficient functioning of motor vehicle insurance as practised under present insurance and liability systems. However, this study has focused only on proposals for possible changes within the insurance mechanism and has avoided recommendations for more fundamental changes which may be needed in the many external factors (e.g., tort law system) bearing on insurance results and on society.⁹

⁹ For a discussion of some of these issues see document TD/B/C.3/176/Supp.1, p. 11 below.

Document TD/B/C.3/176/Supp.1

PROBLEMS OF DEVELOPING COUNTRIES IN THE FIELD OF MOTOR INSURANCE

Study by Mr. A. R. B. Amerasinghe

[Original: English]
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FOREWORD

The present study was prepared at the request of the UNCTAD secretariat by Mr. A. R. B. Amerasinghe, former Commissioner of Insurance, Fiji, and Regional Insurance Adviser, Commonwealth Fund for Technical Co-operation; former Secretary of the Board, Chief Legal Officer, General Manager, Insurance Corporation of Sri Lanka, at Colombo. The views expressed therein do not necessarily reflect those of the UNCTAD secretariat.

CHAPTER I

Socio-economic problems

1. Motor accidents cause death, bodily injury and property damage. Where death or permanent total disablement is caused to an economically active person it depletes human resources, and where a replacement involves educating, training and developing the skills of a substitute, it results in the expenditure of financial resources which could otherwise have been used for productive purposes. In the interim period between the death or permanent disablement of the person and the instalment of an appropriate replacement, there is a reduction in efficiency in the relevant unit of production and a loss to that extent. Such economic consequences may be negligible in a given case; but in the aggregate, taking all the deaths and permanent disablements caused by motor accidents into account, the consequences may be socially and economically large enough to excite national attention and concern.

2. Sudden accidental death or permanent disablement also causes shock and personal anguish. Where the deceased or disabled person is an economically active member of a joint or extended family, the result is a depletion of the relevant unit of production and, in the event of permanent total disablement—as opposed to death—an increase in the burden of the unit to the extent that the person concerned becomes dependent. In a nuclear family, permanent total disablement has similar consequences. But the death of a breadwinner could have far-reaching social effects. A widow left to carry on alone may lose control of her children because she lacks the financial means for keeping the family together, or worry and overwork may lead to broken health and result in inadequate care and attention for the children. Alternatively, children may be forced to abandon or neglect their studies to be able to contribute to the family income. In certain instances they may be compelled to accept cruel and difficult working con-

ditions. Juvenile delinquencies, ill health, child exploitation, mental disease and—if these ills are sufficiently widespread—an eventual destabilization of society are likely to follow.

3. If personal harm falls short of death or permanent total disablement, it may nevertheless cause varying degrees of social and economic distress in the form of loss of income, loss of services to the employer, medical expenses, reduction in the enjoyment of life, nervous shock, disfigurement and psychological harm.

4. The vehicles involved in an accident, as well as other objects collided with, may require repairs and replacements that often cause not only a waste of local financial resources but also, in most developing countries which import motor cars and spares and building materials and equipment, a waste of scarce foreign exchange.

5. Motor accidents, therefore, create problems for three groups of people, namely, governments; vehicle owners; and members of the public.

6. Governments are concerned with the waste of human and material resources caused by motor accidents. They are equally concerned with the social problems, including the destabilization of homes, caused by accidental deaths and injuries. There is also the problem of financing medical care, rehabilitation and welfare services for the victims of road accidents.

7. Vehicle owners are adversely affected by damage to their vehicles and also by the financially crippling risk of having to pay enormous amounts to claimants.

8. Members of the public live in fear of being killed or maimed or suffering property damage as a result of a motor accident.

CHAPTER II

Official preventive schemes

9. Governments are understandably concerned with the socio-economic problems caused by motor accidents and they formally organize schemes or actively support and encourage efforts to reduce road accidents and minimize their consequences. These include physical, procedural and educational strategies.

10. Procedural devices include such measures as traffic laws and codes of conduct (highway codes) regulating not merely the manner of driving but other matters as well, such as the wearing of seat belts, helmets for motor cyclists, speed limits, the inspection of vehicles for roadworthiness, ensuring driving competence by testing and licensing drivers, supervision of behaviour through road patrols and traffic police and the punishment of delinquent drivers through the courts.

11. Safety campaigns for the public and special lectures and demonstrations for schools are conducted by traffic police and by road safety councils as a part of the programme to reduce accidents.

12. Similarly, in order to reduce the consequences of accidents, governments provide ambulance services, special accident medical clinics, wards and services, instructions in first aid and rehabilitation facilities.

13. The quality of these measures, and hence their effectiveness, varies a great deal from one country to another. It seems, however, that the measures taken by Governments in developing countries to reduce road accidents and minimize their consequences are generally inadequate because of a lack of sufficient resources to finance such projects.

14. Moreover, motorization has not yet reached a level where it creates sufficient public pressure to warrant the introduction of certain measures on a priority basis. This will change in time. As an inevitable consequence of the development process—both as an instrument for and as a result of progress—the number of motor vehicles is increasing in developing countries, despite restrictions on imports and the rising cost of fuel. In certain developing countries the increase in the number of road accidents appears to be related to the increase in the number of vehicles and it is believed by some that the risk of road deaths and injuries increases in proportion to the rise in motor vehicle density.

15. Studies in developed countries clearly indicate the contrary. The risk of accidents involving bodily injury declines with an increase in motor vehicle density and, with few exceptions (e.g. Greece and Japan) there is also a decline in accident severity and fewer road deaths (see annex I to the present document). This is also true of certain developing countries. Increasing motorization reaches a point where the number of accidents and resulting damage or harm stimulates enough public concern to pressurize Governments to take a more active interest in the matter. When the loss prevention methods come to seem economical in relation to the losses that would otherwise occur, it is felt that the time is ripe for the introduction of more sophisticated physical, procedural and educational devices to reduce the number of road accidents and to limit their severity. Until that point is reached, accident prevention is likely to remain little more than a desirable objective.

16. Since motorization is increasing in developing countries without, in many, yet having reached the critical point of change, the motor insurance business is in its darkest hour, though the dawn of awakening is not far off. Since rapid motorization will accelerate the change, the future for the insurance industry appears to be far from bleak. In fact, in the short- and medium-term (say 5 to 10 years), because the rate of motorization in developing countries is likely to increase more rapidly than in developed countries, which have already reached very high levels, the opportunities for insurers to cope with current economic problems (e.g. by offsetting claims costs which are subject to inflationary increases) are somewhat better in developing countries than in developed countries.

17. In the meantime, insurers should take such cost effective steps (not all measures, however desirable that may be socially) as are necessary to reduce the number and severity of road accidents, simply because motor insurance is an important part of their business and it is in their interest to reduce claims. No doubt, with national economic advancement, other classes of insurance business will develop so as to produce a better overall balance and reduce the current, understandable pre-occupation with motor insurance. However, motor insurance business is likely to remain an important, albeit comparatively less significant, segment of general insurance business. In global terms, the share of motor premium volume increased from one sixth in 1950 to over one fifth in 1979. Therefore, the insurance industry will need to maintain a continuing interest in accident prevention and the limitation of the consequences of road accidents.

18. Hitherto, attention has been focused by many countries on the compensation aspect. The following remarks of the Law Reform Commission of Papua New Guinea describes a situation that is typical of most developing countries:

Briefly the prevention of accidents is preferable to the payment of compensation. But the subject of accident prevention remains virtually unexplored in Papua New Guinea. Apart from roadworthiness checks in the major centres and occasional police 'blitzes' very little has been achieved. Seat belts are not compulsory and breathalysers have not yet been introduced.

The Commission also found that the relevant traffic laws were outdated.

19. There is, however, a growing realization of the need for more attention to be paid to the two other, at least equally important aspects of the subject: namely, prevention and rehabilitation. The reasons why accident prevention activities should be of interest to insurers have already been referred to.

20. Rehabilitation is just as important, for if victims of road accidents can be fully or partly restored to their former state of health and earnings capacity, then claims costs will be reduced correspondingly, quite apart from the socially desirable consequences and the important public relations effect of such efforts.

21. In fact, there is growing agitation for an integrated approach to replace the fragmented attention presently given to the three aspects of prevention, compensation and rehabilitation. It is felt that the prevailing, capricious response to a social problem which cries out for co-ordinated and comprehensive treatment is just not good enough. The New Zealand scheme is designed to take account of all these aspects. In Finland, the Ministry of Social Affairs is empowered to order the inclusion in the insurance premium of a "reasonable" amount for the support of activities which are held to be of general significance in the promotion of road safety.

22. Section 11 of the Samoa Accident Compensation Act of 1979 provides that the Board administering the scheme:

shall seek to establish a close and harmonious working relationship with industry, commerce, government departments, public corporations and other bodies and organisations and persons in promoting safety and preventing road, industrial and other accidents, personal injuries and occupational diseases and it shall take all practical steps to promote a well co-ordinated and vigorous programme for medical and vocational rehabilitation of persons who become incapacitated as a result of personal injury by accident.

23. Section 11 goes on to stipulate that the duties and functions of the Board shall include:

(a) Stimulating and maintaining interest in safety and the prevention of accidents, personal injuries and occupational disease by means of education and publicity through the communications media;

(b) Publishing and disseminating accident prevention and rehabilitation literature and information;

(c) Sponsoring, assisting and conducting safety campaigns and safety courses;

(d) Sponsoring and fostering organisations and groups concerned with safety and the prevention of accidents, personal injuries and occupational diseases;

(e) Research into and investigation of ways to reduce the number and severity of accidents and personal injuries and the incidence of occupational diseases;

(f) Supporting, stimulating and fostering the interests of all persons concerned with the rehabilitation of accident victims;

(g) Assisting the training or retraining of incapacitated victims of

road or industrial accidents so that they may secure other employment suited to their maximum capacity.

24. The draft Fiji legislation on the subject contains similar provisions.

25. A matter that might be considered here is the bonus/malus schemes of certain insurers, for they are concerned with accident prevention. Such a system has been in operation in the Philippines since June 1978.

26. If, as the evidence shows, most accidents are not caused deliberately or even negligently, then the effectiveness of a bonus/malus system will be necessarily limited. The main usefulness of such a system would be that it leads to a reduction in the number of small claims and related claims costs, the motorist preferring to shoulder his liability or loss to forfeiting his bonus or having to pay an enhanced premium or surcharge.

CHAPTER III

Private schemes

A. The public

27. Apart from taking due precautions, there is little a person can do to avoid road accidents. In order to ensure that the financial consequences of an accident will be less severe, business concerns and private citizens purchase various forms of life insurance, including key man insurance, personal accident insurance and property damage insurance.

28. These arrangements are most important in countries which do not have compulsory third party insurance, for unless a person has protected himself by insurance, he may find that the motorist who caused him damage or harm is impecunious and unable to comply with the judgement of a court of law in his favour.

29. Even in countries with compulsory third party insurance, there is a need for such protection. For one thing, most compulsory schemes are limited to death and bodily injury. Secondly, many motorists in developing countries tend to purchase the minimum cover. Thirdly, some systems require compulsory cover only in respect of injury to persons who are not the driver or a passenger in vehicles unless the passenger is being carried for fee or reward. Fourthly, owing to the weakness of enforcement processes, many motorists do not in fact purchase the required third party cover. There are also dangers from the hit-and-run motorist, where anonymity makes recovery impossible. In any event, as will be seen later, recovery through the tort system takes considerable time and expense and depends on the ability of the claimant to prove negligence on the part of the defendant.

30. Unfortunately, owing to a variety of circumstances, including ignorance of the protection available and financial incapacity to purchase it, the vast majority of persons in developing countries remain unprotected or inadequately protected by private insurance. No doubt, with increasing education and an improvement in personal economic circumstances, there will be an increase in life, personal accident, motor comprehensive and property insurances in developing countries, with corresponding increases in the relevant portfolios of insurers.

31. As will be seen later, in certain countries there are schemes which guarantee the payment of some com-

ensation regardless of questions of fault. Since these threshold payments are often very small, people feel the need to supplement the amounts payable under the scheme by private insurance. In fact there is evidence to show that, on account of the so-called "recognition effect" which such schemes have, people are induced to bridge the gap between what is essentially a social security payment and actual needs. Moreover, premiums for merely topping up are likely to be more affordable than the private purchase of all the required insurance. In the circumstances, the introduction of threshold schemes is likely to increase insurance business in various spheres.

B. Motorists

32. Motorists run the risk of damage to their vehicles. In the event of being responsible for an accident, they also face the prospect of financially crippling claims for damages. In order to protect themselves from various claims and the loss of what is for most people in developing countries the most precious asset after their home—namely their motorcar—motorists purchase comprehensive "own damage" as well as liability insurance. Where vehicles are bought on a hire-purchase basis, the lender usually insists on comprehensive cover on the vehicle to protect his interests.

33. Insurers benefit from such arrangements. In fact in many developing countries motor insurance business constitutes a very significant portion of the non-life section of insurance business. In Egypt, for instance, in 1979 motor insurance constituted 27.3 per cent of the total non-life premium income. In Fiji in 1979 motor business accounted for 31.8 per cent of the non-life premium. In Papua New Guinea in 1979 motor business constituted 33.33 per cent of the non-life business. In the same year motor business accounted for 42.1 per cent on the net non-life premiums received by general insurers in Malaysia.

34. There are exceptions of course. In Pakistan, for example, in 1979 motor premiums accounted for only 4.63 per cent of the non-life premiums of the National Insurance Corporation and, in the case of the private companies, motor insurance accounted for 8.9 per cent of the non-life premium.

CHAPTER IV

Personal retribution

35. In most primitive legal systems, the remedy for causing harm or damage was, at least in certain circumstances, personal retribution. For example, in early Roman Law—the ancestor of the modern systems in Europe and much of the developed and developing world—Gaius says:

Poena autem iniuriarum ex lege XII tabularum propter membrum quidem ruptum talio erat; propter os vero fractum aut conlissum trecentorum assium poena erat, si libero os fractum erat; at si servo CL: propter ceteras vero iniurias XXV assium poena erat constituta, et videbantur illis temporibus in magna paupertate satis idoneae istae pecuniariae poenae.¹

¹ Gaius, *Institutiones* Commentarius Tertius, 223:

“Under the Twelve Tables the penalties for outrage used to be: for destroying a limb retaliation, for breaking or bruising a bone 300 asses in the sufferer was a free man, 150 if a slave; for all other

36. Although personal retribution may afford psychological relief and, to that extent, satisfy an injured person, it seldom or never solves the economic consequences of the wrongful act and it may be contrary to the interests of society and civil stability to permit people to take the law into their own hands and extract personal vengeance, retaliation and reparation. The problems caused by the “pay back” system in some developing countries are worth being taken into consideration.

outrages 25 asses. These penal sums were considered sufficient in those days of extreme poverty.”

The Institutes of Gaius, Part I: text with critical notes and translations by Francis de Zulueta (Oxford, Clarendon Press, 1951).

CHAPTER V

Tort law

37. In the interests of law and order, therefore, the principle of retaliation is held within certain prescribed norms. These may be fixed by religious law, as in Afghanistan where the Islamic law governs the subject or in Saudi Arabia where Sharia blood money of 40,000 riyals is payable.

38. It may also be governed and regulated within acceptable bounds by legislation or the rules of Common Law designed to replace retribution or supplement it with correction. For example, the law of torts, which is the basis in most developed and developing countries of the systems relating to the payment of compensation for road accidents, rests on the concept of the punishment of the delinquent. Sir John Salmond, a leading authority on the law of torts, says:

Reason demands that a loss shall lie where it falls, unless some good purpose is to be served by changing its incidence; and in general the only purpose so served is that of punishment for wrongful intent or negligence.²

39. There is some difficulty in deciding whether Roman Law, on which most modern systems are based, regarded *culpa* in a subjective or objective light; but partly, no doubt, under the influence of Canon Law and its secular offspring, natural law, the modern systems based on Roman Law took *culpa* to imply moral blameworthiness, and preoccupation with moral blameworthiness has to some extent impeded the solution of the problems caused by motor accidents.

40. The attitude that those who are at fault (proved or inferred) should pay, lies at the base of the prevailing systems of many developed and developing countries. Liability for road accidents is based on established

negligence in Belgium (in law), Cyprus, the United Kingdom, Ireland, the Dominican Republic, Trinidad and Tobago, Bermuda, Egypt, the Gambia, Ghana, Kenya, Liberia, the Libyan Arab Jamahiriya, Sierra Leone, Nigeria, South Africa, the Sudan, Swaziland, Uganda, Zambia, Zimbabwe, Lebanon, Pakistan, India, Bangladesh, Sri Lanka, Singapore, Hong Kong, certain states of Australia, Fiji, Tuvalu, Kiribati, Solomon Islands and the Cook Islands.

41. In some other countries the basis is presumed negligence. This is the case in Belgium (in practice), France, Benin, the Central African Republic, Chad, the People's Republic of Congo, Gabon, Ivory Coast, Madagascar, Togo, Tunisia, Upper Volta and Japan.

42. If total or partial relief does, as suggested, depend on punishment for moral wrongdoing for which the offender must pay, then it is a curious fact that this attitude stops short of ensuring that damages are not awarded in proportion to the conduct which is said to justify the award. For the extent of liability is not measured by the quality of a defendant's conduct but by its results. Reprehensible conduct can be followed by feather blows while a moment's inadvertence may have devastating consequences.

43. The fact should be faced that, despite the moralizing which has enabled the fault theory to develop and to take a firm hold of a large number of developed and developing countries, it is really not possible to equate negligence as an independent tort with moral blameworthiness. Negligence is tested not in terms of the state of mind or attitude of the defendant, but impersonally against the (occasionally remarkable) performance of a hypothetical individual described as “the reasonable man of ordinary prudence”. If, in all

² *Salmond on Torts* (1907), cited in *Cambridge Law Journal*, vol. 42, part I (April 1983), p. 74.

the circumstances, it is likely that a reasonable man would have avoided the accident, then the defendant's failure to measure up will be regarded as negligence, irrespective of his mental attitudes or even his ability to reach the required standards. It is for such reasons that the use in law of the word "negligence" to describe an independent civil wrong has created a good deal of confusion even among lawyers. Because, in its ordinary application, "negligence" carries pejorative overtones, the remedy tends to be primitive.

44. Some judges have attempted to extricate the system from the morass into which it has fallen. But despite denials that damages are punitive, the shadow system duplicating criminal law, in which fault is punished, lingers on in most developed and developing countries.

45. Since spurious moral overtones have attached to words like "tort" and "wrong", the law has been led into the fallacious position that there is misconduct when an injury is caused so that enormous sums must be extracted from the delinquent by way of punishment.

46. This is particularly evident in countries where the law relating to compulsory third party insurance stipulates that cover in respect of bodily injury and death should be "unlimited". This includes Belgium, Cyprus, Finland, Norway, Spain, Australia, Algeria, Benin, Bermuda, the United Republic of Cameroon (except for non-passengers), Egypt, the Gambia, Ghana, Kenya, the Libyan Arab Jamahiriya, Malawi, Mauritius, Nigeria, Sierra Leone, Uganda, Zaire, Zimbabwe, Bangladesh, Burma, Hong Kong, the Republic of Korea, Malaysia, Singapore, Sri Lanka, the Syrian Arab Republic and Democratic Yemen.

47. This problem is less acute where the law specifies a minimum sum to be assured, for then the protection purchased tends to be for the stipulated minimum and there is often little or no practical purpose in suing for more even though it may be theoretically possible. Exceptionally, an affluent motorist or a corporate person having substantial assets to protect will take out protection for larger amounts. But most motorists in developing countries would have no need to buy protection beyond the stipulated minimum. Minimum amounts are prescribed in Denmark, France, the Federal Republic of Germany, Greece, Iceland, Italy, Portugal, Sweden, Switzerland, Antigua, Barbados, Brazil, Costa Rica, the Dominican Republic, Haiti, Jamaica, Mexico, Trinidad and Tobago, the United Republic of Cameroon (in respect of non-passengers), the Central African Republic, Chad, Congo, Gabon, Ivory Coast, Malaysia, Morocco, Mozambique (if there is no negligence), Swaziland (in respect of passengers carried for hire or reward), Tunisia, Upper Volta, Zambia, Afghanistan, Indonesia, Iran, Israel, Kuwait (in case of death), the Philippines, Turkey, and Yemen.

