

THE OSBORNE REPORT: "NO" TO NO-FAULT

Lewis Klar*
Edmonton

This article discusses the Osborne Report of Inquiry into Motor Vehicle Accident Compensation in Ontario. The Report recommends that, with some modifications, the existing court system of compensation be retained, and rejects "no-fault" compensation schemes. The author concludes that the Report's strong defence and endorsement of the existing system places the onus of proof clearly on those who would change it.

L'auteur de cet article examine le Rapport de l'enquête Osborne sur les dédommagements en cas d'accidents automobiles en Ontario. Le rapport recommande que soit gardé, avec quelques modifications, le système judiciaire actuel de dédommagements et rejette les systèmes "sans faute". En conclusion, l'auteur affirme qu'en raison de la vigoureuse défense du système actuel et de son acceptation par l'auteur du rapport, c'est clairement sur ceux qui voudraient changer le système que repose le fardeau de la preuve.

Introduction

The Osborne Report of Inquiry into Motor Vehicle Accident Compensation in Ontario¹ (hereinafter referred to as the Osborne Report) is an impressive document which now becomes a major player in the fault/no-fault debate in Ontario. It is the product of extensive research and study by an experienced Commissioner and staff. It is frank and clear. The Osborne Report will encourage some and disappoint others of those who have participated in this contentious debate. Notwithstanding one's own views, however, the Osborne Report, its research studies,² and the facts and figures provided are significant information and input for the continuing fault/no-fault debate. The Osborne Report must not be ignored.

The report was commissioned by the Ontario government as a follow-up to the Report of the Ontario Task Force on Insurance (hereinafter referred to as the Slater Report).³ The Slater Report recommended that compensation for victims of automobile accidents be provided by the private insurance industry on a complete "no-fault" basis, and that the Ontario government should move at first to a universal accident compensation,

*Lewis Klar, of the Faculty of Law, University of Alberta, Edmonton, Alberta.

¹ Attorney General of Ontario and the Ministry of Financial Institutions, Report of Inquiry into Motor Vehicle Accident Compensation in Ontario, The Honourable Mr. Justice Osborne, Commissioner, Vols I, II (1988).

² Published in Volume II of the Report.

³ Ontario Task Force on Insurance, David Slater, Chairman, Final Report (1986).

and ultimately, to a universal disability compensation, plan.⁴ The Osborne Committee was specifically asked to examine this "no-fault" recommendation, and to evaluate the merits of the existing tort system of compensation for injury by automobile accident. More particularly, the Committee was mandated to consider and report, *inter alia*, on the following matters:⁵

The adequacy, timeliness and fairness of compensation to accident victims under the present system;

The effectiveness of the tort system as a deterrent and compensation mechanism;

The implications of removing tort liability as a basis for compensation in automobile accidents and replacing it with a no-fault system;

The cost savings and effectiveness of a no-fault system for compensation for claims arising out of automobile accidents;

The appropriate design of a no-fault automobile insurance system for Ontario . . . ;

The desirability of a modified no-fault system with some form of threshold at which recourse to the tort system would be allowed; . . .

The Osborne Report⁶ focuses on three general areas. One is the fault/no-fault debate, a second relates to the insurance industry and the delivery of insurance benefits, and a third to the question of public versus private insurance.⁷ In this commentary, I will discuss the report as it relates to the fault/no-fault debate. It must be noted, however, that there is much of value in the report on the other two areas. The Osborne Report provides a detailed discussion of how automobile insurance works in Ontario, and how it can be improved. It undoubtedly will be of enormous importance and influence in this area.

I. 'No' To No-Fault

A. The Choices

The Osborne Committee's mandate was restricted to issues of compensation for victims of motor vehicle accidents. The Committee did not consider the fault/no-fault debate outside of this context. This is an important point to highlight. Tort law is not just motor vehicle accident compensation law, or even just negligence law. It covers a much broader range of personal injury and property damage cases. The arguments relating to tort law's role in the compensation of victims of motor vehicle accidents cannot be extended uncritically to the operation of tort law in other contexts, such as professional malpractice, product liability, or

⁴ *Ibid.*, p. 69, recommendations B.28, B.29 and B.30.

⁵ Osborne Report, *op. cit.*, footnote 1, Vol. I, p. x.

⁶ Two volumes were produced. The first volume contains the actual report, including the discussion of the issues, the findings of the Commission, and the recommendations. The second volume publishes the research studies produced for the Commission.

