LIABILITY FOR MOTOR-VEHICLE ACCIDENTS IN EUROPE: RECENT REFORMS AND REFORM PROPOSALS

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Summary: I. Introduction; II. German Law; III. French Law; IV. The Law of the United Kingdom; V. Future Developments in Europe.

In most legal systems the law of tort is basically founded on the principle that the only sufficient reason for shifting a victim's loss to the person who caused it is if the latter was guilty of careless or reprehensible conduct in causing it. This principle of «No liability without fault» –the *Verschuldensprinzip* of German law– has its historical roots in the liberal individualism of a century ago: An individual's freedom of movement should only be limited by the imposition of liability in damages if he failed to conduct himself in accordance with the general duty to act carefully. In modern conditions, however, a law of tort which rested exclusively on the principle of «No liability without fault» would be hard to accept. The growing use of machines and technical devices of all kinds in industry, manufacture and transport, the increased risk they present of causing damage to person or property so severe as to exceed the victim's capacity to bear it, the victim's consequent need for protection, the possibility of spreading the risk of loss through the community as a whole by means of insurance, and the great change in people's view of the degree of social security which a legal system should guarantee to its members– all those factors have led many industrial states in the world to limit, restrict, or evade the pure principle of fault, or even to abandon it quite openly for certain types of accident, such as motor vehicle accidents.

In Germany, Austria, Switzerland, France and many other countries special rules have been created –either by the legislature, or by the courts– which impose a strict liability for harm caused by a motor

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vehicle that is independent, or nearly independent, from a proof of negligence [1]. In all those states, the operators of motor vehicles are required by law to have liability insurance with a minimum coverage determined by statute. A license to use the vehicle will only be issued if a certificate of insurance has been produced. In addition, most legal systems have now statutory rules which give the accident victim a right to demand compensation from the insurance company directly and which ensure that an accident victim will be entitled to claim damages from a special fund if the vehicle involved in the accident has not been identified (as in a hit-and-run case) or was not covered by insurance, or where the insurance policy was not valid at the time of the accident or where the insurance company is insolvent.

However, the law never stands still. Not only have many critics pointed out that despite the improvements in the modern law of traffic accident liability there are still a number of deficiencies and gaps in the protection of the victim. It has also been argued that the current system of strict liability for motor vehicle accidents is extremely expensive to operate. It has been estimated in Britain that of every £ 100 paid in premiums by motorists only £ 55 go to victims [2], the rest is eaten up in court and lawyer's fees, the administration cost of insurance companies, and the sums paid to their agents. This is mainly due to the fact that every single case requires a finding not only on questions of negligence, causation, and the other elements of liability, but also on the extent of the victim's property damage, personal injury, and pain and suffering. These questions are often disputed, and have to be taken to court by lawyers. This is why it has been suggested in many European countries not to patch up the liability system with peacemeal reform measures but to adopt the more radical approach of replacing tort liability by a system of accident insurance.

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[1] For a comprehensive comparative survey of the rules governing the compensation of harm resulting from motor vehicle accidents see Tunc, «Traffic Accident Compensation: Law and Proposals», in *International Encyclopaedia of Comparative Law*, Vol. XI, Chapter 14 (1980).

[2] See *Report of the British Commission on Civil Liability and Compensation for Personal Injury* (Cmnd. 7054, 1978), nos. 83, 121 261. In other words, operating costs amount to 45 per cent of the premiums.

In order to understand the strengths and weaknesses of the current rules of tort liability for motor vehicle accidents in Europe, I will start with a brief description of German, French and British law. I will also discuss the recent French reform legislation and the various reform proposals debated in these countries. Finally, I would like to draw your attention to the more radical plans to replace the system of tort liability by special compensation programs or a system of comprehensive state-operated accident insurance.