48. On the other hand the minimum sums prescribed by the relevant statutes or regulations in many developing countries have remained for so long that the compensation payable has proved to be inadequate. The fact that there is provision to take account of changes in the value of money and revise the minimum sums assured had been of little value where the relevant enabling provision has not been used to update the

amounts payable. The payment of enormous sums is also partly attributable to the so-called "contingency system" under which lawyers work on a no-cure-no-fee basis. Countries following the British system under the laws relating to champerty prohibit such practices. Arrangements of this sort nevertheless do exist even in such countries and exaggerated sums are demanded by injured persons on the advice of their lawyers, who take a percentage of the award. Judges, assessors and juries, knowing that this happens, sometimes unofficially take this into account in fixing damages. The result is excessive awards which in turn keeps premiums unnecessarily high.

49. The contingency system also encourages litigiousness, for a man is more likely to sue his adversary if he knows he has nothing to lose even though he fails. This tends to overload the courts and to slow down the judicial process, thereby delaying the settlement of claims.

50. Where the contingency system is now used, lawyers tend to extort a large share of the award by way of fees. This defeats the purpose of the award (where judges and juries do not add this unofficially to the award) since the amount left in the hands of the injured party becomes inadequate to serve the needs for which compensation was assessed and awarded.

51. As for the balance that remains once the lawyer has taken his share, importunate friends and relatives or the plaintiff's own improvidence often dissipate it in no time at all. This is a weakness of the lump sum settlements made under the tort system. Admittedly it is neat and simple, but it does not replace income with income and permits the victim to fritter away the money he receives.

52. Another weakness of the compensation scheme in the systems under consideration is the lack of uniformity of the awards made by different judges for similar events or injuries. To take a case to court under the tort system is to enter a lottery. Precedent concerns only legal principle and the award of compensation is generally at the discretion of one person whose views are necessarily coloured by his own experience. There is so much room for individual choice that the assessment of damages is more like an act of discretion than an ordinary act of decision. Naturally, therefore, complaints are often heard that there is injustice.

53. In fact it is impossible to assess compensation accurately. The amount of future earnings, expectation of life, promotion prospects, prospects of remarriage, future tax movements, inflation rates, medical prognosis and similar factors are imponderables and uncertainties.

54. Although some persons are paid large amounts by way of compensation, often without sufficient regard for other awards in respect of similar injuries and circumstances, others are paid very little or nothing at all. It is a notorious fact that in certain developing countries, owing to lack of education and "claims-consciousness", claimants are bought off by insurance companies. A few tins of biscuits and some kerosene oil are standard settlement practice in some Pacific island areas. In short, the scene is one of feast and famine with

a large proportion of injured persons receiving very little or no compensation at all. One has only to compare the number of persons reported by the police to have been killed or injured in road accidents with the number of claims paid and regarded as incurred by insurance companies to appreciate the seriousness of the problem.

55. The problem is also present in developed countries. For example, it has been estimated that in the United Kingdom about 40 per cent of injured persons are not compensated and that many of those who are compensated have their compensation reduced on the grounds of contributory negligence.³ The size of the problem in developing countries, however, is much larger on account of the lack of claims consciousness and awareness of rights.

56. The fact that in both developed and developing countries many injured persons are not compensated is in part due to the failure to prove fault on the part of the defendant. Before compensation can be awarded negligence must be established by the plaintiff in some countries. These include Cyprus, Ireland, Argentina, Barbados, Brazil, the Dominican Republic, Ecuador, Trinidad and Tobago, Burundi, Egypt, The Gambia, Ghana, Kenya, Liberia, the Libyan Arab Jamahiriya, Nigeria, Sierra Leone, South Africa, the Sudan, Switzerland, Uganda, the United Kingdom, Zambia, Zimbabwe, Hong Kong, India, Lebanon, Malaysia, Singapore, Sri Lanka, Fiji, Kiribati, Tuvalu and Solomon Islands.

57. Proving negligence consists of showing the failure of the defendant to observe the standards of a *bonus paterfamilias*, a reasonable man sensitive of his duties towards both himself and his fellow citizens. In the words of the Roman law from which the current law of negligence is derived: "*culpam autem esse quod cum a diligente provideri poterit non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit.*"

58. Today in the countries mentioned (cf. para. 56 above) it is for the claimant to establish that the act was occasioned by negligence. The onus of proof is on the plaintiff and if he fails to discharge this burden he will not be awarded damages. In certain circumstances the facts may speak for themselves—*res ipsa loquitur*—and the presumption of negligence raised by the circumstances will relieve the plaintiff of adducing further evidence of negligence unless the defendant rebuts the presumption.

59. This system has led to unsatisfactory results, for if in the circumstances a judge is satisfied that the decision taken by a motorist, although wrong, was nevertheless one which the hypothetical reasonable man might have taken or was a mere error of judgement, the defendant will be free from liability and the victim of the accident will not be compensated. Error, it ought to be noted, is not slight fault or negligence. It is quite a different concept.

60. Although some accidents are due to negligence, a large number of them are not due to blameworthy

conduct. Many of them are due to mere errors attributable to unavoidable human imperfection. Traffic accidents are by and large a social phenomenon (or even an epiphenomenon) and are statistically unavoidable, although they can be predicted and modified in accordance with changing traffic conditions. This is not to deny that the driver is a very important element in the occurrence of a motor accident. He unquestionably is. However, although the traditional concepts of civil liability on which the motor insurance third-party legislation of many countries are based have been devised with the deliberate choice between two possible causes of behaviour in mind, it appears in fact that the main human factor in the causation of accidents is mere error rather than fault. Unlike faults, errors are the result of human imperfection. In many instances accidents are not due to any conscious deviation from a standard of behaviour but simply to accident proneness—that is, a tendency in certain people to have accidents because of slow reflexes, defective vision and other physical and temperamental characteristics. Road users are mere mortals and hence imperfect, physically and mentally. In the *International Encyclopaedia of Comparative Law*.⁴ Professor André Tunc quotes a study by the World Health Organization which estimated that a driver commits at least one error every three kilometres. Mere human failures which result in accidents are not intentionally or recklessly or even negligently caused. Road accidents are often the result of split-second lapses of care and momentary errors of judgement, of human frailty and fallibility and, as such, are statistically unavoidable. They are the inevitable result of putting the power of hundreds of horses into frail human hands. In developing countries the result is worse than elsewhere because, as we have seen, the environment has not been modified to take account of changing traffic conditions.

61. If, as the evidence suggests, a large number of road accidents are inevitable and a large number of them are not due to negligence but due to mere error and human frailty, then a system which insists on proof of negligence before compensation is given must necessarily leave many persons without any relief. Such a system cannot be acceptable in a modern society which claims to be just and caring.

62. Motor accident litigation does not exist in a vacuum. Many of its problems are those of civil litigation in general. Experience has shown that civil litigation takes too long. The interval between a road accident and the date of judgement may be several years. This has several undesirable results.

63. First, witnesses are reluctant to waste their time coming to court year after year and therefore pretend not to have seen anything. Those who do come give a version of the events which are rather different from those which really took place. Apart from any documented fact, the narration is the result of conjectural recall, imagination, colourful dramatization and often pure inventiveness in the interests of the plaintiff, either on account of sympathy or for a consideration.

³ See Insurance Institute of London, *The advantages and disadvantages of the tort system and alternative methods of accident compensation*, report by Advanced Study Group No. 205 (London, 1978).

⁴ Volume XI, *Torts*, chap. 14, "Traffic accident compensation: law and proposals".

Even if a witness is honest, he may nevertheless give false information because his impressions may be blurred by the passage of time. Moreover, an accident happens so quickly that a witness's supposed observations may be in reality a series of *ex post facto* reconstructions of the minutiae of events assumed by him to have happened because he has been told so by other witnesses or by lawyers during the preparation of the case. This sort of evidence has to be reconciled with known physical circumstances such as marks on the road, angles of impact, damage to vehicles and part of the body struck. This is a precarious task. As Ehrenzweig observes in *Psychoanalysis*:

We must finally recognize and acknowledge that when we compel litigants in "negligence" cases to prove and disprove guilt and innocence as causes of what in truth are inevitable incidents of our hazardous society, we are repeating a procedure not greatly superior to trial by battle or the ordeal by water or fire.

64. The second consequence of delay is cost. Since insurers usually step in to defend the delinquent because it is in their interest to do so, the costs of litigation are added to the cost of claims which in turn keep premiums high.

65. In order to remedy this situation some insurers attempt to settle quickly the small, so-called "nuisance" claims and to fight the more substantial claims. Papua New Guinea affords a classic example:

Amount of claims in kina	Months for settlement
1-1 000	6.11
1 001-1 200	4.61
2 501-5 000	11.62
5 001-10 000	14.67
10 001-20 000	16.47
20 001 and over	15.00

66. This has unfortunate results. Those who are slightly hurt are often promptly and even over paid, while those with serious injuries are paid, if at all, a fraction of their damages—and that, too, only after long delay. In the more substantial cases, the delay is often an insurer's method of breaking down a claimant. With continuing fixed costs in the form of food, rent and so on, plus mounting medical expenses, the claim-

ant becomes more and more desperate and is likely at a certain point to settle for much less than he is fairly entitled to.

67. Other claimants, spurred on by their lawyers, react differently. In the heat of battle, considerations of economy go to the wall and the claimant ends up selling or mortgaging his properties to raise money to litigate. If he succeeds, he will spend a substantial part of his compensation in redeeming his pledged assets. If he fails, he loses it all. Professor James, in *The Law of Torts*,⁵ comments that "The only class that profits systematically from the present system is the lawyer, and I do not say this to disparage, for I think many of them are doing a conscientious job, given present circumstances, but I do say it to note an important fact in the situation".

68. Yet another problem with the systems based on negligence is the inability of an injured person to establish fault where the delinquent was a "hit-and-run" driver. There is no defendant to be proved guilty of negligence. In such a situation, even if negligence can be inferred from the circumstances, the injured party is left without compensation.

69. Then again, there are problems relating to causation and contributory negligence. If the injury suffered by the plaintiff is too remote a consequence of the defendant's conduct to have been "reasonably foreseeable by him", no negligence can be imputed to him. It is not possible to go into details in a short paper of this sort, but it may be observed that the application of the principles relating to causation has occasioned acute difficulties and deprived many a plaintiff of compensation.

70. If the injured party himself was in some way to blame, then the causal connection between the defendant's act and plaintiff's injury is interrupted by the plaintiff's act and therefore no compensation is payable.

⁵ F. James Jr. and F. Harper, *The Law of Torts* (Boston, Little, Brown and Co., 1956).

CHAPTER VI

The ragged advance towards a solution

71. For many years the inadequacy, inappropriateness, illogicalities and injustice of the theory and practice of the law relating to compensation for road accidents have been severely criticized in both developed and developing countries.⁶

⁶ See, for example: Columbia University Council for Research in the Social Sciences, *Report by the Committee to study compensation for automobile accidents* (Philadelphia, International Printing Co., 1932); D. Payne, "Compensating the accident victim", *Current Legal Problems* (London), vol. 13 (1960); Consumers Union of the United States, *Consumer Report*, various issues, 1962; H. R. Gray, "Liability for highway accidents", *Current Legal Problems* (London), vol. 17 (1964); R. E. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (Boston, Little, Brown and Co., 1965); A. Tunc, in *International Encyclopaedia of Comparative Law*, *op. cit.* (footnote 4 above); Report to the Legislature on the accident problem in Puerto Rico,

A. The so-called merits of tort-based systems

72. However, there has been a general reluctance on

1966; New Zealand, *Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand* (Woodhouse Report), December 1967 (Wellington, Government Printer, 1972); United States of America, Department of Transportation, *Motor Vehicle Crash Losses and their Compensation in the United States* (Washington, Government Printing Office, 1971); A. R. B. Amerasinghe, "Compensation for road accidents in Ceylon", *Acta Juridica* (Cape Town), 1973; Australia, *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (Woodhouse-Meares Report), July 1974 (Canberra, Government Printer, 1974); United Kingdom, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Pearson Report) (London, HM Stationery Office, 1978), Cmnd 7054-1; Insurance Institute of London, *op. cit.* (footnote 3 above).

the part of Governments to dispense with tort law as the basis of compensation for road accidents. It is argued that the system:

- (a) Is superior to one of personal retribution;
- (b) Enables each case to be treated subjectively, and that this should be so because circumstances do vary;
- (c) Is flexible and enables the extension of areas of valid claims;
- (d) Although theoretically it requires a plaintiff to obtain relief from court, yet in practice most cases are settled out of court;
- (e) Recognizes the established right of a victim to sue for damages and that should not be interfered with.

73. Nevertheless it is generally agreed that some change in that system is desirable if not also inevitable. Something more socially acceptable and appropriate to supplement the traditional arrangements which have proved to be illogical, harsh and iniquitous, something to close the gaping lacunae in the compensation provisions which the tort-based systems produce, seems to be universally desired. However, people are divided as to the form, nature and direction the changes should take.

74. So far the efforts at reform have been directed towards supplementing rather than supplanting the tort-based systems and there has been a somewhat ragged advance towards a better system. The rest of the report describes the steps taken.

B. Compulsory third party insurance

75. Obtaining a decree from a court does not ensure the payment of compensation. If the delinquent driver is impecunious, the injured party will have only thrown good money after bad. Some countries, including Bolivia, Ecuador, Peru, Venezuela, Ethiopia, Liberia, Lebanon, Oman, Saudi Arabia, Yemen, China, Kiribati and Tuvalu, prefer to leave the matter there, for logically it is difficult to justify a special scheme for victims of road accidents and ignore other accidental injuries, at least if they are occasioned by negligence.

76. New Zealand has put all accidents on an equal footing. The question of affordability prevents most countries from going as far as New Zealand and providing compensation for all accidents occurring anywhere, 24 hours a day. But certain categories may be added as required. For example, in 1978 Samoa, through its Accident Compensation Act, put industrial accidents and road accidents on an equal footing and a similar move has reached an advanced stage of consideration in Fiji.

77. However, in order to protect more effectively at least the victims of motor accidents, Massachusetts in 1927 made third party insurance compulsory in respect of personal injuries. The United Kingdom followed. Steps have been taken by many developed and developing countries to require by law that no person shall use or permit any other person to use a motor vehicle unless there is in force a policy of insurance in respect of third party risks that complies with the provisions of the relevant legislation and regulations framed thereunder.

78. This is the case in European countries, including Austria, Belgium, Cyprus, Denmark, Finland, France, the Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

79. The position is similar in the Latin American countries of Antigua, Argentina, Barbados, Brazil, Costa Rica, the Dominican Republic (except for diplomats), Haiti, Jamaica, Saint Lucia, and Trinidad and Tobago.

80. Third party insurance is also compulsory in the African States of Algeria, Benin, Burundi, the United Republic of Cameroon, the Central African Republic, Chad, Congo, Egypt, Gabon, the Gambia, Ghana, Malawi, Mauritius, Morocco, Mozambique, Nigeria, Sierra Leone, Somalia, South Africa, the Sudan, Swaziland, the United Republic of Tanzania, Uganda, Upper Volta, Zaire, Zambia and Zimbabwe.

81. Countries and territories of Asia and the Pacific follow suit. For example, compulsory liability protection is required in Australia, Bangladesh, Burma, Fiji, Hong Kong, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, the Republic of Korea, Kuwait, Lebanon, Malaysia, the Philippines, Singapore, Sri Lanka, the Syrian Arab Republic, Turkey and Democratic Yemen.

82. In Togo, compulsory third party insurance is required only of those engaged in transport undertakings. In Thailand, the Transportation Act of 1954 does not require compulsory third party insurance except for carriers and haulage contractors. In Mexico (see *Ley sobre el contrato de seguro*, 20 August 1935 and *Reglamento del tránsito del D.F.*) compulsory third party insurance was not required except for licensed public carriers and haulage contractors. Plans were afoot in 1980 to extend this.

83. The fact that the law requires compulsory third party insurance does not necessarily mean that every vehicle is in fact insured. Enforcement of the law is known to be very weak in many developing countries. It is also the case with developed countries. For example in 1975, 140,000 motorists were successfully prosecuted in the United Kingdom for driving uninsured vehicles and this was said to be just the tip of the iceberg.

84. Moreover, although compulsory third party insurance has the desirable effect of minimizing the chance of a plaintiff ending up with a pyrrhic victory in court, it makes the system illogical. Compulsory third party insurance spreads the economic consequences of negligent driving directly over the insuring public and indirectly (by the cost of insurance being passed on eventually to consumers) over the entire community. Every motorist must share in the losses, whether characteristically inclined to this sort of negligence or whether marked by the uniform prudence of the reasonable man. Against this background the search for negligent drivers who might deserve to pay is really a search to control the aggregate sum that will become payable. It is not the delinquent but the insurance company, the policyholders later and, eventually, the public who pay compensation. As a necessary corollary of the imposition of a system of compulsory insurance, the law of tort relating to negligence, based as it is on punish-

ment of the delinquent, has degenerated into a legal fiction.

85. A further problem in some countries is that certain classes of road users are not required to be covered under the scheme. For example, passengers and the driver are not required to be covered in Fiji or in Sri Lanka unless passengers are being carried for fee or reward. In the Philippines the owners of private motor vehicles must obtain comprehensive cover against third party liability for death, bodily injury and damage to property. In the case of others, the cover must also be comprehensive in respect of third parties and passengers in respect of death, bodily injury and property damage.

C. Implications for insurance industry

86. Despite strident and oft-repeated claims by insurers that motor business—especially third party business—is “rotten” and that they would rather not transact such business, the underwriting results in some countries suggest that things are not as bad as they are sometimes made out to be.

87. In Pakistan, for instance, the results are as follows for compulsory third party insurance:

Year	Earned premium (Pakistani rupees)	Incurred losses (Pakistani rupees)	Loss ratio (percentage)
1975	3,513,195	450,242	12.81
1976	4,222,373	43,006	01.01
1977	5,184,804	730,590	14.09
1978	5,386,872	647,782	12.02
1979	6,464,246	772,338	12.02

88. It is freely admitted (in private, of course) by some insurers in Pakistan that this is the result of few claims and even fewer payments.

89. Other motor business in Pakistan also showed underwriting profits:

Year	Earned premium (Pakistani rupees)	Incurred losses (Pakistani rupees)	Loss ratio (percentage)
1975	26,215,876	19,393,574	73.97
1976	31,425,131	22,063,474	70.20
1977	37,402,906	22,444,316	65.35
1978	43,460,956	30,150,848	69.51
1979	52,153,147	36,181,017	69.37

90. In Malaysia net claims as a percentage of earned premium have been as follows:

Year	Act business (i.e. compulsory insurance) (percentage)	Other motor (percentage)
1970	93.9	43.0
1971	95.6	45.7
1972	101.4	43.4
1973	106.2	54.8
1974	108.9	60.0
1975	112.7	57.9
1976	115.9	57.6
1977	139.2	49.7
1978	95.1	54.0
1979	96.9	56.1

91. In the Philippines good underwriting results have been obtained in motor insurance business other than compulsory insurance. Even in the sphere of compulsory covers, underwriting results (except in 1975) have been favourable:

COMPULSORY MOTOR INSURANCE

Year	Earned premium (pesos)	Incurred losses (pesos)	Loss ratio (percentage)
1975	12,288,198	1,247,903	10.15
1976	101,143,065	114,808,007	113.51
1977	156,897,689	130,622,197	83.25
1978	165,125,215	161,490,253	97.8
1979	164,782,860	161,527,522	96.20

OTHER MOTOR INSURANCE

Year	Earned premium (pesos)	Incurred losses (pesos)	Loss ratio (percentage)
1975	153,325,631	101,278,747	66.06
1976	245,492,317	155,160,416	63.2
1977	142,536,263	123,419,590	86.59
1978	166,908,276	106,624,864	63.88
1979	286,712,760	177,027,929	61.74

92. In other countries, however, the business of compulsory third party insurance does appear to justify the claim that business is bad.

93. In Egypt, for example, motor third party claims ratios in 1978 and 1979 in respect of direct transactions were 232.2 per cent and 245.2 per cent, respectively. 63.5 per cent in 1978 and 61.2 per cent in 1979.

94. In Papua New Guinea also loss ratios in compulsory third party motor insurance have been unsatisfactory: 125.43 per cent in 1975; 125.89 per cent in 1976; 124.90 per cent in 1977; 123.31 per cent in 1978; and 145.75 per cent in 1979.

95. Fiji was in a similar situation some years ago. Loss ratios for compulsory third party insurance in Fiji were as follows: 120 per cent in 1973; 89.3 per cent in 1974; 105.7 per cent in 1975; and 103.39 per cent in 1976.

96. However, with the introduction of rate increases, despite strong public protests and a recommendation by a Select Committee of the House of Representatives advocating a reinstatement of the old premiums, the third party account has become profitable. In 1979 the loss ratio was 62.72 per cent. Although the Government did not accept the recommendation of the Select Committee to order the restoration of the old rates, it accepted the recommendation that third party insurance should be taken away from private insurers and placed in the hands of a statutory corporation.