⁷ In fact, only five of the seventeen chapters in Volume I deal with the tort/no-fault debate, the remainder dealing with insurance issues and background information.

intentional wrongdoings. The fault/no-fault debate has frequently ignored this simple point. It was surprising, for example, when the New Zealand Accident Compensation scheme was instituted, abolishing all causes of action in tort for personal injuries caused by "accident", based upon a report⁸ which focused exclusively on the defects of "negligence" law primarily within the context of motor vehicle accident litigation.

This is not to say, however, that we cannot draw from the Osborne Report implications for the fault/no-fault debate as it applies to compensation issues outside of the motor vehicle accident context. For many reasons, if no-fault compensation is the correct way to go, the place where it is most needed and where it will work the most effectively, is in the motor vehicle accident area. There is no doubt that the social and health problems caused by motor vehicle accidents are enormous, both in absolute terms and relative to other personal injury and property damage areas presently dealt with by tort law. Since some no-fault is already a component of motor vehicle accident compensation, there is an existing base on which an extension to pure or threshold no-fault can be built. Administrative and regulatory structures, relating to driver licensing, vehicle registration and compulsory insurance, already exist. Arguments which focus on the weaknesses of tort law,⁹ or on its inability to achieve its stated aims,¹⁰ are most relevant in reference to motor vehicle accident cases. In addition, the argument that tort law is superfluous in view of other more powerful deterrent forces, such as the fear of injury, or criminal sanction, is most persuasive in the context of motor vehicle accidents. In short, if pure or threshold no-fault is rejected for the compensation of motor vehicle accident victims, where the no-fault proponents are on their strongest ground, and the tort law proponents on their weakest, it is unlikely to win much support in other compensation areas.

The Osborne Committee considered five compensation systems for injuries caused by motor vehicle accidents.

The first, "pure tort", was quickly rejected. In the pure tort option, tort law would be available to provide compensation to victims who are injured by the fault of others, but there would be no scheme of compulsory no-fault benefits which could assist others. First party no-fault insurance would still be available to those who wanted it, but this would be strictly optional. No Canadian province presently has a pure tort system, and I would agree with the Osborne Report that the adoption of pure tort

⁸ Mr. Justice A.O. Woodhouse (Chairman), Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967).

⁹ For example, that "fault" is illusory, unconnected to subjective blameworthiness, difficult to prove.

¹⁰ Liability insurance is said to defeat the goals of deterrence and justice, for example.

now would be "a retrograde step, not justified by current social policy or by any substantial cost savings . . .".¹¹

The second scheme considered by Osborne is a "tort system with add on no-fault benefits".¹² This is the existing system in Ontario and every other province, except Quebec. Its essence is that there are immediate no-fault benefits paid on a first party basis to all those injured in a motor vehicle accident, regardless of fault. Tort however remains available to all victims who wish to pursue this avenue. The no-fault benefits which have been received by tort claimants are deducted from any tort award to which they may be entitled. It is this existing system which the Osborne Report recommended, subject to modifications, the most significant of which is a substantial increase in the no-fault benefits.

"Pure no-fault", restricted to motor vehicle accident victims, was the third option considered. In pure no-fault the personal injury victim is entitled to no-fault benefits exclusively. The right to sue in tort is eliminated. Pure no-fault is the system which the Province of Quebec has in place, but, as will be discussed in more detail below, it was rejected by the Osborne Report for Ontario.

A fourth option considered was "threshold no fault". Under threshold no-fault, there is a minimum threshold, expressed either in monetary or verbal terms,¹³ which a claimant must meet in order to have recourse to tort law to recover non-pecuniary losses. Below this threshold, there is compulsory no-fault for economic losses. This option was also rejected by the Osborne Report.

Finally, the Osborne Report considered "comprehensive no-fault", although it was strictly beyond its mandate. The report also discussed the various options put forward by advocates of alternative schemes.¹⁴ The report recommended that comprehensive schemes be given future consideration by provincial and federal governments, although there was no indication in the report that Osborne would favour a comprehensive scheme.¹⁵

Having considered the options, the Osborne Report rejected no-fault schemes which eliminate the right to sue in tort. Why?

¹¹ *Op. cit.*, footnote 1, Vol. 1, p. 449.

¹² *Ibid.*, p. 450.