II. GERMAN LAW

The German Road Traffic Act of 1952 provides that the custodian or «operator» of a motor vehicle is liable for damage arising «through the operation» of the vehicle and that liability is excluded only if the operator can prove that both he and the driver took all the care called for in the circumstances of the case and that the accident was not attributable to a defect in the construction of the vehicle nor to a failure of its functional parts. This means that even an unforeseeable and unavoidable failure of the components of the vehicle –such as a tyre defect, axle fracture through metal fatigue, brake failure, or the steering seizing up– makes the operator liable. But if the accident is due to an «external» event such as an animal running in front of the vehicle or faulty driving on the part of other motorists, the operator is not liable if he can prove that both the driver and he himself observed «all the care called for in the circumstances». This is more than the ordinary care required under the tort provisions of the Civil Code. It has been defined by the courts as «care going beyond what is usually required, extreme and thoughtful concentration and circumspection» [3]. In practice, such proof is hardly ever forthcoming and only in very few cases –such as when a car leaves the road because of entirely unpredictable black ice [4], or a small child darts out onto the street from between two

[3] See *Bundesgerichtshof*, 10 Oct. 1972, NJW 1972, 44.
[4] *Landgericht Bonn*, 10 oct. 1956, MDR 1957, 163.

parked cars [5], or a car projects a stone which strikes a pedestrian– has it been accepted that the accident was one which even an «ideally careful» driver could not have avoided. Since proof of such «extraordinary» care is difficult and in most cases impossible, German law has created a liability, this is closely akin to liability without fault.

Liability under the German Road Traffic Act is not limited to damages arising from death or personal injury, but includes also property damage. There is no need, therefore, for a German plaintiff to resort to the Civil Code's general provisions on tort law to recover property damage. On the other hand, the Road Traffic Act strictly limits the amount of damages payable. Claims in respect of immaterial damage, i.e. pain and suffering, are wholly excluded, and an upper monetary limit is fixed for the liability of the defendant. In the case of death or personal injury the operator of the vehicle is liable only up to 500.000 DM, and if damages are payable in the form of an annuity, it may not exceed 30.000 DM per year. These limits are increased by statutory amendment from time to time in order to take inflation and other factors into account. If several people are injured or killed in the same accident, the applicable limits are 750.000 DM and 45.000 DM. Damages for pain and suffering, and damages exceeding the stated amounts, can be obtained therefore only on the basis of the tort provisions of the Civil Code. This means that even if strict liability under the Road Traffic Act is clear there is often a long and tiresome dispute about the proof of fault required under the Civil Code.

The operator's liability under both the Road Traffic Act and the Civil Code must be covered by liability insurance. The minimum coverage prescribed by statute is not of practical importance since most German vehicle operators buy coverage of a much larger scope. It is quite common for the operator of a car used for non-business purposes to acquire coverage for 2 million DM. The maximum coverage available in the German insurance market for such holders is 7.5

[5] See *Bundesgerichtshof* 28 May 1985, NJW 1986, 183.

million DM, and it is by no means rare that coverage in this amount is obtained since the additional premium cost is negligible.

There are a number of proposals for the reform of the law. Plans aiming at the replacement of tort law by accident insurance will be discussed below. More proposals that are modest seek to fill the gaps left by the existing system [6].

One proposal is to modify the Road Traffic Act to exclude the operator's liability only in a case of true *force majeure*. This would mean that there would be liability despite the fact that even an «ideally» careful driver would not have been able to avoid the accident. It is argued that if a small child is hurt in a traffic accident a risk has materialized that should in fairness be borne by the motoring public even if the accident was totally unavoidable for the driver concerned. There seems to be general agreement that this change of the law is desirable. Not even the insurance industry seems to be opposed to it, and the reason why the legislature has not yet taken appropriate action is, in my view, that this point, if taken alone, is too small to find Parliament's attention.

Another proposal is to extend the coverage of the Road Traffic Act to damages for pain and suffering and to remove the monetary ceilings mentioned. This change of the law would eliminate the need of the accident victim to base his claim for damages on the Civil Code's tort rules. As a result there would be fewer cases in which liability would depend on proof of the driver's negligence. It is argued in support of this proposal that, while many European countries have introduced strict liability for motor vehicle accidents, it is only German law which limits the kind and amount of damages payable by the strictly liable vehicle operator. The only explanation of this peculiar

[6] See Kötz, Deliktsrecht (7th. ed. 1996) 165 ss.; *id*, *Empfiehlt sich eine Vereinheitlichung und Zusammenfassung der gesetzlichen Vorschriften über die Gefährdungshaftung im BGB?, Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, Vol. 2 (1981) 1779 ss.

feature of German law seems to be that the fault principle on which the Civil Code provisions are based is regarded as the essence of tort law and that strict liability, being of an exceptional and anomalous nature, cannot result in full damages as provided by the Civil Code. Most writers do not share this view and have therefore supported the proposal. The insurance industry, while not openly opposed to a change of the law, has made it clear that it would not be costless and that a rise of insurance premiums would be inevitable. It is estimated, however, that premiums would have to be increased by no more than one or two per cent [7].