97. Much depends on the freedom to underwrite at economical rates. Many countries and territories have a uniform tariff. These include Turkey, Cyprus, Barbados, Bolivia, Brazil, Costa Rica, The Dominican Republic, Ecuador, Mexico, Nicaragua, Peru, Venezuela, Algeria, Burundi, the United Republic of Cameroon, Egypt, Ethiopia, Swaziland, the United Republic of Tanzania, Togo, Tunisia, Uganda, Zambia, Afghanistan, Hong Kong, India, Iraq, Jordan, the Republic of Korea, Kuwait, Malaysia, Oman, the Philippines, Singapore, the Syrian Arab Republic, Democratic Yemen and Fiji.

98. In some of the countries the tariff must be approved by the supervisory authority. This is the case in Cyprus, Costa Rica (Instituto Nacional de Seguros), Ecuador (Superintendencia de Bancos y Seguros), Mexico (Comisión, Nacional Bancaria y de Seguros), the Gambia, Ghana, Swaziland, the United Republic of Tanzania, Zambia, Jordan and Republic of Korea.

99. In others, the tariff must be approved by a Minister or by the Government. This is the case in Turkey (Minister of Commerce), the Libyan Arab Jamahiriya (Minister of Economy), Morocco (Ministry of Finance), and Uganda (State).

100. In a third group of countries, the rates are fixed by statute or regulation. For example, this is the case in the Dominican Republic.

101. A few countries have a free rating system. These include the Libyan Arab Jamahiriya, Mauritius, the Sudan, Lebanon, Saudi Arabia and Yemen.

102. In yet another group, rating is free but the supervisory authority fixes the maximum. This is the case in Benin, the Central African Republic, Chad, Congo, Gabon and Ivory Coast.

103. Where underwriters are free to fix rates, they have no one to blame but themselves if business is bad.

104. On the other hand, if the rate is directly or indirectly controlled by the State, underwriters could be in difficulties (especially where by law or in practice they are compelled to provide the cover if the Government or the authority concerned unreasonably refuses to permit the adjustment of premiums to meet established needs).

105. Governments and supervisory authorities have no doubt sometimes been unreasonable. However, in other instances underwriters themselves were to blame, for they have been unable to produce credible statistical information to support their demands for premium adjustments. They have been found in certain places to manipulate arbitrarily IBNR (incurred but not reported) and outstanding claims reserve figures to support demands for premium increases. In some countries insurers complain of poor results despite underwriting profits because high administrative costs, including procurement costs, erode profits. In the absence of evidence that every effort has been made to streamline administrative procedures and peg down procurement and other costs, it is hardly surprising that certain Governments and regulatory authorities have refused to authorize premium increases. Moreover Governments and supervisory authorities have to be cautious in approving increases, not only because they compel motorists to insure and appear to be in a position of exploitation but also because additional premium costs are passed on to the public, often not merely to the extent of the increase but many times more on the pretext of increased insurance costs.

106. It should also be noted that, despite their complaints, insurers faced with losing the business (e.g. on account of its being transferred on a monopoly basis to a statutory authority) protest vehemently. The reason is that motor business assists them in their cash flow situation. This is of special importance in countries where, owing to over-capacity and competitive considerations, other business is sold on credit and/or high investment returns more than off-set underwriting losses, if any.

D. Hit-and-run and uninsured vehicles

107. Another small but significant step taken by some others to remedy one of the inadequacies of tort-

based systems relating to motor accidents is to introduce the concept of what is sometimes called the "nominal defendant". In essence the arrangement is to create a fund from premiums paid or other sources to enable the victim of a hit-and-run accident to claim compensation.

108. Injuries caused by uninsured or hit-and-run vehicles are paid out of a State fund in Brazil, by the Instituto Nacional de Seguros in Costa Rica, in Algeria by the Special Indemnity Fund, in the United Republic of Cameroon by the Automobile Guarantee Fund, in Morocco by the Guarantee Fund, in Tunisia by the Guarantee Fund, in Uganda up to 200,000 Ugandan shillings per event by the Motor Vehicle (Third Party) Insurance Fund, in Zimbabwe by the Motor Insurance Bureau, in Malaysia and Singapore by their respective Motor Insurance Bureau, and in Papua New Guinea by the Motor Vehicles Insurance Trust.

109. Other countries have also been considering the introduction of similar arrangements. Pakistan, for instance, is considering the establishment of a Traffic Accident Victims (Fatal Injuries) Compensation Fund to make ex gratia payments not exceeding 5000 Pakistan rupees to the dependants of a person killed by an unidentified vehicle.

E. Contributory negligence

110. Following the United Kingdom Law Reform (Contributory Negligence) Act of 1945, most developing countries whose law is based on English law changed the law so that contributory negligence ceased to defeat an injured person's rights but merely operated to reduce damages having regard to the degree to which the claimant was at fault. The court is expected to do what is just and equitable in the circumstances of each case. As might be expected, the apportionment of liability is arbitrary and depends a great deal on the evidence available, the judgement and reliability of witnesses, the persuasiveness of counsel and the personal inclinations of the judge.

111. Developing countries influenced by the continental systems—e.g. in Latin America and certain African States—have had no problems in this regard. Division of blame was recognized as far back as 1811 in the Austrian Civil Code. The principle became part of the German Civil Code which came into force in 1900. French law applied the doctrine of common fault and liability for motor accidents is strict, the presumption of responsibility being rebuttable only by proof of *force majeure* or *cas fortuit* or some cause foreign to the defendant.

1. LEGAL AID

112. In some countries legal aid schemes mitigate the problems of legal expenses and unaffordability encountered in ordinary circumstances. The free legal aid scheme of Sri Lanka is one example. In Papua New Guinea, the office of the Public Solicitor provides valuable advice and services to litigants at comparatively modest fees.

113. One difficulty with such schemes, however, is the comparative lack of competence of the lawyers

handling such matters for claimants. In respect of a claim of any significance, insurers are financially better placed to engage the services of a leading counsel against whom the claimant's legal-aid counsel can do very little.

2. BURDEN OF PROOF

114. We have seen that negligence is the basis for the recovery of compensation for road accidents in many countries (see para. 40 and 41 above) and that on account of the uncertainty of some of the principles applicable and the practical application of the general rules, proving negligence is a precarious exercise which comparatively few injured persons are in a position to undertake in the first place and in which even fewer persons eventually succeed, thus leaving a large number of victims of road accidents without any compensation.

115. Various devices have been adopted to remove or minimize the problem.

116. In some countries, although negligence is retained as the basis of the remedy, the ordinary rule of evidence that the plaintiff must adduce evidence to establish the ingredients of his claim (including proof of negligence on the part of the defendant) is amended so that negligence is inferred from the fact of the accident. In other words although negligence must be established, and established by the plaintiff, there is said to be a presumption of negligence, the burden of adducing evidence to disprove negligence being shifted to the defendant. This is the law in some developed as well as developing countries including Denmark, France (presumption of negligence of the *gardien*), Italy, Japan, Benin, the Central African Republic, Chad, Congo, Gabon, Ivory Coast, Madagascar, Togo, Tunisia and Upper Volta.

117. Other countries adopt a sort of split system in which negligence remains the basis of the remedy for all persons or types of harm but a presumption of negligence is drawn in certain circumstances. For example in Morocco there is a presumption of negligence in respect of fare-paying passengers and other third parties but passengers carried free of charge must adduce evidence of negligence.

118. In a third group of countries, negligence remains the basis of the remedy but the law goes beyond merely drawing an interim, rebuttable presumption of negligence in favour of the claimant and proceeds in certain prescribed cases to conclude firmly that the defendant was negligent. The onus of proof remains on the plaintiff, although in certain countries the plaintiff may through a presumption of negligence be relieved of the burden of adducing evidence. In other words, a system of absolute or strict liability mixed with either the plaintiff being temporarily relieved of the burden of adducing evidence of negligence or required to adduce evidence of negligence in certain cases. For example this is the case in Austria, the Federal Republic of Germany, Turkey, Mozambique and Mauritius, where there is absolute liability in some instances but negligence has to be proved by the plaintiff in other cases.

119. In Portugal and Malawi there is absolute liability in certain cases but negligence must be

established in other cases although the claimant, where he is required to establish negligence, is assisted by a presumption of negligence in his favour.

120. The diversity of methods in dealing with the critically important question of the burden of proof is due to historical reasons. It is essential to understand this to refute the suggestion made so often that the tort system is immutable or universal. In fact, owing to the wide diversity of the "rules of evidence", the usual discussions which proceed on the assumption that there is a system which has to be reformed seems futile.

121. The Roman Law, on which most modern tort systems are based, did not specify where the burden of proof lay in cases of negligence. In accordance with the general rule that one who alleges a fact must prove it (*ei incumbit probatio qui dicit, non qui negat*) we must assume the plaintiff had to prove not only the damage but also the guilt of the defendant. This was followed by the English law, and many developing countries, influenced by English law (see above), have followed the rule.

122. The principle of no liability without fault grew in strength in the nineteenth century as the predominant power in the State passed to the entrepreneurial class; and the march of progress seemed bound up with the use of machines and other instrumentalities whose usefulness was matched only by their capacity for doing harm. The risk of accidental harm from their operation seemed something to be borne not by their exploiters but by any person who happened to be injured.

123. French law took a different turn. The compilers of the Code Civil inserted in article 1384, which for the most part deals with questions of liability for the acts of other persons for indemnity for damage caused "*par le fait des choses que l'on a sous sa garde*". For nearly a century these words were not applied in their literal sense and indeed the possibility of using them to establish a doctrine of strict liability seems never to have suggested itself for almost 70 years. Perhaps it was thought that the scope of the term "*des choses que l'on a sous sa garde*" was exhausted by the two examples, animals and buildings, which are the subjects of the two following articles, 1385 and 1386. In 1897 the Cour de Cassation disinterred the crucial words "*des choses que l'on a sous sa garde*" from article 1384 and gave a stoker damages against his master for personal injuries caused by the explosion of a boiler in the master's custody although the stoker could not prove any fault in his master. The older school of jurists objected on scientific grounds. Although they had not been unsympathetic towards the public policy involved in the decision, they advocated a return to the traditional interpretation of article 1384. This might conceivably have happened, for the Court had not accepted the extreme theory of risk, had not motor accidents revived the problem in another, perhaps more extreme, form. Although in the earlier stages of development before 1914 there was a general tendency to apply the doctrine of fault, the freedom of French law from any strict theory of precedent has allowed the Courts to swing round first in favour of the presumption of fault and finally since 1930 to a doctrine of presumption of responsibility which can be defeated only by proof of

force majeure or *cas fortuit* or some outside cause not imputable to the defendant.

F. No-fault schemes

124. A system which through a presumption of negligence relieves a plaintiff of the burden of adducing evidence therefore still, in principle, leaves him with the burden of proof and hence the risk—admittedly a reduced risk—of failing in his action on account of insufficient evidence to counter the defendant's submissions.

125. Where the system is mixed, it is difficult to explain away the anomalies caused by partially or totally placing some on one basis and others on a different footing.

126. In any event, even where absolute liability applies in all cases, it leaves the system open to criticism on the other grounds described earlier in this report relating to negligence-based systems.

127. Some countries have therefore, at least partly, dispensed with the system based on negligence and substituted for it a so-called "no fault" system in which negligence, actual or presumed, plays no part in theory or in practice in so far as the no-fault system applies. The only curious exception is in the case of Norway, which seems to have a no-fault scheme but recognizes contributory negligence, which a no-fault scheme logically cannot do.

128. There is nothing novel or revolutionary about the basic concept of no-fault legislation. The first serious inroad on the principle of no liability without fault was made by the Prussian Railway Law of 1838, which introduced strict liability for certain accidents. The Act formed the model for the more far-reaching Reichshofpflichtgesetz of 1871, which applied to the whole Reich and for the later extension of the principle to motor cars and aircraft. These reforms spread rapidly to Austria and Germany and to the colonies.

129. In Norway towards the end of the nineteenth century there grew up in the Common Law the principle of absolute liability for dangerous enterprises. When motor cars appeared, they were immediately classified as dangerous enterprises and liability resulting from their use was absolute. The principle of objective liability was incorporated in the Motor Vehicle Liability Act of 21 June 1912.

130. No-fault schemes have been on the statute books for some time in Saskatchewan (1946), Puerto Rico (1968), British Columbia (1970), Massachusetts (1971), Tasmania (1974), Victoria (1974), Norway (1974), Finland (1974), New Zealand (1974), Papua New Guinea (1974), Israel (1975), Sweden (1976), the Philippines (1976), Samoa (1978) and the Northern Territory of Australia (1979). Though federal-level legislation was attempted in the United States Senate Bill No. 354 and fell by the wayside, more than half the states in the United States of America have no-fault schemes.

131. Other countries have been actively considering the subject. For example, in the United Kingdom in

1976 a Private Members' Bill—the Road Accidents Compensation Bill—which was aimed at introducing a no-fault system, failed to get a second reading for lack of time. The Government was not happy for the Bill to proceed before Lord Pearson's Royal Commission had reported. Lord Pearson's Commission recommended a limited no-fault system. However, the recommendation has not been implemented. In Australia, the Woodhouse-Meares recommendations went as far as being incorporated in the National Compensation Bill, but with the dissolution of the Australian Parliament in 1975 the Bill, which would have introduced "no-fault" at a Federal level, lapsed.

132. Similar consideration has been given to no-fault schemes in a few developing countries as well. For example in Malaysia, according to the Commissioner of Insurance (Annual Report 1980):

A careful study of the no-fault insurance scheme in New Zealand has revealed that the scheme is not suitable for Malaysia. Accordingly the Government has decided that a further study be undertaken with a view to including a viable scheme in Malaysia. In this regard Government will continue to review the developments of "no-fault" schemes in certain relevant countries.

133. In Sri Lanka a Committee of the Minister appointed to report on road transport legislation in 1973 recommended the introduction of a system of no-fault protection. The subject has been revived from time to time, but not proceeded with.

134. In Fiji, the Transport Enquiry Committee of 1974 recommended the introduction of a system of no-fault protection and in 1978 a Select Committee of Parliament made a similar recommendation. Draft legislation has been prepared and endorsed by Cabinet and it is expected that the relevant bill will be introduced in parliament shortly.

135. Any attempt to introduce a system of no-fault protection to replace the tort system runs into various difficulties.

136. The most vociferous opponents are understandably the members of the legal profession, particularly the so-called "ambulance lawyers", who expect to be put out of a very lucrative source of business. And lawyers in developed and developing countries are, both in and out of the legislature, a very influential group.

137. Once the scheme is implemented, however, things are not as bad as they seem. Reporting on the New Zealand scheme, K. L. Sandford, Chairman of the New Zealand Accident Compensation Commission, speaking to the 62nd Annual Convention of the International Association of Industrial Accident Boards and Commissions on 22 September 1976, stated:

Lawyers: They have lost their claims for common law damages. But strangely, the legal profession in New Zealand was badly split on whether they welcomed the proposed new scheme or deplored it. They were never able to speak or lobby with a united voice. By now there are only a few lawyers still offering criticism, and by and large the legal profession has accepted accident compensation as part of the moral fabric of our lives. The demand for legal services in New Zealand has been such that most lawyers who have lost their personal injury practice have found plenty of other work to replace it.

In short actual results are better than expected.

138. The New Zealand scheme is the most comprehensive scheme in the world covering all accidents, 24 hours of the day, for all persons.

139. Objections are nevertheless made by the legal fraternity even where no-fault schemes are to be confined to motor accidents. This happened to the Keeton-O'Connell plan for Massachusetts. It happened also in Samoa. Yet eventually the schemes were introduced.

140. No one, however, ever actually hears the objection that the scheme would adversely affect lawyers. The objections are overtly based on other grounds regardless of what the underlying unmentionable, yet fundamental, motive might be.

141. One of them is that the introduction of a no-fault scheme will result in more accidents because drivers will become careless. This is a common but worthless argument. Drivers do not lose the inducement to drive carefully. Hamish Gray observes as follows:

Even today a driver's measure of third party liability is probably no more than the amount of his premiums and the loss of his no claim bonus; much more to a driver than either of these sums is the safety of his own car, his own person and the persons in the car with him. And it is an unusual driver who can kill or maim another highway user and remain unmoved by the experience.⁷

142. The Advanced Study Group of the Insurance Institute of London observes as follows:

In the Soviet Union liability insurance was long prohibited on the grounds that if a man was held personally liable for his own tortious acts he would exercise a greater degree of care. Whether the absence of insurance would in fact have this effect seems doubtful but it is, of course, equally doubtful whether the existence of liability insurance protection has any effect upon the driving standards of the motorist. The drivers who are involved in the majority of accidents become liable because of last moment errors in judgment or because of distractions and it is difficult to appreciate how any concern for civil liability could remedy this kind of error in such circumstances. The following relevant comment appeared in the report of the New York Insurance Department to Governor Rockefeller (1970) "Insurance—for Whose Benefit":

"It is mythology notwithstanding, the fault insurance system is inherently incapable of deterring unsafe driving. Individual, last moment driver mistakes undeterred by fear of death, injury, imprisonment, fine or loss of licence—surely cannot be deterred by fear of civil liability against which one is insured."

143. It might also be pointed out that the introduction of a no-fault system does not imply that the criminal law which is designed to punish reckless and negligent drivers is interfered with at all. Punishment in any event is the sphere of the criminal law and not the civil law of torts.

144. According to J. E. Bannister,⁸ in Puerto Rico, following the introduction of the no-fault scheme, third party claims were reduced both in frequency and in cost. Accident rates "did not increase disproportionately, and pain and suffering suits did not increase". He adds that the experience in Massachusetts was also favourable.

145. In Samoa, the Annual Report of the Accident Compensation Board for 1980 reported a decrease of 3.5 per cent on claims between 1979 and 1980 though

there was an 8 per cent increase in the number of people involved in accidents during that period.

146. On the weight of evidence available it seems that no-fault schemes *per se* neither increase nor reduce accidents. They have nothing to do with it. On the other hand an upsurge in the number of claims might be expected because the removal of the barriers of the tort system were intended to have precisely the effect of enabling more people to be compensated. Moreover, in terms of Vesty's law "the frequency and extent of liability claims varies in direct proportion to the probability of their successful prosecution".

147. Another objection to the replacement of the tort system is that it would be tantamount to removing a well-established fundamental right. Action for the recovery of compensation based on negligence in developing countries dates back at most to colonial times and is neither ancient nor well-established.

148. In any event, the history of the remedy even in developed countries (already described in paragraphs 121-123 above) shows that there is no justification for regarding it as a universal, fundamental right. The Advance Study Group of the Insurance Institute of London concluded that "the tort system is not as it appears to be commonly believed something which is immutable, inherent and implicit in human relationships. Justice changes with the age in which it is administered and the view with the viewpoint".

149. It is also relevant to point out that, notwithstanding the introduction of the fault-based systems, there are shortcomings in all of them which leaves the claimant with the right to recover in respect of such deficiency under the law of torts.

150. The most comprehensive scheme in the world, the New Zealand scheme, provides an alternative to only part of the tort system. For example, it does not cover property damage or non-economic losses for which there is no specific provision in the legislation. In these cases recovery must be through the tort system. In other words, the New Zealand system truncated but did not wholly excise the law of tort.

151. Although under the New Zealand scheme a claimant is subject to a recovery ceiling and is denied his former right to sue should he feel that the compensation provided by the law for his injuries is inadequate, in some other schemes the stipulated compensation merely provides a threshold, a dissatisfied claimant being left to recover a larger amount if it is warranted in the opinion of the court and provided liability under the tort system can be established.

152. In Finland and Norway property damage claims are limited under the no-fault scheme. In Sweden they are limited in respect of both property and personal injury claims in excess of 50 million Swedish crowns.

153. Nor was tort abolished in Puerto Rico. It remained possible for an injured party to sue a negligent person who caused the accident if the economic damages exceeded the threshold amount or the agreed cost of the "pain and suffering" loss exceeded the specified threshold.

154. In the Philippines, by the terms of Presidential Decree No. 612 (the Insurance Code), the threshold is

⁷ H. R. Gray, "Liability for highway accidents", *Current Legal Problems* (London), vol. 17 (1964), pp. 136-137.

⁸ "No fault' motor insurance in practice", *Policy Holder Insurance Journal* (London), vol. 90, No. 41 (13 October 1972), p. 1936.

5000 pesos. If the total indemnity claim exceeds 5000 pesos and there is controversy in respect thereto, the question of fault becomes relevant for that extra amount claimed. It is only in respect of the first 5000 pesos that questions of fault cannot be raised. Moreover no fault indemnity applies only to death or bodily injuries and not to cases of property damage only. And the discharge of obligations arising out of bodily injury takes priority over disabilities for property damage.