¹³ For example, the words "serious impairment of bodily function", or "serious permanent disfigurement" have been used in some jurisdictions which use threshold no-fault.

¹⁴ Such as T.G. Ison, J. O'Connell, S.D. Sugarman; see Osborne Report, *op. cit.*, footnote 1, Vol. 1, pp. 495-505.

¹⁵ In fact, the reasons which Osborne puts forward for retaining tort would presumably apply here.

B. A "Made in Ontario" Compensation Scheme

One of the features of the fault/no-fault debate in the past has been the highly theoretical and overly general level of the arguments presented. Debate concerning the nature of tort law, its defects, and the needs of accident victims frequently ignores important jurisdictional differences which bear upon the issue. Although it is no doubt true that there are similarities between Canadian provinces, American states and other Commonwealth countries which permit us to ignore borders somewhat in developing our arguments, there are differences, both in the substantive law of torts, and the level of benefits available to motor vehicle accident victims, which demand a cautious approach when looking elsewhere for solutions.

This point is well made in the Osborne Report. In terms of substantive tort law, the Osborne Report notes the many changes in Ontario which have made it easier for victims of motor vehicle accidents to make tort claims and receive increased awards.¹⁶ The list includes the elimination of the common law's contributory negligence rule, the introduction of lengthier limitation periods, the abolition of inter-spousal tort immunity and guest passenger discrimination, the restriction of the *volenti* defence, the introduction of pre-judgment interest, the expansion of the number and rights of family member claimants, the adoption of the collateral benefits rule, and the adoption of damage assessment principles which assure full compensation for the real losses of personal injury victims.

More impressive are the differences between Ontario and American jurisdictions on the liability insurance, social insurance and medical insurance side. The Osborne Report notes, for example, that in Ontario the average insured motorist has third party coverage of more than \$500,000.00, automobile insurance is compulsory, there are minimum third party limits of \$200,000.00, less than two per cent of Ontario drivers are uninsured, all Ontario drivers have underinsured coverage.¹⁷ This is compared with the situation as it prevails in the United States, where mandatory third party limits have remained very low, invariably in the range of \$50,000.00 or less.¹⁸ In addition to automobile no-fault benefits which form a part of the compulsory automobile insurance coverage, the Osborne Report notes the "host of social welfare plans and private insurance programs available to assist individuals injured in motor vehicle accidents".¹⁹ There

¹⁶ *Op. cit.*, footnote 1, Vol. 1, pp. 328-343.

¹⁷ *Ibid.*, Vol. 1, p. 2.

¹⁸ *Ibid.*, Vol. 1, p. 341. S.D. Sugarman, *Doing Away with Tort Law* (1985), 73 Cal. Law Rev. 555, argues that a problem with tort is that of uncompensated and undercompensated victims, due to the many tort defendants who are judgment-proof, and the distressingly large number of motorists who drive without liability insurance or who carry a bare statutory minimum.

¹⁹ *Ibid.*, Vol. 1, p. 301.

is unemployment insurance, workers' compensation, general welfare assistance, short-term and long-term disability plans, and hospital and medical care insurance. In short, on the matter of motor vehicle accident compensation, the Osborne Report believes that "Ontario should be an exporter, not an importer of compensation systems".²⁰

C. *The Costs*

One of the most important aspects of the fault/no-fault debate has been the question of costs. Proponents of no-fault compensation have consistently argued that compensation based on fault is very costly as compared with the delivery of no-fault compensation benefits. This has been expressed in terms of the percentage of the incoming dollar of premium which is returned to the victim as compensation. The intent of the argument is to demonstrate that in view of the significantly greater costs of tort law, its alleged benefits are not worthwhile.²¹

The cost efficiency argument was heavily relied upon by the Slater Committee in its report. According to the Slater Report, "the inordinate financial cost of continuing to use tort for injury compensation" represents the "most serious" deficiency of tort law.²² Slater stated that "more than 50 cents of every premium dollar is absorbed in the administrative and legal costs of running the system", and that "less than 50 cents of the premium dollar is actually paid out in compensation under tort, compared with 80 to 90 cents that are paid out under no-tort insurance plans".²³ The Slater Report also referred to the "Trebilcock Study"²⁴ which stated that tort "victims receive only a little more than 1/3 of the monies enter-

²⁰ *Ibid.*, Vol. 1, p. 4.