Under §8a of the Road Traffic Act passengers in a vehicle can only sue its operator under the Act if they were being carried by way of business and for reward, as in a taxi or bus. In all other cases injured passengers must rely on the Civil Code's provisions on tort law and therefore prove the defendant's negligence. If, for example, a vehicle operator causes an accident by which a friend riding in the same car and a pedestrian are injured, the pedestrian's claim for damages can be based on the strict liability of the Road Traffic Act, whereas the friend will recover only if he can establish the driver's negligence. This restriction is sometimes defended on the ground that the injured passenger «consented» to the risk of injury or that it would be improper if a non-paying passenger were able to sue his «benefactor» without at least proving some fault on his part. These arguments are now increasingly recognized for what they are –fictions, appropriate to an era when third-party liability insurance was not compulsory, but objectionable relics, now that modern insurance practices have transformed this part of the law.

Another reform proposal that would have a considerable impact on traffic accident compensation is concerned with the defense of contributory negligence. According to §9 of the Road Traffic Act, the

[7] See Köndgen, **Haftpflichtfunktionen und Immaterialschaden** (1976) 144 ss.

victim's compensation must be reduced if any fault on his part contributed to the occurrence of the harm. Thus, if the injured pedestrian, cyclist or driver is himself at fault, his damages are reduced, and may in extreme cases be wholly excluded, according to the extent to which the parties' fault and, if they were operating motor vehicles, the danger emanating from those vehicles contributed to the accident. The reform proposal is not to abolish the defence altogether, but to change the law so as to limit the defense to cases in which the victim was guilty of intentional fault or gross negligence. In support of this view, it is argued that the vast majority of traffic accidents is caused by a momentary lack of attention, by a split-second lapse of care, by an unfortunate reaction to a situation of sudden danger. Errors of this type may be regarded as blameworthy from a technical point of view, but they are really the consequence of human frailty and as such are statistically unavoidable even by a most careful and circumspect person. It is unfair –so the argument runs– to deprive the victim of all or part of his damages if his error is of a kind everybody is bound to commit sooner or later. It is true that the law should seek to achieve accident prevention by imposing economic sanctions on persons engaging in careless conduct. Nevertheless, no significant deterrent effect is to be expected from a rule, which compels the judge to reduce the victim's damages if all he can be blamed for is a momentary error of judgment or another statistically unavoidable oversight. Accordingly, the defense of contributory negligence should be available to the tortfeasor or his insurance company only in cases in which the victim's conduct amounts to recklessness or gross negligence. While many German writers support this proposal they differ on a number of secondary points. It is doubtful, for example, whether the proposed rule should apply only to personal injuries or also to property damage. Should it apply only where the tortfeasor or his insurance company is made liable based on the Road Traffic Act? Or to all cases where the tortfeasor is covered by compulsory liability insurance? Or to all tortfeasors whether insured or not? Should the rule benefit only the traffic accident victim himself, or also his insurer who has been surrogated to the insurer's claims against the tortfeasor?

III. FRENCH LAW

Unlike most other European countries, France has no special legislation on the liability of operators or motor vehicles. There was no need to enact such legislation because the French courts have been able, by what must be called a bold act of «judicial legislation», to interpret a provision of the French Civil Code so as to make the «guardian» of a thing strictly liable for all harm caused by the thing. Art. 1384 of the French Civil Code provides that:

> «One is responsible not only for the damage one causes by one's own act but also for the damage caused by the act (...) of things which one has under one's control».

Until the end of the 19th century, this provision was taken to be simply a shorthand reference to other provisions of the Code imposing liability on the guardian of an animal and the owner of a building. The growing number of industrial accidents due to the increased use of machines in industry and transport led the French courts to adopt an extensive construction of Art. l384 [8]. As the law now stands, a person who has control over a thing –including not only motor vehicles, but also trains, ships, bicycles, elevators, bottles of mineral water, and indeed all inanimate objects– is strictly liable in tort for all the harm caused by the thing unless he can prove that the accident was due to an act of God or to some other unforeseeable and unavoidable cause. The only major defense that remains open to the defendant in such cases is to prove that the accident has been caused by the victim's fault. Indeed, the normal reaction of automobile insurers from whom victims sought compensation was to assert as often as possible the victim's fault.