155. In Samoa the Accident Compensation Act of 1978 provides a detailed scheme for the assessment of compensation below specified ceilings. Property damage is not covered and to that extent a claimant will have to depend on the law of torts to recover compensation. Even with regard to bodily injury, the claimant may opt to sue under the Common Law. If he does so, he is precluded from making a claim under the Accident Compensation Scheme. If he has already obtained compensation paid under the Scheme, the Court must deduct any compensation paid under the Scheme (Section 57).

156. In Papua New Guinea delays in claims settlements caused so much frustration that people started resorting to personal retribution on a "pay back" basis. The Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act was therefore enacted to prevent tribal killings and the wanton destruction of property. In terms of the Act, on receipt of a Court order, certain payments are made regardless of questions of fault. In the case of a deceased person survived by a dependent wife and child the maximum payable is 2000 kina. In other cases the maximum is 1500 kina. Further claims may be made under the Common Law but any payment under the Basic Protection Act will be deducted from the Common Law award.

G. No-fault and the insurance industry

157. It is also said that a no-fault scheme would kill the non-life sector of the insurance industry, especially in developing countries. Although motor insurance forms an important segment of business in many countries, this, as we have seen, is not the case in every country.

158. Secondly, even in countries where motor business is relatively important, the proportion of third party business may be of comparatively less significance than comprehensive business. In Egypt, for instance, in 1979 third party compulsory covers accounted for only 17.1 per cent of the motor portfolio. Motor third party business accounted for only 4.7 per cent of the total non-life premiums. In the same year in Malaysia Motor "Act" business accounted for 12.9 per cent of the total non-life premiums. In Fiji, motor third party business in 1979 accounted for 7 per cent of the total non-life premiums, although motor business as a whole accounted for 31.8 per cent of the general portfolio.

159. In Papua New Guinea compulsory third party premium accounts for 15.25 per cent of the total non-life premiums although motor business as a whole accounts for 35.33 per cent of the general portfolio.

160. Thirdly, although in some countries (like New Zealand, Puerto Rico and Samoa) no-fault schemes are placed in the hands of statutory boards or in the hands of a government insurer as in Saskatchewan, there is no reason why private insurers cannot be permitted to transact no-fault insurance business as is the case in Norway, Finland, Sweden, Massachusetts and in the Philippines. Moreover, even in countries in which third party business has been lost to a government organization, the industry as a whole has continued to thrive. Samoa, Puerto Rico and New Zealand bear this out.

161. In fact, for reasons already explained (see para. 33 above), a no-fault scheme may stimulate non-life insurance business.

162. Another argument against a no-fault scheme is that it will not be viable and will eventually end in being a burden on the Government and the community. In New Zealand, for instance, the *National Business Review* alleged that the scheme was heading for a crisis. Professor Geoffrey Palmer, one of the architects of the scheme, responded strongly, however, that it was nonsense to suggest that the scheme was becoming too much of a burden to sustain. He thought the scheme was a great deal more economical than the insurance schemes which it replaced.

163. The income and expenditure accounts of the Motor Vehicle Compensation Fund of the Samoa Accident Compensation Board for 1979 and 1980 are as follows:

	1979	1980
	(In tala)	
<i>Income:</i>		
Fuel levy	325 774	296 876
Less: refund	113 623	102 341
	212 151	194 535
Interest from general income and expenditure account	14 671	25 449
	226 822	219 984
<i>Expenditure:</i>		
Lump sum—deaths	21 100	26 075
Weekly compensation	13 387	3 277
Lump sum—injury	19 020	17 640
Funeral expenses	3 846	4 008
Dental expenses	345	(345)
Conveyance expenses	19	15
Weekly-Aiga compensation	12 598	25 767
Artificial limbs	—	(431)
	70 315	76 006
<i>Income over expenditure</i>	156 507	143 978
Donations	500	—
Road Safety Company overhead expenses (from general income and expenditure)	13 581	20 324
	14 081	20 324
Fund at 31 December	142 426	123 654

164. The Samoa scheme has been in operation only since 1978 and an analysis of figures over such a short period cannot provide a valid, objective picture of the financial effectiveness of the scheme or indicate scien-

tifically acceptable trends. This is equally true of the New Zealand scheme, where the Commission's Auditors, in the report for 31 March 1976, stated:

The Commission acting on the best information available considers that the item 'Provision for future payments' is adequate to meet existing claims as at 31st March 1976. It will be some years yet before sufficient statistical data has been accumulated to enable an actuarial calculation to be made.

165. What is clear is that the schemes have not yet become the financial disasters they were expected to be by the critics.

166. It should also be pointed out that the question of viability depends on the nature of the scheme. No-fault-based schemes vary a great deal on the question of type of harm covered as well as benefits, each country choosing what it considers affordable and appropriate in other ways. Even many developed countries have proceeded cautiously, gradually extending the application and benefits of the system.

H. Type of harm covered

167. All the no-fault systems cover personal injury and death caused by motor accidents.

168. Some no-fault schemes (e.g. those in Norway, Finland, Sweden, Saskatchewan and Massachusetts) cover property damage as well. Others do not cover property damage. For example, there is no property damage cover under the schemes in New Zealand, Israel, Puerto Rico and Samoa.

I. Benefits payable

1. PERSONAL INJURY

169. In some systems (e.g. those in Norway and Finland) the amount payable in respect of personal injury and death caused by a road accident is unlimited.

170. In others there are limits imposed, but the limits vary from one system to another, not only with regard to amounts but also with regard to kind.

2. ECONOMIC LOSS

171. Under the New Zealand scheme, for example, an injured person is (a) entitled to 80 per cent of earnings lost, subject to a weekly maximum; (b) entitled to compensation payable over an indefinite period.

172. In Saskatchewan, however, weekly payments are limited to 104 weeks, in cases of partial disability, though total and permanent disability benefits can be extended for life.

173. In Massachusetts 75 per cent of actual wages lost is payable and there is no weekly maximum.

174. In the Puerto Rico scheme, there is a fixed weekly maximum of 50 per cent in respect of lost wages for the first year, subject to a maximum which declines in the second year and the whole is limited by a maximum amount.

175. In Samoa, total or partial incapacity for work may, at the discretion of the Compensation Board, be

either a lump sum or a weekly payment during the period of incapacity. If a lump sum is awarded, it amounts to a "sum equal to the aggregate of the weekly payments of compensation and weekly allowance, if any, which in the opinion of the Board would probably become payable to the person during the period of his incapacity if compensation by way of a weekly payment were then awarded instead of a lump sum" (Section 21 (2)). Where weekly payments are made it is an amount equal to 60 per cent of the person's weekly gross earnings but not less than 10 tala and not exceeding 75 tala. No minimum is fixed in respect of partial incapacity but, in order to reduce administrative costs, no compensation is payable if the injury does not incapacitate a person for at least five days. If the incapacity lasts for more than five days, the compensation is payable for the whole period.

3. NON-ECONOMIC LOSS

176. Compensation for non-economic loss is payable under certain schemes. For example, a lump sum is payable in New Zealand up to a stipulated maximum.

177. In Saskatchewan also a lump sum up to a stipulated maximum is payable in terms of a schedule according to the nature of the injury. Puerto Rico also pays a limited amount in respect of pain and suffering. The agreed cost of pain and suffering is not to exceed \$1,000. Pain and suffering is assessed by the Court according to the circumstances of each case.

178. In Samoa, if the injury causes permanent loss or impairment of any bodily function, including the loss of any part of the body, the Compensation Board, in addition to all other compensation and assistance payable, also pays a lump sum not exceeding 2,000 tala in respect of such loss or impairment, representing the appropriate percentage of 2,000 tala specified in the First Schedule to the Accident Compensation Act of 1978. If a person sustains multiple injuries in the same accident, he is limited to the maximum sum of 2,000 tala. Sums previously paid by way of compensation for injury to that part of the body are taken into account in making an assessment. Where the injury or impairment is not of a type described in the First Schedule, the Compensation Board may at its discretion, after consulting medical opinion, allot an appropriate percentage to such injury or impairment and apply the schedule by way of analogy.

4. MEDICAL AND HOSPITAL EXPENSES

179. In Norway, because of the obligatory National Health Scheme, the insurer is seldom involved in medical expenses claims. Originally, the National Insurance Department had subrogation rights which were enforced but this practice was abandoned because of administrative costs. In Puerto Rico benefits payable under the no-fault scheme include payment of medical and hospital bills without limit.

180. On the other hand under the Massachusetts scheme only reasonable medical benefits, if incurred within two years, are payable in full. In Samoa, an injured person or a dependant, in the event of death, is entitled to reasonable expenses incurred in respect of

medical or surgical attendance, including first aid, maintenance as a patient in any hospital and physiotherapy up to a limit of 100 tala.

5. COMPENSATION ON DEATH

181. Samoa pays compensation to cover funeral expenses in the event of death. If the deceased leaves any persons wholly dependent on him, a sum equal to the aggregate of weekly payments of compensation equal to 208 weeks gross earnings or 7,500 tala, whichever is less, is payable to the dependants. If such person leaves only partial dependants, they are paid such sum as is recommended as proportionate to their loss, but not exceeding in any case the amount payable to a total dependant. In every case where any weekly payments of compensation have been paid to the deceased, including any lump sum paid in lieu of any such weekly payment, the amount of compensation payable, in respect of death, to a partial dependant is reduced by the amount of the weekly payment or lump sum.

182. Under the Puerto Rico scheme there was initially a \$500 funeral benefit and death benefits which varied with the age, relationship and dependency status of the survivor or survivors. For example, a surviving wife with two children under four years of age would, under the original scheme, receive a benefit of \$10,000, a dependent wife without children would receive \$5,000. The maximum total benefit receivable was \$15,000.

6. OTHER BENEFITS

183. In the Samoa scheme, where as the result of an injury the provision of an artificial limb or aid becomes necessary or desirable in the opinion of the Board, the Board meets the reasonable cost of the artificial limb or aid and from time to time the reasonable cost of the normal repair or renewal.

184. Furthermore, when the person suffers damage to his natural teeth or suffers damage to any artificial limb or aid being used or worn by him at the time of the accident, the Board pays the cost of repairing the teeth or replacing them with artificial dentures or, in the case of damage to any artificial limb or aid including spectacles, the reasonable cost of repairing or, if necessary, replacing it.

185. In the Massachusetts scheme, provision is made for "replacement services" to cover expenses incurred for hiring substitutes. For example, a housewife is compensated for hiring a baby-sitter or a house-owner is compensated for having to hire a painter because he was, on account of the accident, unable to do the work himself.

186. The approach adopted in Saskatchewan was to make a payment of up to \$4,000 for "extra expenses". In terms of the Reparations Committee recommendations it was proposed that "all reasonable expenses incurred as a result of being injured by a motor vehicle, such as medical, surgical, dental, professional nursing, essential non-professional home nursing, ambulance services and the services of a duly qualified doctor or other person authorized to practise healing, up to a limit of \$5,000". In the event of death, funeral expenses would fall under this heading, up to \$1,000.

J. Mode of assessment

187. We have seen that one of the criticisms made of certain systems is that the mode of assessment is arbitrary and leads to injustice. No-fault schemes do not necessarily eschew that problem. The question of fault is concerned with proof of liability. It has nothing to do with quantum. In Norway, Finland, Sweden, and the Philippines, for example, although the question of liability is, within the stipulated limits, beyond dispute, quantum remains to be assessed in the usual way. This is done in Norway by a tribunal, and in Finland by the Motor Vehicles Damage Board on which insurers are represented. The amount of compensation is not known in advance in Norway, as in the New Zealand or Samoa schemes. In Norway, it is fixed by the tribunal or loss adjusters acting for insurers. Norwegian insurers, in co-operation with the government-sponsored Consumers' Council have formed a committee of claims officials which, although it has no ultimate power of decision, exercises considerable influence.

188. In the Philippines the matter of assessment is for court.

189. In Samoa the Accident Compensation Board, within the limits set by the legislation, determines the amounts payable. Discretion is very limited because of the shape of the legislation, especially the schedules of payments stipulating amounts due on account of the loss or impairment of bodily functions. For example, the maximum payable for the total loss of an arm cannot exceed 80 per cent of \$WS2,000. Any person who is dissatisfied with a decision of the Board or an officer of the Board may appeal against the decision to the Board and thereafter on a question of law to the Supreme Court.

190. In Sri Lanka, which formally has the traditional tort system, the Insurance Corporation of Sri Lanka has for many years used a system of settling claims on the basis of detailed schedules based on awards made by the courts in preceding years. The scheme has greatly reduced the number of cases which go to court for settlement and resulted in speedier, less expensive settlements.

K. Financing

191. Financing no-fault schemes takes different forms. In Norway, Finland and Sweden for example, they are financed through the payment of premiums to insurers in a manner similar to payments under compulsory third party premium payments under the tort-based systems.

192. In New Zealand, payments are by way of an annual levy paid by vehicle owners to the Post Office at the time of licensing. There is also an initial levy on driving licences.

193. In Puerto Rico the scheme is financed by an annual payment in respect of all vehicles registered in Puerto Rico, the fund being controlled by the Accident Compensation Administration.

194. In Papua New Guinea, motor vehicle third party insurance is administered by a trust set up by

Parliament. The trust is not liable for sums in excess of 100,000 kina in respect of the death or bodily injury to any one person in any one case and 500,000 kina in the case of one accident or series of accidents or series of accidents arising out of one event. All licensed insurers have a percentage participation in the trust. The fund of the trust is operated on a "pool" basis with all premiums and investment income being credited to the pool and claims being debited against it on a pool year basis. In the event of any dispute with regard to the percentage of a participating insurer in the annual pool or fund, the dispute is resolved by the Commissioner of Insurance. Premiums are fixed annually by a Committee. At first, owing to lack of statistical information, making provision for incurred but unacceptable claims caused certain difficulties. These have been overcome by the systematic collection of data.

195. The Philippines scheme, too, has operated on a pool basis since June 1975. It was set up to act as a clearing house to ensure an equal distribution of risks and to

establish rates and policy conditions in respect of compulsory motor vehicle liability insurance.

196. In Samoa the scheme is funded by a cess on motor fuel. This is levied by customs and periodical remittances are made to the Accident Compensation Board. Where fuel is used for purposes other than motoring—e.g. electricity generation—the amount is refunded.

197. The advantage of the Samoa scheme (this was also proposed for Sri Lanka by the Minister's Committee and is included in the Fiji draft legislation) is that it reduces the cost of collecting premiums. It also eliminates the problem of uninsured vehicles, for every motorist must purchase fuel. Since one who travels more and, therefore, exposes more people to risk also consumes more fuel, he pays more towards the scheme. Furthermore, since the levy is according to consumption of fuel, the payment is spread over the year and relieves the motorist of making a large lump sum payment as he would have to under other schemes.

CHAPTER VII

Conclusion

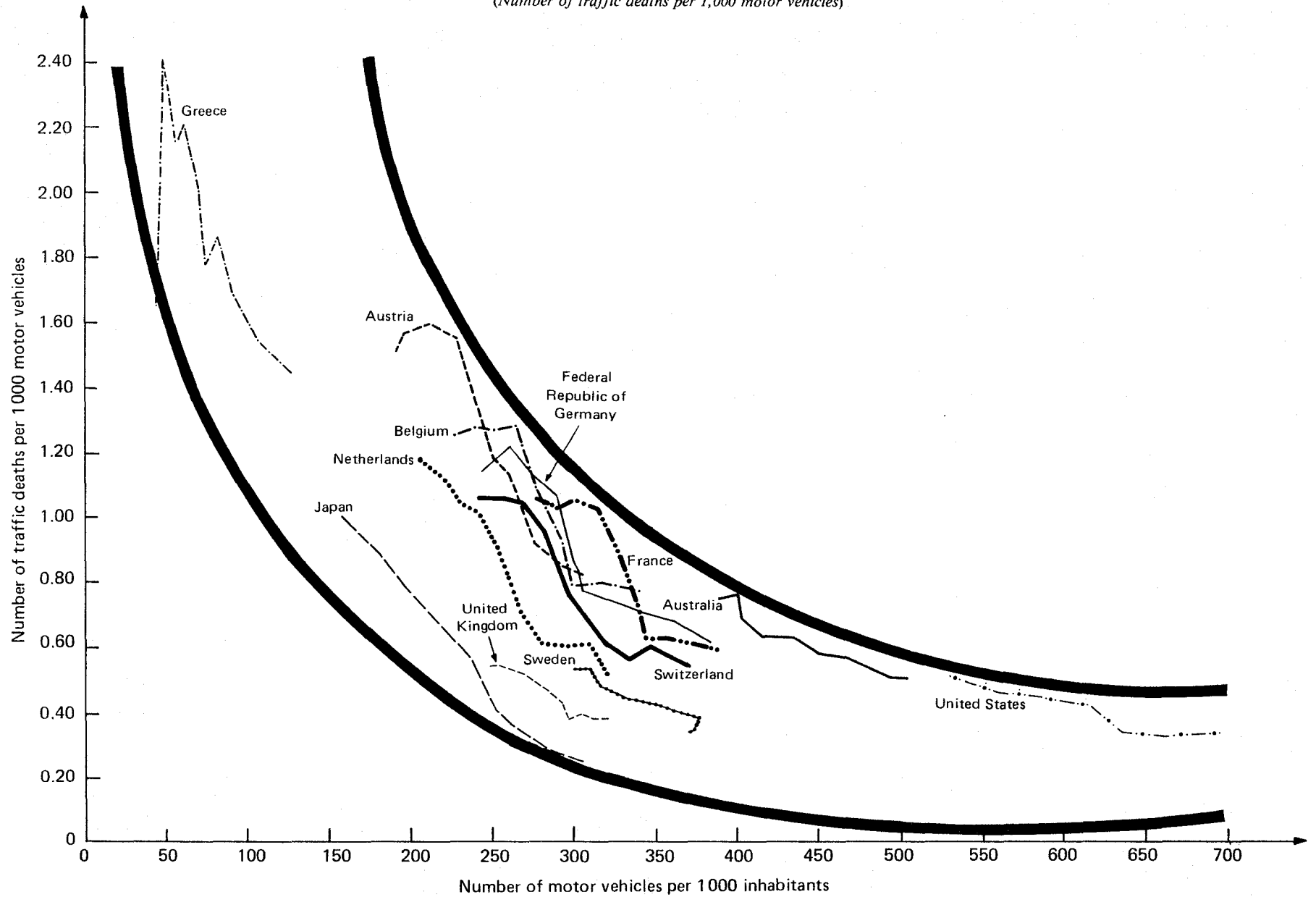
198. Motor accidents cause serious social and economic problems and a variety of strategies have been adopted to deal with them. There has been a somewhat ragged advance towards a more satisfactory system in each country and no such thing as a perfect system has yet emerged anywhere, either in developed or in developing countries. Nor is there a particularly imperfect system waiting to be reformed. It is certainly incorrect to assume that developing countries have a system and to proceed to discuss measures for the reform of that system, for there is no such system. The question is much more complex. The strategy in each country consists of a package of measures, the contents of which vary a great deal. Rather than attempt to

discuss a hypothetical developing country "system", this study has discussed the commonly found elements in national packages and indicated where they are found or not found and the merits and demerits of including or excluding them.

199. The question is: what should be added to each national package? A wide variety of opinions may be held on this, depending on the size and nature of the problem and the social and economic circumstances of the country concerned. The only common feature shared by all is the feeling that the methods adopted—whatever they may be—are more or less inadequate and that changes are warranted.