²¹ One can refer to various no-fault proposals where this argument is made. In T.G. Ison, *The Forensic Lottery* (1966), p. 28, it is submitted that "about 49% of the total amount of money flowing into the system is absorbed by the cost of its administration" and "thus the administrative cost is equal to about 96% of the total amount received by injury victims as net compensation". Ison argued that "it is indisputable that the cost of administering tort liability is extremely high compared with the total amount flowing into the system or with the total amount flowing out as net compensation". The cost argument was also stressed by the A.O. Woodhouse, *Compensation and Rehabilitation in Australia Report* (1974), where the overall cost of running Ontario's Workmen's Compensation Scheme, stated to be about 7% of premiums, was compared with the legal costs and disbursements associated with the operation of the negligence system in Australia, which ranged between 18.1 and 26.9% (p. 66 of the Report). In Sugarman, *loc. cit.*, footnote 18, at p. 596, the argument is made that "the tort system is fabulously expensive to operate in comparison to modern compensation systems". It was stated that "usually well under half of liability insurance premiums go to paying benefits".

²² *Op. cit.*, footnote 3, p. 66.

²³ *Ibid.*

²⁴ M.J. Trebilcock, *The Insurance-Dilemma of Modern Tort Law: Trends in North American Tort Law and Their Implications for the Current Liability Crisis*, prepared for the Slater Committee.

ing the system, compared to 80 to 90 per cent under most forms of first party or social insurance".²⁵

The Osborne Report refuted these cost efficiency claims. According to its research and findings, in Ontario's existing mixed fault and no-fault system, 35.3% of earned premium goes to expenses, and 64.7% of earned premiums to pay claims.²⁶ The expenses are made up of operating expenses, which include business acquisition costs, administration expense, salaries, and so forth, and "claims adjustment expenses", which comprise defence legal costs and adjusters' costs. It is Osborne's opinion that there would not be a significant reduction in the insurer's operating expenses with a switch to a no-fault compensation system. There would be a reduction in the claims adjustment expenses, but it is the assessment of the Osborne Report that the reduction in this area would be no more than five per cent. In other words, a conversion to a pure no-fault plan would leave 69.7% of earned premiums available to pay claims, in contrast to the existing 64.7%. The reduction in threshold no-fault expenses would be even less than the five per cent predicted for pure no-fault.

The Osborne Report was critical of the Slater Report's methodology and findings. Osborne flatly stated that Slater's suggestion that a no-fault system could return 80 to 90 cents on the premium dollar to claimants "must be an error".²⁷ This opinion was reinforced by reference to a study on the Michigan threshold no-fault program which estimated that only 55.1 cent on the dollar is returned to claimants,²⁸ and to a study on Quebec's pure no-fault scheme which concluded that 60% of the premium dollar was returned to claimants under that program.²⁹

Although administrative "cost" comparisons between fault-based compensation and no-fault are of interest in the fault/no-fault debate, certain overriding points must always be kept in mind. The goals and philosophy of a fault-based compensation law differ from those of no-fault schemes. Even if one accepts the Osborne Report's assessment that distributing funds to claimants on a no-fault basis would make five more cents available to claimants, the basic questions are still unanswered. Does society wish to abandon fault-based compensation? As I have argued elsewhere,³⁰ the "cost-efficiency" argument is not made out by simply

²⁵ *Op. cit.*, footnote 3, p. 67.

²⁶ *Op. cit.*, footnote 1, Vol. 1, pp. 521-530.

²⁷ *Ibid.*, p. 527.

²⁸ *Ibid.*, referring to a U.S. Department of Transport study, *Compensating Auto Accident Victims* (1985).

²⁹ *Ibid.*, p. 528, referring to a 1986 study by G. Fluet and P. Lefebvre, *L'Assurance Automobile au Québec: Bilan d'une réforme* (1986).

³⁰ L. Klar, *New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective* (1983), 33 U.T.L.J. 80.

comparing the administrative expenses of no-fault with the administrative expenses of tort. There are other "cost" dimensions. For example, it is usually suggested that if fault-based compensation is replaced by no-fault, the functions of a fault-based system can be taken over by alternative regimes. It is stated that criminal law, safety regulations, and administrative inquiries will take up the slack, but at what costs? Might the accident rate increase, and if so, at what cost? Will virtues of respect for others and self-reliance be minimized, and if so, at what cost? Will there be abuses, and if so, at what cost? Will there be demands from those excluded from the no-fault plan for equal treatment, and if so, at what cost?