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[8] The full story is given by Geneviève Viney, *Les obligations. La responsabilité: Conditions* (1982) no. 48-56. See also Lawson/Markesinis, *Tortuous Liability for Unintentional Harm in the Common Law and the Civil Law* (1982) Vol. I, p.146 ss.; Von Mehren/Gordley, *The Civil Law System, An Introduction to the Comparative Study of Law* (2nd. ed. 1977) Ch. 9; Zweigert/Kötz, *An Introduction to Comparative Law* (2nd. ed. translated by Tony Weir, 1987) Vol. II, p.353 ss.; Tunc, «It is wise not to take the Civil Codes too seriously», *Traffic Accident Compensation in France, in: Essays in Memory of Professor F.H. Lawson*, eds. Wallington/Merkin. 1986, p.71 ss.

This rule was severely criticized for many years. The leading critic was Professor André Tunc of Paris University. He argued that the defense of contributory negligence was the main reason why it took the victim two years or even longer on average to obtain a payment from the insurer. He also pointed out that it made no sense to consider as «faults» mere errors that no human being can avoid committing sooner or later, and that it was unjust to concentrate on the victim's behavior and punish him for the slightest mistake, while the author of the damage, protected as he is by compulsory liability insurance, is practically exempt from civil liability even in a case where the accident was caused by his gross negligence. When the French Socialist party had won the general elections in 1981, a Minister of Justice took office that was sympathetic to a legislative solution of the problem. He established a commission to study the available alternatives. When a majority of the commission recommended the adoption of a pure and comprehensive no-fault statute a storm broke loose. Due to the strong and indeed vociferous opposition of the Bar, the insurance industry and most law professors a compromise had to be worked out. Nevertheless, the statute that was finally passed by the French National Assembly in 1985 virtually abolished the defense of contributory negligence in most motor vehicle accidents [9].

To begin with, the statute provides that if the victim is under 16 or over 70 years old or if he is a disabled person and his disability is at least 80 per cent he will be entitled to full compensation regardless of any contributory negligence. Claims for bodily injury or death of other victims or their dependants will be reduced only if the victim's negligence is «inexcusable» and has been the «exclusive» cause of the accident. For some time, it was feared that the courts would consider as «inexcusable» any conduct amounting to gross negligence. But those fears seem to be unfounded. While some lower courts did

[9] Law No.85-677 of 5 July 1985: «tenant à l'amélioration de la situation des victimes d'accidents de la circulation et a l'accélération des procédures d'indemnisation» (J.O. 6 July 1985, p.758; published also in J.C.P., 1985.III.57405 and 57935.à

take that position, the *Cour de cassation* as the court of final resort in civil matters has made it clear in a series of decisions [10] that the victim's contributory negligence is «inexcusable» only when it is of an «exceptional gravity» exposing him without any valid reason to a danger of which he must have been conscious. In the typical case a pedestrian collides with a car when crossing a street without looking right or left. While this is clearly negligent, it does not normally amount to an «inexcusable» fault. Nor is the pedestrian's fault «inexcusable» if the accident occurs at night or in conditions of poor visibility or where the pedestrian decided not to use a nearby zebra crossing or to cross the street despite a green light allowing motor vehicles to proceed freely on the road or where the pedestrian darts out onto the street from behind a parked car. The only case in which the *Cour de cassation* found an «inexcusable» fault was one in which the pedestrian had crossed at night a badly lit four-lane freeway separated in the middle by a wall. The pedestrian crossed two lanes, climbed the wall, and were hit by a fast-moving car when he came down on the other side. It follows that it will be only in very exceptional cases that contributory negligence will bar the victim's or his dependant's recovery of damages. However, it should be kept in mind that the new legislation favours not only the victims and their dependants but also their insurers. A large part of the population is now covered by some form of health or disability insurance. Since insurers are surrogated to the insured's claims against the tortfeasor they may well be the major beneficiaries of the new legislation because they will recover full compensation despite the insured's contributory negligence.