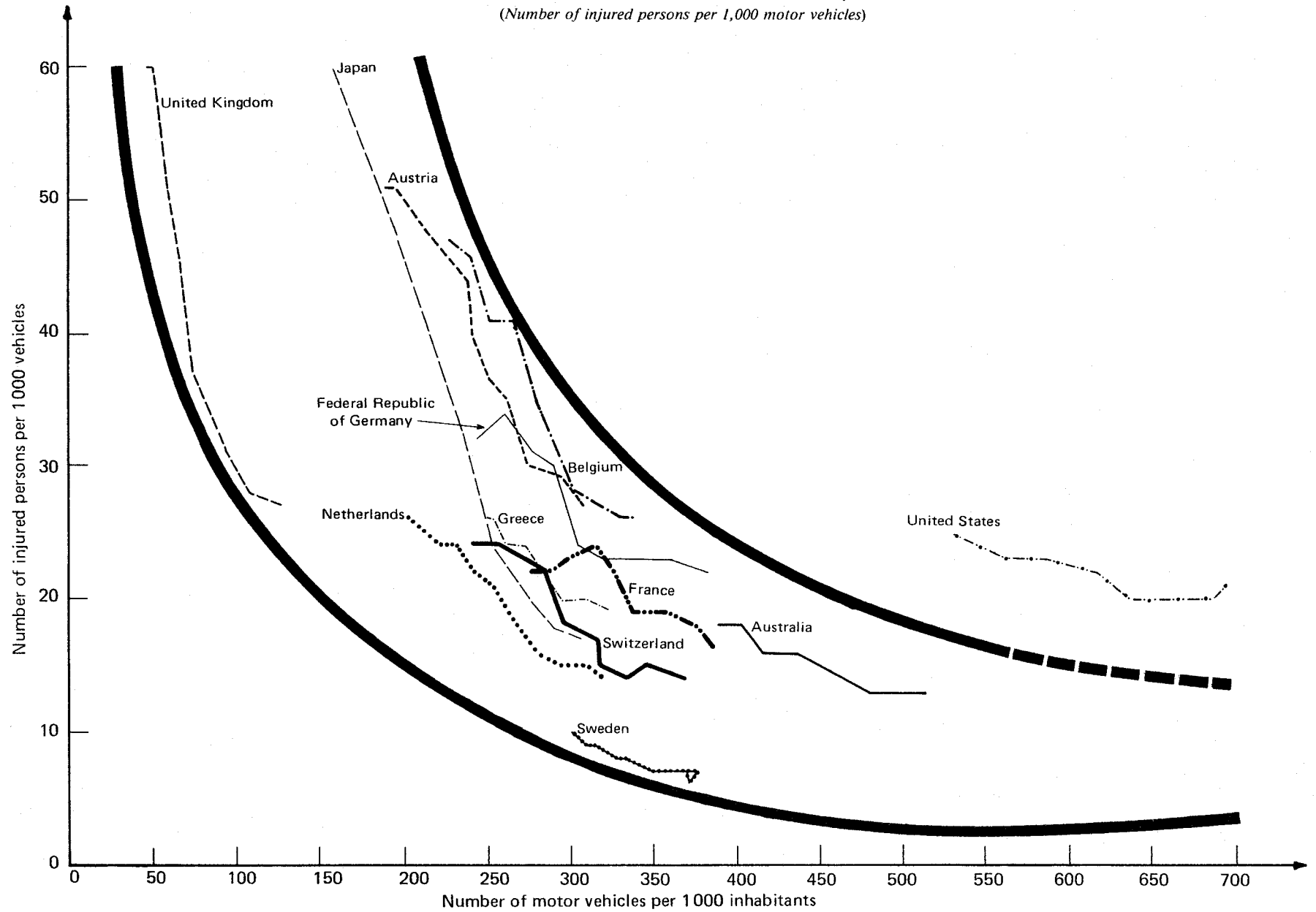
ANNEX I

Accident risk in relation to motor vehicle density
(Number of traffic deaths per 1,000 motor vehicles)



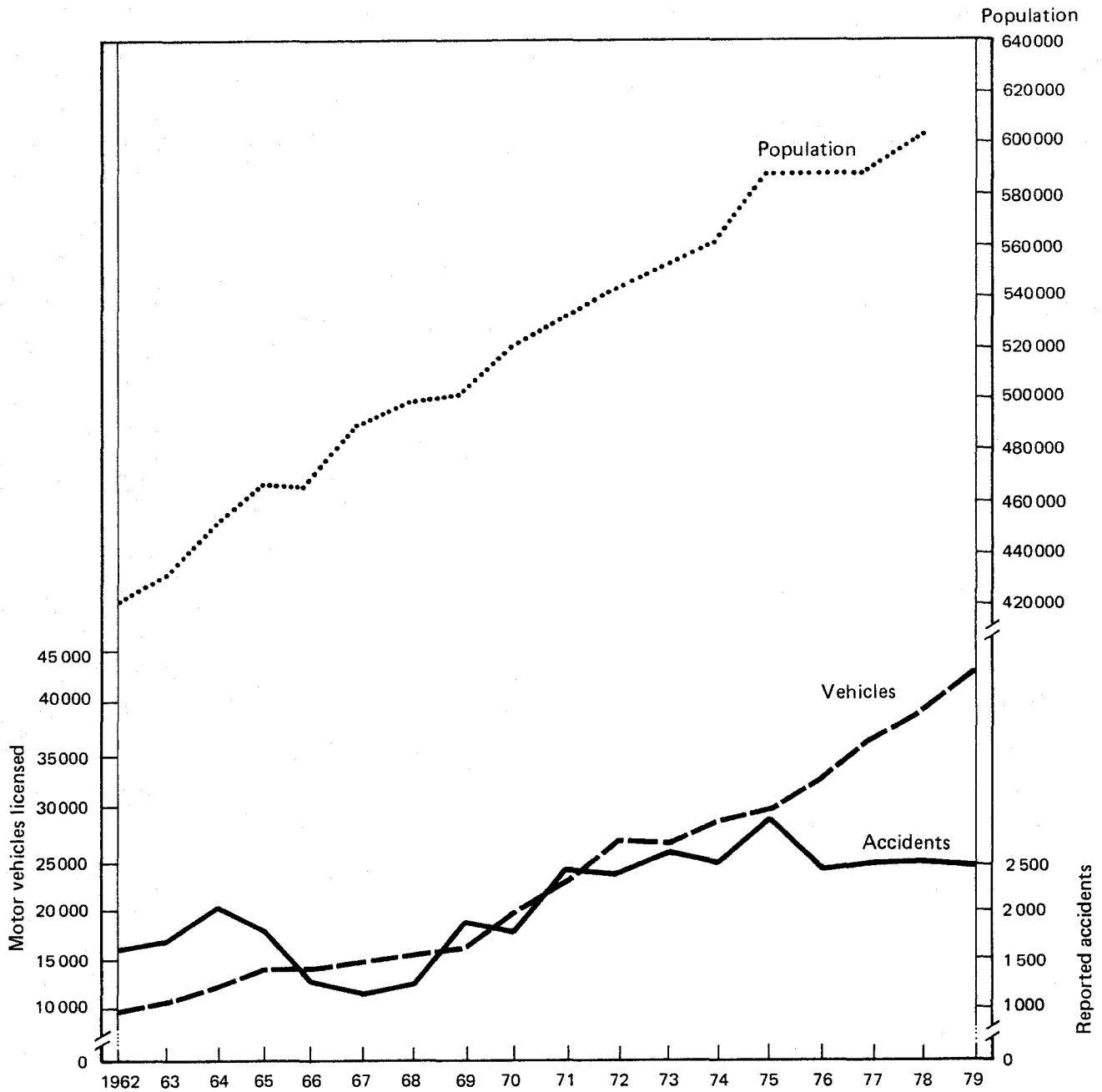
ANNEX II

Accident risk in relation to motor vehicle density
(Number of injured persons per 1,000 motor vehicles)



ANNEX III

Fiji : population, vehicles and motor accidents, 1962-1979



COMPENSATION OF VICTIMS OF MOTOR ACCIDENTS: ALTERNATIVE LEGAL SYSTEMS FOR DEVELOPING COUNTRIES

Study by the UNCTAD secretariat

[Original: English]
[6 November 1984]

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Introduction

1. In its resolution 19 (IX) of 3 October 1980, the Committee on Invisibles and Financing related to Trade requested the UNCTAD secretariat to prepare a study on third party liability automobile insurance, in view of the adverse experience of this class of business in many developing countries.

2. Pursuant to that request, two studies were prepared and submitted to the Committee at its tenth session in December 1982. The first study, entitled "Problems of motor insurance in developing countries", examined the problems facing insurers in

this field and proposed various solutions to them within the legal framework governing the compensation of road traffic victims at the present time. The second study, prepared by A. R. B. Amerasinghe of Sri Lanka, at the request of the secretariat, dealt with issues associated with motor insurance, and examined some of the advantages and drawbacks for the developing countries of different systems of compensation, especially those based on "no fault".

3. These two studies were considered in depth by the Committee at its tenth session. In view of the social,

legal and technical considerations involved in the subject of motor insurance, the Committee adopted resolution 23 (X) requesting the UNCTAD secretariat to prepare further in-depth studies on the alternative legal systems applicable to the compensation of motor accident victims, taking into consideration the social aspect of motor insurance, the responsibility of insurers and the interests of the insurance industry. The present study has been undertaken in response to that request.

4. In the preparation of this study the UNCTAD secretariat had the benefit of two invaluable contributions, from Professor A. Tunc of Paris University and Professor B. Webb of Georgia State University. The former dealt with the legal aspects, while the latter was concerned with the actuarial implications of possible changes in the system of compensation.

5. In view of the importance of the subject, the Secretary-General of UNCTAD convened a group of experts in law, insurance and actuarial science¹ to examine the draft study. Acting in their personal capacity, the experts provided invaluable information on the alternative legal systems and their impact on the insurers, the insured and the victims of road traffic accidents. The final version of the text was prepared by the secretariat, which assumes the responsibility for it.

6. The study comprises two substantive chapters and a final chapter containing conclusions. Chapter I considers four possible legal systems applicable to the

¹ For the list of participants, see the annex to the present document.

compensation of victims: the fault system, the presumption of fault system, the no-fault system and mixed systems based on no-fault and full-fault compensation. Each of these systems is considered according to its merits and demerits. The criteria adopted for drawing conclusions in this respect are the following:

- To compensate the maximum number of road victims;
- To compensate them promptly;
- To compensate them equitably;
- To avoid excessive administrative costs;
- To avoid substantial increases in the cost of insurance;
- To allow insurers a reasonable profit margin.

7. Chapter II highlights the possible impact on the cost of insurance of changes in the system of compensation for motor accident injuries. The cost changes are considered from two standpoints: the first is the effect on the total cost of compensating motor accident victims; and the second is the effect on the redistribution of the cost of the compensation system.

8. This study is meant for the developing countries and takes into account their specific characteristics. The problems of some of them call for drastic measures to improve the operation of this class of insurance, and to achieve an equitable compensation for all accident victims. However, since the purpose of the study is to search for alternative legal systems, it refrains from advocating a specific solution. This unbiased approach to the various systems of compensation can undoubtedly help each developing country to choose the system best suited to its particular situation.

CHAPTER I

Alternative legal systems for compensation of motor accident victims

9. In responding to the request made in resolution 23 (X) of the Committee on Invisibles and Financing related to Trade this study will disregard the compensation of property damage, since losses arising from such damage rarely have drastic consequences for an individual. With regard to personal injury and death, it will consider (a) the various types of losses which may be suffered by victims and their respective priorities; and (b) the possible basis of compensation. Finally, consideration will be given to the financing of compensation for the victims of unidentified or uninsured drivers.

A. The various types of losses

10. Before consideration can be given to the grounds on which a decision may be made as to whether the damage feisor should bear the burden of compensation, it is necessary to enumerate the various types of losses that may be suffered by a victim and their order of priority for compensation. If a balance is to be maintained between the receipts and disbursements of motor insurance, compensation of some types of losses may need to be sacrificed for the benefit of others.

1. COST OF MEDICAL CARE, PHARMACEUTICALS, PROSTHESES AND PERSONAL AND VOCATIONAL REHABILITATION

11. These costs are the inevitable result of any significant bodily injury. Whenever a victim is entitled to compensation, he or she must be reimbursed, particularly if social insurance and health services are inexistent or inadequate. In addition, it is very desirable that the victims should receive medical care without delay and that rehabilitation should be undertaken as soon as possible.

12. Against this, it must be accepted, however harsh such a restriction may appear, that compensation should be provided only "to a reasonable degree" or subject to some other, comparable limit. For example, it should not be thought unacceptable, in certain situations, for an elderly victim to be left with a slight limp as the result of an accident. The money it would take to eliminate that limp completely could be more usefully employed elsewhere in the health field.

2. TEMPORARY LOSS OF WAGES OR OF PROFESSIONAL INCOME

13. An accident frequently gives rise to a temporary inability to work and this may, in the case of a wage-

earner or a professional person, entail a loss of earnings. It is obviously desirable that compensation should be provided for such a loss.

14. It must, however, be observed that a temporary disability does not automatically entail a loss of income. Civil servants and, in some instances, office employees too will continue to receive their salaries or wages if the disability is not protracted. Compensation should therefore be provided only if there is an effective loss.

15. As an economy measure, compensation might be paid only if the disability lasts for more than a certain period or, under a somewhat more restrictive system, once a certain period has elapsed. This is justified by the fact that it is not generally desirable for insurance to come into play for minor damage, as the operating costs in such an event are out of proportion to the amount of compensation. Hence, consideration might be given to paying compensation only for loss of wages or income resulting from a disability lasting more than, say, five days. The institution of such a rule might, however, encourage victims to delay their return to work, perhaps with the complicity of a doctor. It would therefore be more prudent to adopt the more stringent course of reducing by five days the period for which disability compensation is paid. Furthermore, some people are in dire need of compensation as from the first day.

3. ECONOMIC CONSEQUENCES OF PERMANENT DISABILITY

16. It often happens that victims whose degree of injury has been ascertained—that is, persons who after treatment reached a stable condition—are left with a permanent, partial or total disability which may, in turn, cause a loss or diminution of wages or professional income. In these cases, too, compensation is due.

17. As before, however, there is not always a loss or reduction of earnings in such instances. Most civil servants and many office workers will suffer no change in their remuneration even in the event of a serious disability that would have marked financial consequences in some other activity. Once again, payment from an insurance scheme will be justified only where there is a real and proven loss of earnings.

18. With this last remark in mind, schedules of compensation could be introduced. Under such schedules, each infirmity would be held to correspond to a certain degree of disability and a table would show the standard amounts of compensation to be paid to victims according to their degree of disability and their age, or even according to these two factors plus the victims' earnings. Such a system would have the advantage of great simplicity and, for that reason, should be considered by developing countries. There is a danger, however, that it might lead to unjustified or insufficient compensation of a victim because of failure to take into account the particular nature of his or her work. More precise redress would be ensured through a system of compensation *in concreto*. But such a system entails delays and sometimes litigation.

19. Once again, if the victim's actual earnings are to be taken into consideration, it might be decided, as an economy measure, that victims should bear part of their loss. The case of small losses can be ruled out from this

point of view. An employer is hardly likely to reduce by a mere 5 per cent the wages of an employee who suffers from a partial disability. He would either maintain the salary at its initial level, or reduce it more substantially. This leaves two other ways of saving money under an insurance scheme.

20. First, it could be decided that compensation for loss of earnings will be provided only to the extent of, say, 95, 90 or even 80 per cent. Although limitations of this kind are not desirable "in themselves", they may help to achieve a balanced motor insurance scheme. Secondly, it could also be decided that loss of earnings compensation will be paid only below a certain wage or income ceiling. The question is whether motor insurance should cover all losses of earnings, or whether persons with a particularly high income should not themselves guarantee its maintenance by means of a personal insurance. The second course seems fully justified, particularly in developing countries. It is impossible to specify at what level the earnings ceiling should be set. Developing countries might wish, in order to maintain motor insurance premiums at a moderate level, to exclude all earnings that substantially exceed the national average. This type of system has been in use in Algeria since 1980.² Such a limitation would have the advantage of encouraging voluntary insurance, which is in itself a desirable objective.

21. Another problem has to be settled: should the compensation be paid as a lump sum or as an annuity? Payment of an annuity is clearly the natural method of compensating for the loss of periodic income. However, payment of a lump sum seems necessary in developing countries, not only for the sake of its simplicity, but in order to protect victims against monetary erosion. Such payment is also closer to the expectations of victims. It has the further advantage of facilitating economic reorientation by enabling victims to set up or buy a small business.

4. ECONOMIC CONSEQUENCES OF A DEATH

22. As in the case of injury, the death of an accident victim entails expenses and, in some instances, loss of income. It would seem natural to repay funeral expenses within reasonable limits. It would also seem fair, for humanitarian reasons, that, in cases where the victim's activities were a source of income for the family, those who actually benefited from such income should receive a replacement compensation which need not necessarily be 100 per cent, but might, perhaps, amount to 90 or 80 per cent and be subject to a ceiling (see paragraph 20 above). Consideration might be given, despite the somewhat arbitrary nature of the measure, to the cessation of payments from the time when the deceased would have reached the age of, say, 65, if he had been employed.

5. THE CASE OF VICTIMS WITH NO WAGES OR PROFESSIONAL INCOME

23. Whether an accident causes injury or death, the economic loss it causes will be more difficult to assess if the victim was not gainfully employed. The question

² See document TD/B/C.3/191, p. 45 below.

arises first and foremost with regard to children. A child could have helped its parents to cultivate the family holding. It could also have gone to a college or university and trained to earn a living that would have benefited the immediate relatives. It seems hardly feasible, however, to provide compensation for the economic loss occasioned to such relatives by a child's death or disability.

24. The question often arises too in the case of the "housewife" or the person who, while having no profession, works the family plot to assure the family's subsistence. In the developing countries, where solidarity is more deeply rooted than in the industrialized countries, there is often likely to be no economic loss to the relatives of a victim; the work will continue to be done, either by the victim—albeit with more difficulty—in the event of slight or medium disability, or by a relative in the event of serious disability or death. However, there will not always be a replacement for the victim in the last two cases, and it would seem fair to grant those members of a family who suffer from the absence or disability of the direct victim an allowance based on the hypothetical minimum wage to which the victim was entitled.

25. On the other hand, it would seem appropriate to consider an elderly person who no longer worked regularly, or at all, as having had no economic value even if he or she still rendered some service from time to time.

6. PHYSIOLOGICAL CONSEQUENCES OF PERMANENT DISABILITY

26. The above deals with the consequences of bodily injury or death solely from the economic standpoint. It is generally agreed that the principal objective of a system for the compensation of motor accident victims should be the compensation of economic loss. If the breadwinner of a household is killed, the essential requirement is to secure for the family, without delay, the equivalent income of which it will have been so abruptly deprived, or at any rate a large proportion of it.

27. However, consideration must also be given to the non-economic consequences of damage, particularly adverse physiological effects. If, as the result of an accident, a person loses a limb or is left with some kind of disability, should that person be compensated and, if so, how? Compensation is justified for such losses but it is not essential. If insurance premiums do not suffice to compensate all losses, it would seem appropriate to provide compensation for economic losses as a priority.

7. OTHER NON-ECONOMIC LOSSES

28. What should be done as regards suffering caused by injuries or treatment, aesthetic impairment, suffering caused by the death, disability or suffering of a loved one, etc.? Caution and thrift seem to be even more important in this field than in that of physiological damage. However, aesthetic impairment when serious is perhaps the kind of non-economic damage for which the payment of some compensation is most justifiable.

B. Legal bases of compensation

29. Four possible legal systems exist for the compensation of road accident victims, each capable of variations. They are: (a) the fault system; (b) the presumption of fault system; (c) the no-fault system; (d) a mixed system of basic no-fault compensation and full fault compensation.

1. THE FAULT SYSTEM

30. Under the fault system, the victim of a traffic accident receives compensation only to the extent to which he or she is able to prove that the accident was caused by the fault of the driver (or, exceptionally, that the car was defective due to someone's fault).

31. This system is the first which comes to mind. It appears "natural". It is simply the application of the idea that a person should be liable for the consequences of his or her fault, but that no one should be held liable for a fault he or she has not committed. However, this philosophy may not be adequate for the phenomenon of accidents in general and traffic accidents in particular: this is a point which will be discussed (see paragraphs 33, 47, among others). Still, this inadaptation has to be demonstrated. The first reaction when an accident has occurred is to ask: "Whose fault is it?" and it is hard to uproot the popular feeling that justice is done when the question is answered.

32. This system, however, entails serious practical inconveniences for the victims and is, in fact, far from doing justice to them. As regards its practical consequences: (a) Most victims are left without compensation. This is particularly unfortunate in developing countries, where social security and personal insurance protection are either non-existent or very restrictive. (b) In all countries, the precise circumstances of the accident, circumstances from which the behaviour of the parties can be assessed, are usually unclear. Thus the outcome of the dispute (whether in court or out of court) between the victim and the tortfeasor (or insurer) depends upon the presence or absence of witnesses, upon their impartiality and their clarity of expression. This is part of the "negligence lottery" which has been denounced almost universally. However, the situation of developing countries in this respect is the most serious owing to the high rates of illiteracy and the deficiency of police services.³ In this context the concept of fault as a basis of liability leads to distorted consequences bearing no resemblance to reality. (c) As a result of that situation, the insurers of the tortfeasor in developing countries are systematically tempted to decline their responsibility to a greater extent even than in developed countries. The victim is thus left with the alternative of renouncing compensation (or accepting a grossly unfair sum) or bringing the case to court, with all the delays, expenses and uncertainty entailed by a law suit, which are even more noxious in developing than in industrialized countries. (d) The assessment of damages in developing countries, and, in particular, non-economic damages, is not based on realistic factors. Unequal consideration by courts causes disparity

³ See document TD/B/C.3/176/Supp.1, p. 11 above, para. 63.

in the awards. This situation is exacerbated when the victims are poor and they accept any settlement under pressure of need, while some privileged people with money to pay lawyers are often able to obtain high awards.