In considering the "cost efficiency" argument, it is also important to note that the "liability insurance crisis", which was the reason for the creation of the Slater Committee in the first place, was never directed at automobile liability insurance. It was agreed by both Slater and Osborne that "there is no general crisis of price or availability of personal automobile insurance in Ontario. . .".³¹ A conversion from the existing system of fault and no-fault compensation to a pure or threshold no-fault system cannot be justified upon an existing "cost crisis". It can only be based on acceptance of the value judgment that it would be better for Ontario society to take those funds which are presently used for a mixed system of fault and no-fault and concentrate them into a pure, or threshold, no-fault system. This of course is not a "cost efficiency" argument at all, since different goals are being achieved through a different use of the funds.

D. Deterrence

One of the most contentious aspects of the fault/no-fault debate concerns the question of deterrence. In a fault-based compensation system, one's right to be compensated and one's obligation to compensate depend upon the nature of the conduct which caused the injury. Does this fact encourage more careful behaviour, resulting in fewer accidents, injuries and deaths?

It is clear that this is a critical question, especially from the perspective of those who argue for pure no-fault. It would be very difficult to convince most individuals to accept no-fault if this may result in an even greater rate of injury and death caused by motor vehicle accidents than we presently have.

The standard position of proponents of no-fault has been that tort law exercises an ineffective deterrent influence in cases of motor vehicle accidents. It is argued that deterrence can be achieved through criminal

³¹ Osbourne Report, *op. cit.*, footnote 1, Vol. 1, p. 83, quoting from the Slater Report, *op. cit.*, footnote 3, p. 82.

sanctions, quasi-penal regulation, and fear of personal injury, and that tort law's deterrent effect is irrelevant in view of these more powerful influences.³² The Slater Report, for example, was insistent that tort law is unable to achieve a significant deterrent objective, and that in view of liability insurance and the ability to introduce premium variability in no-tort plans, the "tort-deterrence debate is ultimately irrelevant".³³

Proponents of fault-based compensation have been equally convinced that there is a deterrent influence exercised by tort, even in the motor vehicle accident compensation area. As I have argued elsewhere, for example, although liability insurance does certainly weaken the deterrent sting of a tort judgment, the threat of increased premiums, the danger of the insurance company seeking indemnity from the insured, and the possibility of policy limits being exceeded and the excess becoming the responsibility of the wrongdoer, are factors which create a "deterrent" influence, despite insurance.³⁴

With the introduction of pure and threshold no-fault in various jurisdictions, the "empirical" testing of the theoretical assumptions and predictions became possible. As discussed in the Osborne Report, however, the studies which have resulted are far from being conclusive or consistent. Some purport to demonstrate that no-fault has had no negative impact on accident rates or driving habits,³⁵ whereas others seemed to demonstrate the opposite.³⁶

A research paper was commissioned by the Osborne Committee on the deterrence issue.³⁷ Its findings are of interest and shed some addi-

³² For an example of this argument, see Ison, *op. cit.*, footnote 21, p. 83, who argues:

But if the risk of injury to oneself, the inconvenience of accidents, the risk of damage to one's own car, and the risk of a fine, imprisonment, or the suspension of the driving licence, are not effective deterrents against unsafe conduct, then it seems highly unlikely that the risk of an increase in the cost of insurance will have the desired effect.

³³ *Op. cit.*, footnote 3, p. 65. Slater referred to other like-minded studies, primarily E.P. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (1983).

³⁴ Klar, *loc. cit.*, footnote 30.

³⁵ See, for example, C. Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience* (1985), 73 Cal. Law Rev. 976.

³⁶ See, for example, E.M. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of The Effect of No-Fault Accidents* (1982), 25 J. of L. and Econ. 49, cited by the Osborne Report, *op. cit.*, footnote 1, Vol. 1, p. 538. Osborne also cites studies which are critical of Landes' study, for example J. O'Connell and S. Levmore, *A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault?* (1983), 48 Missouri L. Rev. 649.