If the victim is not a pedestrian, a bicyclist, or a passenger in a vehicle but a driver, the new Law does not protect him. This is the major concession that had to be made to appease the opponents of the reform. However, this gap has been very successfully filled by the

[10] Decisions by the Second Civil Chamber of the Cour de cassation of 20 July 1987, J.C.P. 1987.IV.358-360. The decisions are also reproduced in an annex to the article by Bloch, *La faute inexcusable du piéton*: J.C.P. 1988.I.3328. See also the decision by the Assemblée plénière of the Cour de cassation of 10 November 1995, J.C.P. 1996.II.22564 = D.1996, 633.

insurance industry, which has marketed a new type of first-party insurance covering drivers against the risk of a traffic accident. Professor Tunc has estimated that because of the legislation and the new type of accident insurance compensation, in 85 or even 90 per cent compensation will now be fully independent of the negligence of tortfeasor and victim [11]. It is still technically correct to speak of a system of tort «liability» for traffic accidents. In substance, however, tort liability has been largely replaced in France by a system of insurance protection in which the issue of fault is no longer of major significance.

The new Law does not only deal with the victim's right to compensation. Indeed most of its articles are devoted to procedural matters. Thus, in order to speed up the settlement process, the Law provides that within 4 months after the accident the victim, his dependants, his insurer and all other persons or organizations entitled to recover compensation must notify the tortfeasor's liability insurer of their claims. Then another period of 4 months will start running before the end of which the insurer will have to offer a settlement to the victim which may be provisional only if the victim's health condition is not yet stabilized. Financial sanctions are provided against the insurer who does not offer a settlement in time or makes a clearly inadequate offer. There is also a provision in the Law requiring the Government to publish periodically the average levels of compensation awarded by courts or agreed upon in settlement. It is hoped that such figures will have a persuasive authority, reduce litigation with all the cost, and delay that it entails.

IV. THE LAW OF THE UNITED KINGDOM

Britain now seems to be the only major European country, which still applies the general rules of negligence liability to cases where

[11] See Tunc (*supra* n. 8) 83.

harm has been caused by a motor vehicle accident. In other words, the driver or owner of a motor vehicle is not liable to make compensation to anyone who is killed or injured in consequence of the use of the car, unless he can be shown to have been at fault. It is true that the courts have found ways and means to establish liability by demanding from the driver a degree of care that is so extreme as to be barely distinguishable from liability without fault. After 1930, when owners of motor vehicles were required by law to have liability insurance the courts began:

> «In cases where the plaintiff excited their compassion ... to twist the law of negligence to make a defendant liable for negligence when he was really not negligent at all, to make the insurer pay» [12].

Thus, it has been held that a learner driver who had just obtained a provisional license is acting negligently in not displaying the care of an experienced driver [13]. Since it is impossible to learn to drive without going on the roads, this means that every learner driver is in law negligent, and it is necessarily negligent to learn to drive.

Similarly, the owner of a truck the brakes of which had failed was found to have been negligent even though he had done everything which a reasonable owner would have done to maintain them [14]. Even so, cases constantly crop up such that with the best will in the world one cannot find any negligence. For example, a pedestrian will recover nothing if a motor vehicle unforeseeably loses a wheel or its driver unexpectedly has a heart attack. The case of *Snelling v. Whitehead* [15] provides a tragic illustration. A 7-year-old boy went out on his bicycle one evening without his parents' knowledge. On coming out from a minor road, he was struck by a car. He suffered severe brain damage. The Court of Appeal set an initial award of over £40.000 aside on

[12] Spencer, «Motor-Cars and the Rule» in *Rylands v. Fletcher: A Chapter of Accidents in the History of Law and Motoring*: Camb. L.J. 42 (1983) 65, at p.80.
[13] *Nettleship v. Weston*, [1971] 2 Q.B. 691.
[14] *Henderson v. Jenkins*, [1970] A.C. 282.
[15] Reported in *The Times*, 31 July 1975.

the ground that no negligence on the part of the driver had been proved. The boy's father appealed unsuccessfully to the House of Lords. Lord Wilberforce said in his speech that the case was one, which in his opinion should attract automatic compensation regardless of fault. Needless to say that even when the defendant's negligence has been established the plaintiff's compensation must be reduced if he himself was at fault in causing the accident.

Various attempts to enact a strict liability statute on the pattern of the legislation in Continental Europe have failed. Against a bill that was before Parliament in 1932 it was argued that it would raise insurance costs, that it would make motoring prohibitively expensive, and so wreck the motor industry, that it would increase accidents, because if pedestrians could always sue, they would throw themselves under the wheels of passing cars, that it was an attempt to introduce sinister practices from Continental Europe by holding a citizen guilty unless he can prove his innocence, and so on [16]. The bill failed, and a similar bill introduced in 1975 suffered the same fate.