33. As applied to accidents, in particular traffic accidents, liability for fault is far from ensuring that justice will be done. First, liability for fault is fully justified when someone has made a deliberate choice between possible modes of behaviour. This is not the case in accidents. Accidents occur against the will of the author, who frequently becomes a victim, whether they are work accidents or even traffic accidents, and there is often a tragic disproportion between the fault and its consequences. A pedestrian may be killed because of a split-second lack of attention. Is it just to refuse any compensation, as if his or her "fault" deserved the death penalty?

34. It should also be noted that, in the context of accidents, liability for fault has no deterrence value. Secondly, there is an inherent contradiction in the application of the fault liability to traffic accidents. Fault is currently defined as a form of behaviour that departs from the behaviour of a reasonable man, a good citizen. Unfortunately, traffic accidents are caused every day by good citizens. They are guilty of no more than an oversight, a fleeting lack of attention, an unfortunate reaction to a danger. These are errors, regrettable indeed, but statistically unavoidable on the part of the best drivers or the most careful pedestrians. They are part of human nature: *errare humanum est*. It is a contradiction to call them "faults" and an injustice to apply to them the legal consequences of a fault. For instance, when a driver is killed in a collision, it is a tragic injustice to refuse all compensation to the family and to leave the family in financial distress because it may be proved that the driver, faced by the danger, by a natural reaction applied the brake whereas the collision would have been avoided if he or she had used the accelerator. Thirdly, because traffic accidents are "accidents" and not the result of deliberate decisions, liability insurance is available to drivers of motor vehicles and indeed is often imposed by the State.

35. Consequently, the application of the fault principle to traffic accidents is purely fallacious. The driver who kills or injures someone does not incur any civil liability: he or she is entirely protected by the insurer. The only person who is accountable to society for his or her behaviour and who bears the consequences of the fault principle is the person who has been killed or injured. Whether from the point of view of deterrence or on the grounds of justice, the system is basically paradoxical and unjust.

36. Finally, the point should be stressed that the fault system does not logically admit limits to compensation and sometimes does not legally admit them. If the present difficulties of the insurance industry in developing countries are to be overcome, limitations to the principle of full compensation are necessary. No attempt should be made to compensate non-economic losses fully (by definition incapable of pecuniary compensation). Perhaps, also, the idea should be admitted that persons with an income well above the average should

seek their protection from personal insurance (see paragraph 20 above).

37. All these adjustments are possible if traffic compensation is placed within the philosophy of realization of a risk. Society is then entitled to adjust compensation to financial resources. No adjustment, on the other hand, is possible if traffic accidents are considered as results of faults. On which ground then would it be possible to refuse full compensation? If an object is stolen, the victim of the theft, whether poor or rich, has the right to recover it. Similarly, if someone is injured as a consequence of a fault, he has the right to full compensation, whether he is a poor peasant, a wealthy trader or a foreigner who has spent years of the country's average per capita national income in order to enjoy a week in a luxury resort.

38. The conclusion thus seems inescapable that the fault system, when applied to traffic accidents, is highly favourable to the tortfeasors of damages (and even more when coupled with liability insurance), utterly unfair to the victims, and detrimental for the insurers, notwithstanding the fact that the number of victims compensated by them is limited.

39. The question may then be asked how it is possible that the system remains in force in many developed and developing countries, particularly those influenced by British common law. The truth is that in the United Kingdom the system operates over and above a large network of social protection. The National Health Service provides, free of charge, complete medical and rehabilitation care to every victim of a traffic accident. Other social security schemes provide for reasonable compensation of wages lost. The victim is then at liberty to decide whether he or she has a good chance to win in the "negligence lottery". As remarked by Professor Harry Street,⁴ the system of traffic accident compensation would be unbearable if there was no social protection underneath it. Notwithstanding this basic factor, the system is widely criticized. Reform has been advocated by the 1978 Pearson Commission⁵ and by a number of most eminent judges and jurists.⁶

40. Despite the shortcomings of the fault system based on the tort concept, several measures could be introduced to improve the system, namely:

(a) Measures to compensate a greater number of victims by including categories of victims excluded from the protection of insurance, such as passengers who are travelling free of charge in vehicles as well as the families of drivers. These inclusions have been effected in most European countries;

(b) Measures to compensate accident victims through the operation of Indemnity Funds, when the person responsible for the accident is either not insured or is unknown;

(c) Measures to speed up compensation procedures by obliging insurers to make payments in advance to

⁴ D. W. Elliot and H. Street, *Road Accidents* (London, The Penguin Press, 1968).

⁵ Royal Commission on Civil Liability and Compensation for Personal Injury, under the chairmanship of Lord Pearson.

⁶ See J. R. Spencer, "Motor-cars and the Rule in *Rylands v. Fletcher*: a chapter of accidents in the history of law and motoring" *Cambridge Law Journal*, vol. 42, part 1 (April 1983).

victims where the responsibility is clear. It may also be possible to speed up the settlement of cases by proposing arbitration as a first step, before going to court;

(d) Measures to facilitate recourse for the victims against the insurer, by establishing the direct responsibility of the insurer. This can be achieved by allowing the victims to address themselves to the insurer of the driver who caused the accident, and by prohibiting the insurer from using means of defence against the victim. It is clear, however, that none of these measures can correct the shortcomings of the fault system to a really effective extent.

2. THE PRESUMPTION OF FAULT SYSTEM

41. Since motor vehicles are inherently dangerous, a number of countries, following the example given by Denmark as early as 1903, have created a presumption of fault bearing on the operator (or the owner or holder) of motor vehicles. This is the case of France and its former colonies.

42. The system is capable of numerous variations, as regards not only the person on whom the presumption bears but also and more especially the events that will discharge it. Reference can be made to natural events of a certain magnitude or to the behaviour of third parties. However, the most natural solution is to consider the victim's behaviour in order to discharge the motorist fully or partially.

43. The merits of the system, compared to the previous one, are obvious. As the burden of proof would be placed on the motorist (or the insurer), the situation of the victim would be improved and more victims would be able to obtain compensation. Otherwise, however, the defects of the previous system (see paragraphs 32-38 above) are hardly remedied. In particular:

(a) The victim will be at a disadvantage owing to all the delays, expenses and uncertainties resulting from the dispute, as well as the superior bargaining position of the insurer;

(b) The assessment of damages will remain subject to unequal consideration by courts and a disparity between the amounts received by victims would continue to exist;

(c) The disproportion between the victim's "fault" and its consequences is not alleviated;

(d) The confusion between "fault" and mere "error" is not avoided;

(e) The presumption of fault maintains tort liability entirely, so it would not be possible to suggest any limitation of the compensation. The system has the additional practical defect in developing countries of increasing the burden on the insurance industry without bringing it any relief.

44. Although the system of the presumption of fault is still in operation in France and other European countries, it is nevertheless widely criticized. In France, a recent decision of the court limits the reasons for waiving this presumption of responsibility and a commission was set up in 1981 to prepare a bill providing for automatic compensation of pedestrians, cyclists and passengers of vehicles victims of accidents, with the exclusion of the driver. This system of presumption of

fault was also the one adopted in 1973 by the European Convention on Civil Liability for Damage Caused by Motor-Vehicles.⁷ However, no State has yet ratified this Convention.

45. Some possibilities may exist within the tort and the presumed liability systems which could improve the performance of motor insurance, such as the application of the deductibles, the introduction of the bonus/malus system, the recovery of indemnity from the insured when he or she causes an accident as a result of gross negligence on his or her part, and more efforts in the field of loss prevention.⁸ These measures may have some positive impact on the motor insurance results, but will not change them drastically. Moreover, deductibles may bring prejudice to poorer victims.

3. THE NO-FAULT SYSTEM

46. A pure no-fault system is a system which provides compensation to all traffic accident victims in complete disregard of the behaviour of the parties. In the Province of Quebec, for instance, such a system has been operating without any qualification since 1978.⁹ Most other countries (e.g. Sweden, Israel, Algeria) admit some exceptions, for instance against the driver victim who was under the influence of alcohol or narcotics, or who had stolen the car or had committed a serious fault. Nevertheless, it may be convenient to consider that such exceptions are no more than variations of the "no-fault" system. The Iraqi law of 1980 is also very close to a no-fault system, even though it admits a larger number of exceptions and does not provide for automatic compensation of the personal injuries (short of death) suffered by a driver without being involved in a collision. Some States of the United States have adopted "no-fault" laws. However, in addition to the benefits of the no-fault (basic benefits), they maintain the right of the victim to obtain a supplement of indemnity on the basis of the fault concept. Thus, their systems fall into the fourth category considered in paragraph 56 below.

47. The philosophy of a pure no-fault system is that accidents are the realization of the risks created by motor vehicle traffic; that drivers and pedestrians alike are always liable to commit errors which, in an unfortunate combination of circumstances, cause accidents; and that the behaviour of the parties to an accident is only one factor among others (the environment, the safety standard of the vehicles, etc.) in its occurrence. More precisely, although it is true that the fault (as opposed to mere error) of one of the parties may be a decisive factor in causing the accident, this is exceptional. For instance, research conducted by the American Insurance Association found fault to be a factor in less than 5 per cent of the cases of collision and less than 10 per cent of the cases of accident without collision. The conclusion of the Association was that it would be a great waste of time and money to try to single out the cases in which the victim had committed a fault, in order to reduce or refuse the compensation.

⁷ Council of Europe, European Treaty Series, No. 79.

⁸ See document TD/B/C.3/176, p. 1 above.

⁹ See C. Belleau, in A. Tunc (ed.) *Pour une loi sur les accidents de la circulation* (Paris, Economica, 1981), pp. 205 et seq.

48. This conclusion is especially relevant in developing countries where, as already remarked, it is particularly difficult to ascertain the conduct of the parties to an accident; and where, moreover, road infrastructure, the vehicles' condition and the difficulty of providing emergency treatment are factors which, even more than in the industrialized countries, reduce the importance of behaviour in the occurrence of losses.

49. Perhaps it should be remarked that the no-fault system was not conceived as a theory. Traffic accidents, like work accidents, were first dealt with in the context of liability for fault. It was the observation of the working of the system which revealed its practical deficiencies (see paragraphs 32-38 above) and led to reflection on the reasons for its inadequacy. The shortcomings of the fault system were first realized at the end of the nineteenth century as regards work accidents and, in some countries, at the beginning of the twentieth, as regards traffic accidents. However, as regards traffic accidents, what was initially advocated most of the time was presumption of fault. It was not until 1932 that a thorough study of the matter was made by Columbia University and that a no-fault system was advocated in the famous *Columbia Report*.¹⁰

50. The merits of a no-fault system are obvious. First, it provides compensation to all accident victims. The victim thus avoids the "negligence lottery". His or her fate no longer depends on the presence, impartiality and clarity of thought of witnesses, nor on a fortunate or unfortunate reaction to an unexpected danger. Only the proof of the occurrence of the accident and of damage attributable to that accident would be necessary. Secondly, the delay in payment of the compensation may drastically reduced, from years to weeks or even days, mainly when the system is coupled with a system of schedules fixing the amounts payable for different injuries (see paragraph 52 below). Even in the absence of such schedules, a no-fault system would assure all victims of immediate coverage of all medical, pharmaceutical and rehabilitation expenses. To the extent that automobile insurance covers loss of wages and income, the insurer may also be required to give immediate compensation or at least immediate provisional compensation. As to the discussion of the victim's actual losses, in the absence of schedules this is a point that will be much more easily settled than that of the "liabilities" in the accident. Speed of settlement is particularly valuable in developing countries, where the level of social security and personal insurance protection is very low. Thirdly, the system permits direct compensation of the driver and passengers by the insurer of the car; this "first party" procedure accelerates the settlement and saves administrative expenses. It should be underlined that the institution of no-fault has no bearing on the number of accidents. Apart from dramatic cases in which a very poor person may wish to be slightly injured in order to receive a modest compensation, no one will be influenced by the system of compensation in force to kill or injure someone, or to be injured. Deterrence of dangerous conduct is a task for the

police and the penal courts, and is outside the realm of civil compensation. Furthermore, a no-fault system eliminates the risk that a penal court may sentence a driver for the sole purpose of assuring compensation to a victim, or deprive a victim of compensation because it refuses to sentence a driver. The system, therefore, is all in favour of the victims; it provides all of them with swift and inexpensive compensation and avoids the injustices inherent in the application to accidents of the fault principle.

51. The system is also favourable to the insurers. Although the fault system and the presumption of fault system inevitably lead to full compensation, a no-fault system is compatible with every scheme of compensation. In Sweden, the law provides for full compensation. In New Zealand, where a no-fault system is applied to all accidental injuries and to professional diseases, the law provides for generous compensation (usually in the neighbourhood of 85 per cent of the economic losses). In Algeria, in Israel and in Quebec, the compensation is much more limited.

52. It is submitted that this flexibility is particularly necessary in developing countries in order to assure an equilibrium between the premiums and disbursements of automobile insurance. If the resources are small, the law could provide for coverage of medical, pharmaceutical and rehabilitation expenses only, and even set some limits to these expenses, when necessary. When the resources are larger, compensation of loss of wages or income could be provided for, with a low ceiling to start with and a higher ceiling later on. The system would even admit compensation of non-economic losses (physical damage and suffering, disfigurement, suffering caused by the death of a loved one) in accordance with some form of schedule if such compensation appears desirable. By its inherent flexibility as regards the items and levels of compensation, a no-fault system permits every country to organize its compensation scheme with due consideration for the possible level of automobile premiums and the expectations of its population.

53. Obviously, a limited scheme of compensation would induce nationals of the country with an income significantly above the average to take out a personal insurance, which would increase the resources of the insurance industry for the benefit of the national economy. Foreigners should be notified at the country's borders of the system of compensation in force and given the opportunity to take out a temporary personal insurance.

54. It should be remarked perhaps that there is no reason why a no-fault system should necessarily lead to socialization of the insurance industry. State insurance and private insurance have merits and demerits which it is not appropriate to dispute in this study and which furthermore may vary from one country to the other. There is, for instance, State insurance in some no-fault countries such as Algeria and Iraq, and also in the no-fault Canadian Provinces and private insurance in various others, such as Israel, Norway and Sweden. In France, proposals for a no-fault system have never been made in conjunction with the idea of the socialization of insurance.

¹⁰ Columbia University Council for Research in the Social Sciences, *Report by the committee to study compensation for automobile accidents* (Philadelphia, International Printing Co., 1932).

55. Finally, the system is favourable to the State. It is in the interest of the State that all citizens be protected against traffic casualties, and that victims of the risks created by motor vehicles be taken care of at the expense of automobile owners and not of the citizens at large. There is inherent justice in the idea that the "Automobile should pay its way through society".

56. However, a number of criticisms have been made of the "no-fault" system, viz.:

(a) The system does not guarantee full compensation, as in the case of tort liability. The answer is that it might provide full compensation if a country is able and willing to adjust the insurance premiums to the necessary level.

(b) In cases of collision between vehicles, the logical result of abolishing tort liability is the disappearance of the insurer's right of subrogation against the tortfeasor, which would further burden the insurers and would lead to increases in premiums. The answer is that the right of subrogation might be maintained between insurers as, otherwise, the insurer would at the same time be deprived of, and protected from, the right of subrogation. Insurers would probably be led to establishing a right of subrogation between them according to certain objective criteria (type of vehicle, weight, power, etc.) which would save them a great deal of administrative expense.

(c) In the context of the economic situation of developing countries, automatic compensation of victims may result in the deliberate provoking of injuries in motor accidents in order to obtain compensation.

(d) The system does not give satisfaction to the prevailing, even if perhaps irrational, feeling that the victim is victim of a fault and should receive full compensation. Hence the value of a mixed system.

57. In order to safeguard the situation of the victims, the following measures could be introduced:

(a) The ceilings of compensation could be periodically reviewed in order to adjust them to changes in the cost of living, and to changes in the capacity of the insurance market to pay higher compensation.¹¹

(b) Compensation could be limited to economic losses only, i.e. medical and rehabilitation expenses, loss of earnings and death benefits, thus excluding pain and suffering, except perhaps for mutilation and disfigurement, and symbolic indemnities could be fixed for such damages.

(c) For the sake of simplification and practicability and in order to avoid the negative impact of erosion of money values, indemnities could be paid in the form of lump sums and not in annuities.

(d) If there are some other sources of compensation for injuries resulting from motor accident (e.g. workmen's compensation, pension schemes, etc.), indemnities could be reduced by the amounts received from these sources in order to prevent victims from being compensated twice for the same loss.

4. THE MIXED SYSTEM

58. The mixed system is a two-tier system. It provides limited compensation, originally to many victims

¹¹ See document TD/B/C.3/191, p. 45 below, chap. VI (Philippines).

and, in the modern version, to all victims. But, in any case, it offers victims access to full compensation if they can prove a fault on the part of the author of the damage and, in the modern version, if the damage is of a certain magnitude.

59. Germany was probably the first country to have adopted a mixed system. A statute of 1909 provided for a rather complicated two-tier system of compensation. The victim was protected by a presumption of fault bearing upon the "holder" of a car, rebuttable only under rather exceptional circumstances. But the protection was limited to a certain amount of damages. The victim could obtain full compensation only upon proof of a fault. The 1909 Act has been amended a number of times. Its principles, however, remain valid. As a matter of fact, courts have imposed an unattainable degree of diligence upon drivers. A reform of the system is now being studied at the request of the Federal Minister of Justice.

60. As already mentioned, half the States of the United States have adopted another mixed system, inspired by Keeton and O'Connell's *Basic protection for the traffic victim*.¹² All victims are covered within limits which may vary from a few hundred dollars to \$100,000. But, after a certain threshold of damage (which again varies widely, and may be expressed by a descriptive term—such as "important"—or by a certain amount of medical expenses), victims may obtain greater compensation (i.e. full compensation at the exclusion of some non-economic losses), if they can prove fault. Although the German system was a combination of "presumption of fault" and "fault" systems, this one is a combination of the "no fault" and "fault" systems.¹³ A combination of basic no-fault compensation and full fault compensation was also adopted by Costa Rica in 1973, Brazil in 1974, the Philippines in 1974 and India in 1982. In those countries, compensation for death in the no-fault scheme is usually in the neighbourhood of \$1,000.¹⁴

61. The merit of the system is obvious. It assures every traffic victim of a basic protection, and also satisfies the general feeling that every victim of a fault should receive full compensation. On the other hand, the system inevitably reintroduces at least some of the defects of the fault system. The law should make it clear that, within the basic protection level, the victim's fault will never be taken into consideration. This is not only because the victim, from a human point of view, may need this protection whatever has been his or her behaviour, but also because the victim's rights should be protected from contestation, with the delays and pressures which result from this.

62. Even with this safeguard, however, a mixed system presents many defects that are inherent in the fault system. First, it exposes insurers to claims that may or may not be justified, with all the administrative expenses resulting from the settlement of such disputes.

¹² R. E. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim; a Blueprint for Reforming Automobile Insurance* (Boston, Little, Brown and Co., 1965).

¹³ On the American scene, see J. G. King, "The statutory architecture of State no-fault systems", *Pace Law Review*, 1984, 297-403.

¹⁴ See document TD/B/C.3/191, p. 45 below.

Secondly, it assures full compensation to persons who do not need such compensation, e.g. wealthy people who may already be covered by large personal insurances. Thirdly, even if it were possible to avoid unjustified or unnecessary payments (which it is not), scarce resources which might be used much more profitably in the no-fault scheme would still be diverted by the system towards the "negligence lottery" and its administrative expenses. Fourthly, the danger even exists that the basic compensation payable under the "no-fault" scheme might be used to pay recourse to courts for full compensation.

63. It is submitted that these defects of the mixed system would be reduced (not eliminated) if compulsory insurance were to apply only to the basic protection of the traffic victims, leaving every car owner the choice of whether or not to insure the liability resulting from the fault of the driver. This is the scheme in force in Brazil where the ceiling for compensation for bodily injury or death was, as at 31 December 1983, 1,214,912 cruzeiros (\$1,235) per victim, and in Costa Rica where this ceiling was 40,000 colones (\$916).¹⁵

64. In such a case, the insurers would not have to increase the premiums of compulsory insurance in order to be able to carry the cost of liability for fault. They would be free to adjust the premiums of the optional coverage to its cost. To be realistic, the average car owner, in a developing country, would not take out the optional insurance. If he has some wealth, the accident might be a tragedy for him as well as for the victim. In the contrary case, the victim would not receive the compensation provided by law (or would receive it from some Indemnity Fund, but such a Fund would need significantly increased financing) (see paragraph 68 below). This system, therefore, would be far from perfect. However, it might be considered a compromise for countries which would not consider it possible to enact a pure no-fault system.