There is no doubt that many people in England find the present state of the law highly unsatisfactory. One of the most prominent critics is Lord Denning. In a book he published after his retirement from the Bench he said:

> «In the present state of motor traffic, I am persuaded that any civilized system of law should require, as matter of principle, that the person who uses this dangerous instrument on the roads –dealing death and destruction all around– should be liable to make compensation to anyone who is killed or injured in consequence of the use of it. There should be liability without proof of fault. To require an injured person to prove fault results in the gravest injustice to many innocent persons who have not the wherewithal to prove it» [17].

[16] See the detailed report by Spencer (*supra* n. 12) at p.82 s.
[17] Lord Denning, **What Next in the Law** (1982) 128.

In 1974, the British Government decided to set up a «Royal Commission on Civil Liability and Compensation for Personal Injury» under the chairmanship of Lord Pearson. It was asked to make a wide-ranging inquiry into the basis on which compensation should be payable in respect of death and personal injury. As to accidents suffered by a person through the use of a motor vehicle the Pearson Commission recommended that a no-fault compensation scheme should be introduced and that the benefits payable under the scheme should be similar to those paid to workmen in the event of an industrial injury. It was also recommended that the system should not be administered by the insurance industry, but by the Government, and that its cost should be met by a tax on petrol. On the other hand, the Pearson Commission proposed to keep fault liability for traffic accidents in existence side by side with the new state-ran scheme, but that in assessing tort damages the no-fault compensation should be fully deducted [18].

The road accident scheme proposed by the Pearson Commission is just one type of many different no-fault schemes which are now being discussed all over the world and some of which have already been enacted. It is an «add-on» scheme in the sense that while it provides limited no-fault benefits for pecuniary losses arising from personal injury it leaves the tort action intact so that high-earners and victims with large non-pecuniary losses are still able to resort to the tort action. In other no-fault schemes, the right to sue in tort is abolished to the extent that the plaintiff is entitled to recover no-fault benefits. Some states in Australia and in the United States have enacted schemes of this type. Under a more radical type of scheme the tort action is abolished entirely, or nearly so. The chief example of such a scheme is that in New Zealand which has been in operation since 1974 and covers all accidents, not just road accidents. This is not the place for a detailed discussion of the pros and cons of the various schemes.

[18] See Report of the Royal Commission (*supra* n. 2) Chapter 18.

But I would like to conclude by speculating on the development that is likely to take place in this field in the European countries I have discussed here.

V. FUTURE DEVELOPMENTS IN EUROPE

First of all, there is no doubt in my mind that the role of tort liability in the compensation of personal injury will get smaller and smaller in the future, and that in the long run the nature and extent of compensation will depend on the nature and extent of the harm, and not on the way the harm arose or on whether it can be attributed to the fault of the tortfeasor and the contributory fault of the victim. As more and more people are being protected against more and more of the risks inherent in living, such as the economic consequences of sickness and unemployment, it is consistent to urge that the citizen be freed from the risk of *accident* as well, even if he cannot satisfy the traditional tests of tort law and establish a sufficiently close relationship to a «responsible» cause of the injury. If this is the long-term goal, it can admittedly be achieved in different ways. One way is to go straight for comprehensive reform and create a no-fault scheme for motor vehicle accidents or even for all accidents, as in New Zealand. This would arguably eliminate the defects of the fault system, such as the high volume of litigation generated by the need to decide complex issues of fault and assessment of damages, the high administrative costs of the tort system, the delay in obtaining compensation, and the fact that the less seriously injured victims tend to be overcompensated while the more seriously injured victims are often undercompensated.

On the other hand, there are a number of considerations in favour of the retention of the liability system as it exists. Not only can it be argued that liability for fault coupled with strict liability for certain defined risks expresses a basic notion of human responsibility, plays an important role in accident prevention, and, being basically a free-market mechanism, allocates social resources efficiently. If dri-

vers were strictly liable for all personal injuries to pedestrians regardless of their own or the pedestrians' (contributory) fault incentives to take care would be reduced both for drivers and for pedestrians. Consequently, more accidents would result the cost of which would exceed any savings in administrative expense. The counter-argument is of course:

1. That the deterrent effect of negligence liability is insignificant since compulsory liability insurance largely insulates drivers from any damages awarded against them, and

2. that even if some deterrent effect existed it can only be minimal because road accidents are largely random events and financial incentives –e.g. the drivers' risk of having to pay an increased premium after an accident– are minor compared to the driver's fear of personal injury. However, there is now a good deal of empirical evidence showing that the deterrent effect of a fault-based system of liability is far from negligible [19].