C. Compulsory insurance and indemnity fund

65. Effective protection of victims requires a system of compulsory liability insurance (or automatic insurance under a State insurance scheme, as in Iraq). Furthermore, as a significant proportion of car owners will not comply with their duty to take out an insurance (or to pay the required premiums), an indemnity fund should be set up, either by the insurers or by the State, which will pay compensation to the victims of an unknown or uninsured and insolvent driver. Such funds exist in a small number of developing countries only and, in most of them, have met with difficulties. They

are, however, of primary importance and every effort should be made to render them more effective. They need not necessarily be State bodies.

66. The countries that adopt a mixed system of compensation have the choice between compulsory insurance coverage restricted to the no-fault level or extended to the fault liability level (see paragraph 63 above). Obviously, in the latter case, the insurance premiums will be significantly higher, and consequently, the number of uninsured drivers will be greater.

67. In the countries that choose to extend compulsory insurance to the coverage of fault liability, a further choice occurs, i.e. to make the indemnity fund guarantee the no-fault compensation only or the fault liability compensation as well. In the latter case, the problem of financing the indemnity fund will be much more acute. In any event, most developing countries find that car owners are disinclined to comply with the duty of taking out a liability insurance and paying the premiums. Their first task is obviously to do what they can to obtain a higher degree of compliance.

68. The indemnity fund, which may be organized within the framework of a private automobile insurance system, could be financed from various sources:

(a) A fine to the benefit of the fund on the driver or owner of an uninsured vehicle, when a police control reveals that the vehicle is not insured, or only when an accident reveals that the vehicle was not insured;

(b) In the same circumstances, a right of recovery by the fund of the insurance premium of the year, or even of the insurance premiums of the last three years, unless the owner of the car can prove that such premiums have been paid;

(c) A tax on insurance premiums;

(d) A tax on the import of vehicles, or also on the production or sale of vehicles, or on their entry into the country;

(e) An annual tax on vehicles;

(f) A modest tax on petrol which affords some advantages: no one can evade it, the amount levied is in proportion to the mileage travelled and, approximately, to the horsepower of the vehicle. But it does present some disadvantages as well, since it is levied on both insured and uninsured motorists. This scheme was applied in Quebec until very recently;

(g) A subsidy from the State.

69. Each of these sources of financing has merits and demerits which vary from one country to another. Each country should determine which sources are more appropriate and see how they should be combined. Reliance on one source only would probably be an invitation to fraud.

¹⁵ *Ibid.*

The costing of alternative legal systems

70. One of the primary concerns regarding a shift from the tort liability system to a system that will pay more victims is the cost impact of such a change. The cost impact must be measured both in terms of losses incurred by the number of insureds and in terms of the relationship between benefits and premiums. As regards the methods of predicting the cost impact, it is necessary to construct a data base from experience under the tort system and make assumptions about the changes in the number of victims compensated, the average payments and the proportion of motor accidents in various accident categories.

71. Cost changes must be considered from two aspects. The first, and the one most often discussed, is the impact on the total cost of compensating motor accident victims. However, a change in the compensation system may also have a considerable effect on the cost distribution of the compensation system. For example, motorcycle operators pay rather low premiums under a fault system, but their premium under a no-fault system are likely to be very high. Trucks, on the other hand, are likely to have high premiums under a fault system but low premiums under a no-fault system. These and other redistributions of costs may be more troublesome than a change in the total cost of the system.

72. For purposes of analysis, motor accidents will be classified as: (a) pedestrians (including bicycle riders) struck by a motor vehicle; (b) the overturning of a motor vehicle or its collision with a tree, bridge or other fixed object; or (c) a collision between two or more vehicles. The proportion of each of these classifications within the universe of motor accidents in a country will largely determine the cost effects of a change in the motor accident compensation system.

73. Pedestrians and bicycle riders who are struck by a motor vehicle are usually compensated for their injuries by the driver of the vehicle under the fault system if the driver is insured or is otherwise financially able to provide compensation. Changing the compensation system would not cause a great increase in the number of such persons eligible to receive compensation. If a large number of the motor vehicles in a country are uninsured, the adoption and enforcement of a law requiring insurance for all motor vehicles could increase the number of pedestrians actually receiving compensation for their injuries. Injuries to pedestrians and bicyclists tend to be more numerous in urban than in rural areas, so accidents of this type would be expected to constitute a larger percentage of total accidents in countries where urbanization is well advanced.

74. For accidents in which a motor vehicle strikes a tree or other fixed object or overturns, payment of compensation to the injured persons is much less likely under the fault system. The driver generally cannot be held liable to himself or herself, and even passengers in the vehicle may find it difficult to qualify for compensation under the fault laws of some countries. Also, since such accidents frequently occur at high speed, injuries resulting from them usually are more severe, on

the average, than injuries from other kinds of accidents. Consequently, a change in the compensation system could result in a very large change in the cost of motor insurance in countries where such accidents are a large part of the total number of accidents. Injuries from striking fixed objects are more common in rural areas, where vehicle speeds are likely to be greater. So the increase in total system costs resulting from such accidents would be greater in countries where urbanization is not well advanced.

75. When two or more vehicles collide, the fault system of compensation usually requires the driver who caused the accident to compensate those who were injured. The driver at fault receives no compensation under that system. The laws of some countries may make it difficult for some passengers to qualify for compensation even though the driver with whom they were riding was at fault in causing their injuries. Consequently, a change in the compensation system could provide compensation for many more injured people, with a substantial increase in the cost of the compensation system.

76. This three-category classification of motor accidents could form the basis for a simple model to be used in estimating the overall cost effect of a change in the system for compensating motor accident victims. The model is outlined in the following table. The numbers used in this table are for purposes of illustration only, and would not be appropriate in the case of many countries and law changes.

77. Column (1) divides all motor accidents into the three categories discussed above. Column (2) shows the proportion of each category of accidents. It has been assumed that 65 per cent of the accidents in the country result from pedestrians (including bicyclists) being struck by motor vehicles, 15 per cent result from vehicles overturning or striking fixed objects and 20 per cent result from the collision of two or more vehicles. Column (3) shows the expected change in the number of persons compensated as a result of the law change. It is expected that the number of pedestrians and bicyclists compensated will increase by 60 per cent, the number of persons compensated as a result of vehicles striking fixed objects will increase by 80 per cent while the number compensated as the result of the collision of two or more vehicles will increase by 70 per cent. Column (4) of the table shows the expected change in the average amount of compensation paid to victims of the three categories of accidents. It is assumed that there will be a decrease of about 20 per cent in the average payment to pedestrians and to persons injured by striking a fixed object and a decrease of about 30 per cent in the average payment to persons injured in the collision of two or more vehicles. The figures in column (5) for the three categories of accidents are found by multiplying columns (2), (3) and (4). The total of 129 shown for column (5) indicates the expected change in total compensation payments under the system. In this case, an increase of about 30 per cent is indicated.

**A model for estimating the cost effect of a change in
the motor accident claim compensation system^a**
(Percentages)

<i>Kind of accident</i> (1)	<i>Proportion of all accidents</i> (2)	<i>Change in number of persons paid</i> (3)	<i>Change in average payment</i> (4)	<i>(2) × (3) × (4)</i> (5)
Pedestrians	65	160	80	83
Collision with fixed object	15	180	80	22
Collision of two or more vehicles	20	170	70	24
	100			129

^a Figures are notional and are indicated for illustrative purposes only.

78. The simplified model outlined above is adequate for a rough estimation of the cost effects of changes in the motor accident compensation system, but its accuracy is, of course, heavily dependent on the accuracy of the numbers entered in it. The concepts on which the model is based will be used in the remainder of this paper to estimate the direction, but not the magnitude, of cost changes resulting from various changes in the motor accident compensation system.

79. The changes in the fault system to be explored here are primarily those that will be expected to provide compensation for a larger number of motor accident victims. Any change that increases the number of victims compensated must increase the total cost of the compensation system unless it is accompanied by other changes to reduce the average payment, the frequency of injuries, or both. The increased cost could be offset to some degree by the adoption of deductibles or by limiting the maximum amount of compensation available.

A. The presumption of fault system

80. The change from a tort liability system in which fault must be proved to a system in which fault is presumed would increase the number of accident victims compensated for their injuries. Most of the additional people compensated would be from the third category of accidents—collisions involving two or more vehicles.

81. In the absence of deductibles or upper limits on benefits, such a change would increase the cost of the system. The amount of the increase would depend on the details of the new law and the manner in which the old law was administered. The additional cost might be small in some countries.

B. The no-fault system

82. Under a motor no-fault insurance programme, all persons injured in motor vehicle accidents will be compensated for their injuries without regard to fault. Even the drivers who are injured in collisions caused by their own fault will be compensated. This will lead to an

increase in the cost of insurance. One other major factor in the cost effect of adopting a no-fault law is the amount of non-economic loss (pain, suffering, etc.) paid under the fault-based law that is being replaced. If payments under the existing liability system include a large proportion of non-economic loss, then the change to a no-fault system may reduce the total cost of the motor insurance system, provided the no-fault law results in the elimination or substantial reduction of payments for non-economic loss. If, however, the payments under the existing liability system include a relatively small amount for non-economic loss, then the additional payments for economic loss under a no-fault system are likely to exceed the reduction in non-economic loss. Consequently, the change to a no-fault system will increase the total cost of motor insurance.

83. Statistics gathered under a liability system are likely to indicate more non-economic loss payment than actually exists because of incomplete information on such loss. The amount of the payment for non-economic loss is usually calculated by deducting the economic loss from the total payment. Consequently, if the reported economic loss is less than the actual figure, the payment for non-economic loss will be exaggerated.

84. Also, single vehicle accidents (overturns and collisions with fixed objects) are likely to be understated in a liability insurance system. Since many such accidents do not involve any liability, they are not reported to liability insurers. Errors in the estimation of non-economic loss payments and single vehicle accidents under the liability system were major causes for errors in the estimation of the cost effects of no-fault motor insurance in the United States. Because payments for non-economic loss had not been as great as was believed under the liability system, the restrictions on such payments under the no-fault system did not produce savings of the magnitude anticipated, and because there were more single vehicle accidents than originally believed, the additional benefits under no-fault automobile insurance were greater than expected.

85. The best available statistics show that the number of motor accident victims compensated increased by approximately 54 per cent when the change from fault to no-fault was made in the United States. This is the average increase for all no-fault States com-

bined.¹⁶ The percentage change varied from 37 per cent in large cities to 85 per cent in rural areas. The larger increase in rural areas reflects the greater proportion of single vehicle accidents with the vehicle striking a fixed object or overturning in such areas.

86. The statistics from the United States are cited here because they are the only large body of statistics dealing with a variety of no-fault laws. Although they probably cannot be applied directly to developing countries, or even to other industrialized countries, they provide some idea of the limits within which the designer of a no-fault law must work.

87. The substantial increases in the number of persons compensated will result in a substantial increase in the cost of the system unless the average payment is reduced sharply. As one of the features of the system is the abandonment of the search for liability, there is a decrease in legal expenses for the management of the claims. Other reductions in the average payment could result from:

(a) The elimination or reduction of payment for pain, suffering and inconvenience;

(b) The application of deductibles to payments for economic loss. A waiting period is more desirable than a monetary deductible for income loss. For example, there might be no payment for the first two or three days of disability. Payment for disability after the waiting period should be less than the actual income loss sustained to encourage injured persons to return to work as soon as they can; or

(c) The imposition of relatively low upper limits on payment for economic loss. It should be underlined that a very large majority of motor accident victims have relatively low medical expenses and little or no loss of income. Thus, relatively few persons with very serious

¹⁶ For more details, see Alliance of American Insurers, All-Industry Research Advisory Committee, *Automobile injuries and their compensation in the United States: insurance industry studies* (Chicago, 1979).

injuries account for a large part of the total compensation payment.

Other effects of no-fault laws

88. The change from a fault system to a no-fault system, taken alone, will not cause more motorists to insure or bring about any other changes in the behaviour of drivers or passengers. Persons who are so irresponsible as to drive without insurance under a fault system will continue to do so under a no-fault system. If the new act specifically requires all motor vehicles to be insured, and if it is rigidly enforced, the proportion of cars insured will rise. Even then, some motorists will continue to drive without insurance.

89. Some opponents of no-fault compensation systems have claimed that the removal of the threat of liability for fault will cause drivers to be less careful. The experience in countries that have adopted no-fault systems does not support this claim. The change to a no-fault system does not appear to have any effect at all on accident frequency.

C. The mixed system

90. The comments in paragraph 87 above are equally applicable to systems that combine basic no-fault benefits with tort liability. Of course, the reduction in payments for pain, suffering and inconvenience would not be as great if some of the tort liability rules were retained.

91. These comments on the cost effects of changes in the compensation system have been, of necessity, rather general. The exact extent of the change will depend upon the precise nature of the system before and after the change and on social and demographic conditions within the country. The model outlined in paragraph 76 can be used to estimate the magnitude of cost changes more accurately, on the basis of statistics collected or estimated under the existing and proposed systems for the country concerned.

CHAPTER III

Conclusions

92. Having described the various legal systems which can determine the method and amount of compensation for road accident victims, it should be stressed that the choice of the most appropriate system is the responsibility of each State and should, in principle, be made in the light of the criteria indicated in the introduction to the present study (see paragraph 6 above), which reconcile the interests of the victims, the insured and the insurers.

93. However, other basic principles of paramount importance in choosing the type of reform should also be specified. As the insured motorists, victims and insurers will be involved in the operation of such a reform, it is incumbent upon the legislators to conceive it in such a way as to make it efficient. The efficiency

should be measured in terms of costs. Since the main objective of motor insurance is to compensate the victims, it is necessary to lower the operating costs to the minimum and to devote the optimum portion of premiums to the payment of compensation.

94. A second requirement in any intended reform is to provide a simple plan which is understandable to the public. This applies in particular to the methods of fixing the premiums and the settlement of losses. Any suspicion of arbitrariness or of exceptions could be detrimental to the operation of the reform.

95. A third requirement in any intended reform is flexibility, in order to meet the constantly changing

social needs of the community and to permit adjustments in money values.

96. Some developing countries retain the present legal system to which they are accustomed and make efforts to improve its effectiveness. Even if the classic systems comprise inconveniences as described in the present study, it is preferable to keep them and improve the systems, rather than to introduce badly prepared reforms in haste, or reforms that have defects from the legal standpoint and would raise legal questions and uncertainties. The present systems continue to retain all their work. The UNCTAD secretariat study entitled "Problems of motor insurance in developing

countries"¹⁷ lists a number of suggestions for improving these systems, which are mentioned in paragraph 45 above.

97. It is for each State to decide what is best in its particular case, so the aim of this study is simply to draw attention to the advantages and disadvantages of the various solutions that are available. The main object is to find a solution that is suited to the conditions of each developing country, that will take account of the need to keep compensation as low as possible and that will ensure equal justice for all.

¹⁷ Document TD/B/C.3/176, see p. 1 above.

ANNEX

List of experts who took part in the meeting on Motor Insurance in Developing Countries: Search for Alternative Legal Systems

- Dr. A. R. B. AMERASINGHE, Secretary, Ministry of Justice, Colombo
Mr. B. DIOP, Deputy Secretary-General, Conférence internationale des contrôles d'assurances des Etats africains (CICA), Libreville
Professor S. FREDERICQ, Chairman, International Association for Insurance Law, Ghent
Dr. J. F. MORANDI, Professor Titular Ordinario de Derecho Comercial en la Facultad de Derecho y Ciencias Políticas de la Universidad Católica Argentina "Santa Maria de los Buenos Aires"
Dr. M. RAJAB, Counsellor, State Insurance Organization, Baghdad
Professor A. TUNC, Centre d'études juridiques comparatives, Université de Paris I, Panthéon, Sorbonne
Dr. V. UZEL, Managing Director, State Insurance Company, Prague
Professor B. WEBB, Department of Insurance, Georgia State University, Atlanta

Observers

- Mr. J. COWELL, Deputy Secretary-General, European Insurance Committee, Paris
Mr. D. EHLERT, Vice-President, Allstate International, Inc., Manchester, United Kingdom

MOVES TO REFORM THE LEGAL SYSTEMS GOVERNING MOTOR ACCIDENT VICTIMS' COMPENSATION IN DEVELOPING COUNTRIES

Study by the UNCTAD secretariat

[Original: English]
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Introduction

1. During the tenth session of the Committee on Invisibles and Financing related to Trade, several delegations expressed an interest in considering alternatives to the tort principle which had so far served as a basis for the compensation of motor accident victims. The Committee considered this matter worthy of investigation and, by its resolution 23 (X) of 17 December 1982, requested the UNCTAD secretariat to prepare in-depth studies on the alternative legal systems applicable to the compensation of motor accident victims.

2. Pursuant to this request, the UNCTAD secretariat has prepared a study entitled "Compensation of victims of motor accidents: Alternative legal systems for developing countries".¹ It was noted that some developing countries have already introduced new schemes for the compensation of road victims under which the concept of tort liability has been totally or partially abandoned. Thus the system called "no-fault" has begun to gain a foothold in developing countries in Africa, Asia and Latin America. The UNCTAD secretariat is therefore in favour of throwing light on the attempts of these countries to reform their legal systems governing the compensation of motor accident victims, so that there will be a clearer understanding of the tort alternatives when they are put into practice.

3. Most developing countries used to be colonies of European powers. As such, they inherited legal struc-

tures heavily influenced by philosophies and concepts which prevailed in the ex-metropolises. Among the concepts inherited is that of "tort liability" and its application to victims of road accidents.

4. The concept of "tort", as applied to road accidents, assumed two different methods of application. The first is ordinary tort liability, under which, to obtain compensation, the victim must prove that the motorist was at fault. This is the typical system in developing countries whose legislation was influenced by British Common Law.

5. Another application of the principle of tort in motor accident liability stems from rules applicable to damage caused by dangerous objects and this entails the presumption of negligence on the part of the motorist. However, the presumption can be rebutted if the motorist can prove that there was no negligence on his part. The presumed liability of the motorist prevails in countries influenced by the French Civil Code.

6. The introduction of these two types of tort liability in developing countries has generally been associated with the introduction of acts or regulations making it compulsory for motorists to insure against third party liability, in an attempt to protect victims of accidents and to guarantee their compensation. In several developing countries, special funds have been set up to supplement the compulsory insurance, and to protect the victims of hit and run cases, as well as motorists not covered by insurance.

¹ Document TD/B/C.3/190, see p. 32 above.

Algeria

7. Although tort liability, as a concept, is generally accepted in most developing countries, its application to road accidents is being criticized. It is not the intention here to catalogue the advantages and disadvantages of the tort system in developing countries, since this subject was dealt with adequately and in detail in the studies entitled "Problems of developing countries in the field of motor insurance"² and "Compensation of victims of motor accidents: Alternative legal systems for developing countries".³ However, it seems necessary to highlight the main reproach directed at the "tort system", i.e. the fact that it is founded on proofs of negligence, whether devolving on the victim or on the motorist. The requirement of reliable proofs and conclusions as to who is responsible for an accident presuppose well-equipped policy services, appropriate judicial systems and well-organized insurance markets—three conditions which cannot be met entirely by most developing countries. In practice, therefore, the tort concept has meant that many motor accident victims have not received any compensation, or have received it only after a long delay. Also, because recourse to litigation is very expensive and there is no certainty of obtaining compensation, many victims tend to accept unsatisfactory settlements from insurers who are in a position to impose derisory payments. Moreover, because of conflicting situations raised by the application of the tort concept, insurers have to incur high operational expenses, thus reducing the funds which should be available for the compensation of victims.

8. Further, although it is understandable that the tort principle should provide compensation for innocent victims, the strict application of this principle entails an integral reparation of damage, including such damages as pain, suffering and other non-economic losses. Obviously, all these charges throw a heavy burden on motor insurers who see their financial standing constantly jeopardized.

9. The need for some reform in the field of compensation of motor accidents in order to facilitate the indemnization of victims is widely felt in developing countries. This necessity is further underlined by the fact that family solidarity in some developing countries is decreasing, particularly in the urban areas, and social security schemes have not yet been established in most of these countries. Moves to mitigate, at least in part, the iniquities of the tort system⁴ are now being made by the developing countries. Several of these countries have taken steps to change the foundation of traffic accident compensation. Some have established new systems of compensation based on "no-fault", in certain cases introducing limited compensation. Some others, while establishing a system of compensation based on "no-fault" for benefits up to a certain level, or in respect of certain losses only, nevertheless allow the traditional tort liability to operate beyond this level or in respect of some other losses. This study lists the steps that have been taken by selected developing countries to reform their traffic accident compensation systems and, to facilitate a comparison of the systems adopted, a table is annexed which gives the features of each one.

² Document TD/B/C.3/176/Supp.1, see p. 11 above.

³ Document TD/B/C.3/190, see p. 32 above.

⁴ *Ibid.*

10. Until 1974, Algeria followed the French system as regards motorists' liability. The use of a motor vehicle gave rise to a presumptive liability as a dangerous activity ("under article 138 of the Civil Code"), so that proof of a motorist's negligence was not required. On the contrary, the motorist had to disprove the presumption of his liability to exonerate himself from the obligation to indemnify the victim. Such presumptive liability was subject to compulsory insurance to be taken out for every vehicle registered and on the road.

11. In 1974, the Algerian Government issued an Ordinance (No. 74-15) by virtue of which liability based on tort was abandoned in favour of a system which guarantees payment of economic losses up to certain limits in respect of death and bodily injuries caused by motor accidents. The area of property damage caused by an accident remains within the tort ambit.

12. According to this Ordinance, the compulsory insurance indemnifies, in principle, death or bodily injuries of all road accident victims regardless of negligence, whether they are in the vehicle or outside it. However, the Ordinance retains the concept of tort to a certain extent in respect of drivers condemned for causing accidents while they are under the influence of alcohol or narcotics. They have no right to any indemnification. However, their surviving dependants are entitled to an indemnity if the accident results in death.

13. If it is established that the driver of a vehicle is responsible for an accident, his indemnity is reduced proportionately to his degree of responsibility, unless the degree of his permanent impairment is equal to or over 50 per cent. This reduction is not applicable to his surviving dependants, in case of death.

14. In the case of theft of a vehicle, the thieves are excluded from the right to be indemnified. Their surviving dependants, and the passengers and their dependants, are entitled to indemnification.

15. The 1974 Ordinance provides the following benefits:

(a) Medical, pharmaceutical and hospitalization expenses effectively incurred by the victim. If the latter is unable to advance money for such expenses, the insurer is exceptionally entitled to effect direct payment of these expenses.

(b) Eighty per cent of the loss of earnings during the period of invalidity. No income is taken into account which is in excess of 24,000 Algerian dinars or less than 4,500 Algerian dinars per annum. Indemnification for loss of earnings can be in the form of a lump sum or annuity, the choice being left to the victim.

(c) For total or partial permanent impairment of bodily functions, the compensation is calculated on a regressive scale based on the past earnings of the victim and on the degree of the impairment. Indemnity for total or partial disablement is in the form of a lump sum or annuity, the choice being left to the victim.

(d) Death benefits are fixed on a regressive scale based on past earnings of the deceased. Death benefits are distributed in the following manner: 30 per cent for

the surviving spouse; 10 per cent for each dependent father and mother; 15 per cent for each of the first two minor dependent children; 10 per cent for each remaining dependent child.

(e) Death benefits in the case of surviving minor children are in the form of an annuity. The annuity form of indemnity also applies to all cases in which death benefits exceed 30,000 Algerian dinars.

(f) If the victim is a dependent child, the parents or the guardian receive a death benefit of 5,000 Algerian dinars if the age of the victim is less than six years, and 10,000 Algerian dinars if the victim is more than six years old but less than 21.

16. It should be noted that Algerian law, in specifying the amounts of indemnities payable to road accident victims, does not make any reference to non-economic losses except in the case of the death of an infant. It is not clear whether the table of indemnities provided by the law encompasses both economic and non-economic losses or excludes non-economic damages from the scope of compensation. A new legislative step is expected to dispel this ambiguity.

17. Algerian law stipulates that the benefits under the legal arrangements providing for the indemnification of road accident victims cannot be compounded with benefits under workmen's compensation laws, unless a prior permanent invalidity is aggravated by the road accident. Then the insurance company supports the consequences of the aggravation.

18. It is worth mentioning that the Algerian legislation on motor insurance prohibits any intermediary from negotiating, against fees, the settlement of indemnities provided by the law. Any such agreement on the services of intermediaries is considered null and void.

19. A special Indemnization Fund has been set up by the same Ordinance for cases of hit and run, non-insurance, or forfeiture of insurance benefits. This Fund indemnifies death and bodily injuries in the same manner as in respect of insured drivers.

20. To implement the Ordinance of 1974, four decrees, Nos. 80-34 to 80-37, were issued on 16 February 1980 specifying the modalities of the application of the new system which came into force on 19 February 1980.

CHAPTER II

Brazil

21. Motor insurance covering bodily injuries caused by motor vehicles became compulsory in 1975 by virtue of Act 6194 of 1974 completed by Regulations of 1975. In application of this Act, all owners of motor vehicles, whose operation on public roads is subject to licensing and registration, are under the obligation to purchase such insurance.

22. The compulsory motor insurance applies to bodily injuries only. Compensation for damage to property remains outside the scope of compulsory insurance.

23. Compulsory insurance covers cases of death, permanent disablement, the cost of medical treatment,

and additional costs. It does not cover loss of earnings during temporary disablement, nor does it cover non-economic losses, such as claims for pain, suffering, etc.

24. Benefits under compulsory insurance have statutory thresholds per person and per accident and so deductibles are applicable to these benefits. In view of the continuing inflation in the country the thresholds are adjusted every six months. In 1983, the threshold stood at 1,214,912 cruzeiros.

25. "No-fault" constitutes the basis for compensation in respect of bodily injuries covered by the compulsory insurance. It is immaterial whether or not there is a fault. Thus, all victims involved in a motor accident, including the driver of the vehicle that caused the accident, are covered and will be indemnified up to the thresholds provided by the Act. Such a system of "no fault" turns compulsory insurance into a cover against damage and not against third party liability. It endeavours to eliminate questions of a legal nature arising from the fact that the Brazilian legal system adopts the criterion of subjective liability as a general rule.

26. The protection provided by compulsory insurance is a basic plan intended to ensure that help is immediately available to all victims regardless of the application of principles of liability. The automatic indemnity provided by the Act does not preclude, however, the right of the victim or his/her beneficiaries to sue the person responsible for the accident to obtain further compensation. The victim has then to prove the negligence of the driver of the vehicle that caused the accident.

27. Authorized insurers can offer policy-holders the possibility of purchasing optional policies at an additional premium covering their third party liabilities. These optional policies cover medical and hospital expenses, death, funeral costs, permanent disablement (total or partial), temporary disablement, property damage and loss of income. The optional covers operate as a second layer in excess of amounts recoverable under the compulsory insurance.

28. The 1974 Act has also provided a system for compensating victims of accidents caused by unidentified vehicles. Cover is established by means of a pool among insurers providing compulsory insurance. These insurers cede a portion of their motor premiums to the pool, which is administered by the Instituto de Reaseguros do Brasil. The receipts of the pool serve for payment of compensation amounting to 50 per cent of the benefits provided by the compulsory insurance.

CHAPTER III

Costa Rica

29. In 1973, Costa Rica promulgated Law No. 5322 providing for compulsory insurance in respect of all motor vehicles registered in the country. By virtue of this law all bodily injuries caused by motor vehicles are compensated to the limit of 40,000 colones per person and 80,000 colones per accident. These limits include medical expenses, death, burial, permanent and temporary disability. Non-economic damages are not payable under compulsory insurance.

30. The compensation under motor insurance is made on the basis of risk created and not fault. Thus all victims of motor vehicles accidents, whether drivers, passengers or pedestrians, have the right to be indemnified, subject to the maximum amounts provided by the law.

31. However, the tort principle remains applicable. It is possible for the injured party to sue a negligent motorist who has caused the accident if the damages exceed the amount of benefit accorded by the law. The excess liability will be governed by the rules of civil liability established in the civil codes.

32. Injuries caused by uninsured vehicles, as well as hit-and-run cases, are not indemnified under the compulsory insurance system. No guarantee fund has been established for such cases.

CHAPTER IV

India

33. In 1939, India promulgated an Act providing for compulsory insurance in respect of third party liability arising out of motor accidents. Both liability for bodily injuries and property damage have been included in the compulsory cover. Limits for the cover of bodily injury (per person), as also for total liability in this respect, and damage to property (per accident) were provided for in the Motor Vehicles Act 1939.

34. The basis of motor accident liability is the British common law system, under which, in the case of accidents, in order to be compensated, victims have to prove the fault or negligence of the motorist. The tortfeasor has a range of common law defences, and contributory negligence of the victim is often invoked in accidents where large amounts are involved.

35. As a result of the application of the common law system, a great proportion of claims are settled in court, and only a small percentage are negotiated between the insurers and the victims. As a result of excessive recourse to the courts, the cost of legal proceedings has been absorbing a considerable portion of motor receipts, and lawyers were charging claimants high fees to sue insurance companies.

36. A basic plan of protection was introduced in 1982 to enable traffic accident victims to be promptly compensated and to avoid the delays involved in the settlement of claims. This basic plan provides for compensation, regardless of fault, of any person suffering bodily injury as the result of a motor accident. The basic protection is limited to 15,000 rupees per person killed and 7,500 rupees per person suffering from permanent disability.

37. The basic protection provided by the 1982 amendments does not eliminate tort action when the damages exceed the limits of the basic plan. However, any sums received under the basic protection are deducted from a successful claim based on tort.

38. However, the basic protection does not apply to hit-and-run cases. This is why the 1982 amendments have provided for the setting up of a Soletium Fund for such cases. The insurance sector contributes 70 per cent of the Fund and the Central and State Governments

contribute the remaining 30 per cent. The compensation provided through the Fund is small indeed, that is, 5,000 rupees for death and 1,000 rupees for grievous injury.

CHAPTER V

Iraq

39. In 1980, a new law concerning compulsory motor insurance was promulgated in Iraq. This is Law No. 52 entitled "Law on compulsory insurance of accidents caused by motor vehicles". The title has a special significance since the previous title of the Law was "Insurance of third party liability claims arising out of motor accidents".

40. The main characteristics of the Law are as follows:

(a) The relation between the insured, the insurer and the beneficiary becomes a legal and not a contractual relationship. This means that the rights and duties of the parties concerned are no longer derived from the insurance contract but from the law.

(b) Under the new system, there are no insurance contracts or policies to be issued, since all motor vehicles in Iraqi territory are deemed to be covered by insurance.

(c) Such insurance is not linked to the driver of the vehicle but to the vehicle itself, and the proof of payment is the receipt.

41. According to the new law, the insurance does not cover liability based on presumed fault under the old law, but on the basis of the "no-fault" principle.

42. The subject of the guarantee is death and bodily injuries. Property damage is not included.

43. Under the previous legislation some victims were excluded from the guarantee of compulsory insurance (the driver and members of his family). The new law compensates all deaths and injuries arising out of motor accidents except:

(a) Injuries involving the drivers, save in case of collision. However, the death of the driver is covered;

(b) Injuries caused intentionally by the victim to himself/herself, except when the act of the victim is caused by mental sickness which influenced his action.

44. The indemnity must always be in the form of a capital sum and it is not permissible for judges to replace it by an annuity.

45. No transactions regarding the vehicle are lawful without payment of the insurance premium.

46. Subrogation rights against the driver are permissible in the following cases:

(a) The intentional act of the driver;

(b) Stolen car. The legal suit would be against the thief;

(c) A driver without a driving permit;

(d) The accident was caused by the driver being under the influence of alcohol or other drugs;

(e) The illegal introduction of the vehicle into Iraqi territory;

(f) Use of the vehicle for purposes other than those stated in the matriculation register;

(g) Carriage of more passengers than permitted by the regulations;

(h) Use of a car in bad disrepair, contrary to the regulations;

(i) A very important case of recourse against the person responsible for the accident is when there has been grave negligence or fault. The victims or their dependants receive compensation; and the insurer, after paying such compensation, has the right of recourse against the motorist at fault. It is necessary to prove the relationship between the fault and the damage.

47. Death and bodily injuries are compensated even if the accident was caused by an unidentified vehicle.

48. The economic consequences of a death are confined to the dependant left by the victim, even if he is not an heir. The non-material damages are confined to the surviving spouse and to relatives in the first and second degree.

49. Accidents caused by vehicles belonging to the armed forces and the police are also covered by the law. In such cases the insurance company should settle the claim and exercise the right of subrogation against the competent authority. A special agreement has been concluded between the armed forces, the police and the insurance company to this effect.

50. Specialized committees are formed under the law to evaluate motor accident indemnities. Each committee comprises three members: a judge, a social welfare representative and a representative of the insurance company.

51. The insured, the beneficiary and the insurer have the right to submit a recourse, within 60 days, against the decision of the committee to the court of appeals only. The decision of the court is final in this case.

52. The lawyers are entitled to receive a proportion (not exceeding 10 per cent) of the indemnity, provided it is not more than 500 Iraqi dinars.

CHAPTER VI

Philippines

53. By virtue of the Insurance Code, all motor vehicle owners have to present evidence to the Land Transportation Commission that they have taken out an insurance policy, or a guarantee in cash or surety bond

to meet claims arising out of motor accidents, and to cover passengers or third party liability.

54. The Insurance Code requires such insurance to cover liability for death, bodily injuries and damage to property. A basic feature of this Code is that the indemnity required varies on a scale which starts at 12,000 pesos for tricycle, motor cycle, or scooter and rises to 50,000 pesos for a vehicle with an unladen weight of over 3,930 kg. As such limits are relatively low, it is possible to purchase excess cover on a voluntary basis.

55. As from October 1981, the requirement of cover for liability in respect of property damage was discontinued. Thus, compulsory motor insurance now covers liability for death and bodily injuries only.

56. Prior to 1975, the cornerstone of the system of indemnity was the tort law. Presidential Decree No. 612 of 18 December 1974, otherwise known as the Insurance Code of the Philippines, introduced a new system of indemnification. The new system allows immediate payment of claims for death and for bodily injuries without the need to show who is at fault. Such automatic payment is effected provided that:

(a) The total indemnity in respect of any one person does not exceed 5,000 pesos;

(b) Proof of loss is made available, consisting of the pertinent police report of the accident, a death certificate in case of a death claim, or a medical report, or medical and hospital bills if the claims are for bodily injuries;

(c) If the damages for bodily injuries and/or death exceed 5,000 pesos, the first 5,000 pesos must be paid without regard to fault. Amounts over and above 5,000 pesos are paid only if the fault of the driver has been proven.

The compulsory insurance does not cover non-economic damages. However, these could be covered under voluntary insurance, subject to proof.

57. It is to be noted that such automatic indemnity is payable only to third parties and passengers who are not members of the household of the driver or of the owner of the vehicle. Thus the driver of the vehicle causing the accident, and his family, are not covered by such insurance. Accordingly, the Philippine system of indemnization cannot be considered as having "no-fault" features, and therefore remains a third party coverage.

58. Circulars of 1978, 1981 and 1984 have established a schedule of indemnities for bodily injuries and death, covered by compulsory insurance. For instance, the maximum compulsory cover in case of death is 12,000 pesos, including the 5,000 pesos awarded without regard to fault.

ANNEX

Moves to reform legal systems governing motor accident victims' compensation in developing countries

Country	Legislation	Entry into force	Legal basis	Minimum, maximum, and guidelines for compensation	Compensation for non-economic loss	Insurance observations
ALGERIA	Ordinance (30.1.74) Four decrees (16.2.80)	1974 19.2.80	<i>No-fault</i> : Automatic compensation for bodily injuries for all traffic accident victims, with the exception, in some cases, of the driver. Maintenance of the system of presumed negligence in respect of damage to vehicles.	Basic annual wage used to determine amount of compensation: minimum, DA 4,500 (\$US 914); maximum, DA 24,000 (\$US 4,878). In the case of permanent disability, degressive scale based on earnings.	Low compensation for the death of minor. No legal provision for other cases.	Insurance is compulsory. Payment by the Special Indemnity Fund in some cases (i.e. hit-and-run or uninsured drivers). This legislation has not altered the market structure (one existing national company).
BRAZIL	Decree No. 6194, 19.12.74	1975	Mixed system: 1. <i>No-fault</i> : Automatic compensation for bodily injuries for all victims, including drivers, up to a threshold. In the event of death or permanent disability, the threshold is re-adjusted every six months. The threshold as at 1 November 1983 was \$Cr 1,214,912 (\$US 1,235). 2. Full compensation for bodily injuries and property damage caused by negligence.	Maximum compensation under the no-fault system. Compensation only for medical expenses and in the event of death or permanent disability. No threshold.	Compulsory insurance does not cover non-economic loss.	Insurance is compulsory for bodily injuries only (up to the thresholds determined by law). The introduction of the no-fault system has not altered the market structure.
COSTA RICA	Act No. 5322, 27.8.73	12.12.73	Mixed system: <i>No-fault</i> : Automatic compensation for bodily injuries up to ₡40,000 (about \$US 917) per victim and ₡80,000 (\$US 1,835) per accident. Full compensation for bodily injuries and property damage caused by negligence.	Maximum compensation under the no-fault system.	Compulsory insurance does not cover non-economic loss. Such compensation is rarely covered by optional insurance policies and is determined by the courts.	Insurance is compulsory for bodily injuries (within the limits of the no-fault system). The introduction of the no-fault system has not altered the market structure (one existing national company). No commission for agents for compulsory insurance, apart from a 3 per cent commission on payment. Average time required for the settlement of no-fault claims in the event of death or permanent disability: three to five months.

INDIA	Motor Vehicle Act Amendments, 1.10.82	October 1982	Mixed system: <i>No-fault:</i> Automatic compensation for bodily injuries up to Rs15,000 (\$US 1,428) per person killed and Rs7,500 per person permanently disabled. Maintenance of the system of proof of negligence in respect of property damage; amounts awarded under the no-fault system are deducted from amounts received in connection with claims based on negligence.	Maximum compensation under the no-fault system. No ceiling on compensation in cases of negligence.	The courts award very small amounts and only in infrequent cases.	Insurance is compulsory for bodily injuries up to Rs15,000 (\$US 1,428) per victim and for property damage up to Rs6,000 (\$US 571) per accident. Establishment of Soletium Fund in October 1982 for cases involving hit-and-run: Rs5,000 (\$US 485) in the event of death and Rs1,000 (\$US 97) for permanent disability. This Act has not altered the market structure (existing national companies). In 1982, the General Insurance Corporation of India officially expressed fears that victims would use no-fault compensation to make claims based on negligence.
IRAQ	Act No. 52, 1980	1.1.81	<i>No-fault:</i> Automatic compensation for bodily injuries suffered by all traffic accident victims, except, in a few cases, the driver. Maintenance of the former system in respect of property damage.	None.		Insurance is compulsory for bodily injuries and optional for property damage. Compensation for bodily injuries applies in cases involving uninsured or hit-and-run drivers and vehicle theft. The introduction of the no-fault system has not altered market structure (one national company since 1954).
PHILIPPINES	1. Decree of 14.12.74 introducing the no-fault system and fixed max. of compulsory insurance. (Art. 378 of Ins. code.) 2. Circular 8.11.78. 3. Decree No. 1814 of 16.1.81 and circular No. 3-18 of 7.10.81. 4. Circular No. 1-84 of 23.2.84.	1.7.75 10.11.78 31.10.81 10.3.84	Mixed system: 1. <i>No-fault:</i> automatic compensation, except for the driver, for bodily injuries and/or death up to 5,000 pesos (\$US 357) per person. 2. Full compensation for bodily injuries, death and property damage based on torts in excess of no-fault indemnity.	Maximum compensation under the no-fault system. The circular of 8.11.78 introduced a schedule of indemnities for bodily injuries covered only by compulsory insurance. This schedule was modified by the circular of 7.10.81 and increased by the circular dated 23.2.84. No ceiling for compensation on the basis of fault.	Not covered under the compulsory scheme but moderate compensation under a voluntary insurance.	Since 1975 insurance is compulsory for bodily injuries. However, since 1981, insurance against damage to property is not compulsory. Since 1981, maximum compulsory insurance has ranged from 12,000 pesos (\$US 857) to 50,000 pesos (\$US 3,571) depending on the size of the vehicle (private car, bus, etc.). The introduction of the no-fault system has not altered the market structure.

Source: International Monetary Fund, *International Financial Statistics*, various issues.

NOTE: To facilitate comparison, United States dollar equivalents (value as at 31 December 1983) are given below:

Rate of exchange on 31 December 1983

Country	Monetary unit	US dollar equivalent	US dollars per monetary unit
Algeria	Dinar	4.9165	0.203396
Brazil	Cruzeiro	984.00	0.00101626
Costa Rica	Colón	43.650	0.022910
India	Rupee	10.493	0.0953016
Iraq	Dinar	0.310858	3.2169
Philippines	Peso	14.002	0.07144183