The introduction of a no-fault scheme for traffic accidents can also be attacked on the ground that there is no good reason to single out this type of accident for privileged treatment and to subject the victims of other types of accidents to a less favourable regime. Even if one adopts a scheme based on the New Zealand pattern by placing all accidents on the same footing it can still be asked why the person whose health has been injured by an accident should be any better off than the person who suffers similar harm from a disease or a congenital ailment.

There are other problems as well. A major part of the population is now protected by various forms of state-operated systems of health insurance, and in many cases traffic accident victims will receive compensation for lost income as well under similar systems, for

[19] See e.g. McEwin, «No-Fault and Road Accidents: Some Australasian Evidence», *Int. Rev. of Law and Economics*, 9 (1989) 13; Devlin, «Some Welfare implications of No-Fault Automobile Insurance», *Int. Rev. of Law and Economics*, 10 (1990) 193.

example, if the accident was job-related or incurred on the victim's way to or from work. In these cases, the insurance carrier will be surrogated to the insured's tort claims, and it is not easy to see why the increased benefits available under a no-fault scheme should go into the pocket of state-operated insurance carriers.

Then there is the problem of cost. The broader the coverage of a no-fault scheme the higher the overall cost is likely to get. If no-fault benefits are set at a low level in order to keep the scheme within financially manageable bounds, there will he pressure to leave tort liability intact to operate side by side with the no-fault scheme. But then tort law with all its inefficiencies and costly waste would remain in existence. Finally, most proposals in European countries to establish a comprehensive no-fault system are in favour of entrusting the Government with its administration. The recommendations of the Pearson Commission have therefore been criticized on the ground that a state-run no-fault compensation scheme for traffic accidents would necessarily involve the creation of a new small army of civil servants. This argument is advanced with particular vigour by lawyers, insurance men, and their powerful lobbies who have a vested interest in the work and income generated by the existing system of accident compensation. Last but not least the present political and economic climate is not very congenial for no-fault reforms based as they are on an option for social welfare techniques and on the idea of an integrated system of social welfare to deal with all cases of misfortune on the basis of need.

While there seem to be at present no prospects in Europe for drastic and comprehensive reform it is very likely that more limited changes of existing institutions will occur, firstly, by extending the social security system which is already independent of the law of tort, and, secondly, by further modifications of the law of tort so as to make it function more like a system of accident insurance.

As to the social security system, persons who have an accident at work are now covered in all countries not only for medical costs, but also for loss of income. In many countries an accident suffered on the

way to or from work is also treated as an industrial accident. Some countries, such as Switzerland and the Netherlands, have gone further and include all accidents suffered by a workman, including accidents «off work». In Sweden and Germany, additional accident insurance is provided under collective agreements or offered to the workman by his union at very low rates. Since 1971, the same protection as is given by social security to victims of industrial accidents has also been awarded to German school-children and students who have an accident at, or on the way to or from, kindergarten, school or college. In Germany, it has long been agreed that the social security system should be extended so as to apply to accidents suffered by a housewife doing the housework, and only lack of funds has prevented actual implementation. All this goes to show that there is a constant increase in the number of accident victims who need only resort to tort liability for those items of harm, such as pain and suffering, which are not, or not yet, covered by the existing social security system and additional forms of accident insurance.

As to the law of tort, developments in the last few decades strongly suggest that one day it will really be functioning much like a system of accident insurance, though in legal disguise. The development in France points the way. Strict liability under the French Civil Code coupled with the virtual abolition of the defense of contributory negligence have gone a long way toward the establishment of what is in substance a system of accident insurance. In Germany, the proposals to fill the remaining gaps of the strict liability system will be implemented eventually with the same effect. Great Britain is lagging behind. It is perhaps a pity that the Pearson Commission did not make the more modest, but politically more acceptable, proposal to replace negligence liability by strict liability, and to limit the contributory negligence defense in a way similar to that of the new French legislation. From the theoretical point of view, the state-run compensation scheme recommended by the Pearson Commission may have been the best solution. But the best in this case seems to have been the enemy of the good.