³⁷ N.F. White, *The Function of Deterrence in Motor Vehicle Accident Compensation Schemes*, Osborne Report, *op. cit.*, footnote 1, Vol. 2, p. 436.

tional light on this question. As a first point, the paper cautions against the use of "evidence" purporting to demonstrate the effect of no-fault laws on motor vehicle accident rates. As is noted by the study's author, Professor White, "experimental conditions" cannot be applied to this research. The studies cannot control other significant factors which affect motor vehicle accident rates. Nevertheless, the study does concede that this evidence is the best available, but should be accepted only "with reservations".

Professor White argued that tort law does have a role to play in promoting careful driver attitudes and in rehabilitating those drivers who have caused accidents by their careless conduct. It is Professor White's opinion that despite liability insurance, "the average citizen-driver is most influenced by the possibility of civil liability".³⁸ According to Professor White:³⁹

If it is accepted that the 'correct and responsible' role is important for the prevention of motor vehicle accidents, then the values and attitudes supporting this role are correspondingly important and anything which, in turn, promotes them is strategically valuable. The tort system performs this function. People in our society can see in it a demonstration of how we value each other and of what the rules are by which we are held accountable. That is, it is a representation of one's responsibility to the community.

Professor White argued that tort law is "a fundamentally important form of civic theatre . . ."; it has a representational function which makes "it less important because of what it does than because of what it is"; "it is our final referent when we are trying to understand how to resolve social conflicts or how to make real some abstract notion of one's responsibility to others in the community".⁴⁰ For these and other reasons, White's clear conclusion was that "it would seem imprudent to tamper with an institution which may exercise some mortality and morbidity retarding effect, even if the effect is not empirically demonstrable".⁴¹

The Osborne Report agreed. Osborne shared the views of White, and others,⁴² that tort law does influence behaviour and deter accident producing conduct. The Osborne Report adopted White's arguments that for some drivers tort law can influence behaviour which would not otherwise be affected, either by criminal law, or highway traffic regulations. Although the Osborne Report was careful in not wanting to overplay the tort law/deterrent function, it saw enough merit in it to caution against the abolition of tort.

³⁸ *Ibid.*, p. 454.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 457.

E. Justice and Fairness

Frequently ignored, or down-played, in the fault/no-fault debate, have been the questions of justice and fairness.⁴³ The issue of the rights of victims and the obligations of wrongdoers to their victims has too often disappeared from the debate concerning our civil justice system, while, ironically, it is now becoming important in relation to our criminal justice system.

It was encouraging, therefore, to see that the Osborne Report did not ignore this aspect of the debate. In the words of the Osborne Report:⁴⁴

Tort law's capacity for fairness and justice should not in my view be ignored. The public's sense of justice, of what is fair and reasonable, must be taken into account.

The moral values implicit in tort law, seem to me to be both understood and agreed to by a substantial majority of drivers who may not know what tort means, or what tort law is, but who do appreciate what it stands for. As related to motor vehicle accidents, the public understands and accepts the rules of the road. The concept of some individual responsibility for individual actions, at least in a humanely modified form, is central to what reasonable people regard as just.

The Osborne Report referred to an address by Professor Schwartz in which he submitted that the correctness of the "simple idea that if you 'behave improperly and thereby injure another, you are responsible for the consequences'" seemed "obvious and commonsensical".⁴⁵ Osborne also dismissed as "offensive" the argument that the conduct which is responsible for motor vehicle accidents is "morally neutral".⁴⁶ According to the Osborne Report, many would find as unjust a system that would compensate the drunk driver and the victim equally.

The additional argument that no-fault has floundered because of the personal injury bar and politicians was dismissed by Osborne as being "unconvincing", in so far as Canadian society at least is concerned. According to the Osborne Report it has been an "unfocused opposition by the public which has been reflected by members of the Legislature of all parties" which is responsible for no-fault rejection.⁴⁷ In short, no-fault has not been adopted, because no major public interest group or political party wants it. The Osborne Report rejected the sentiments expressed by

⁴² See also G.J.S. Wilde's research paper, Incentives for Safe Driving and Insurance Management, *op. cit.*, footnote 1, Vol. 2, p. 464.

⁴³ The Slater Report, *op. cit.*, footnote 3, for example, deals only with "compensation" and "deterrence"—justice and fairness are factors not mentioned.

⁴⁴ *Op. cit.*, footnote 1, Vol. 1, pp. 543-544.

⁴⁵ *Ibid.*, p. 544, referring to G. Schwartz, speech to the Seminar Faculty of Law, A.N.U., Canberra, Australia, August 17-19, 1984, pp. 71, 72.

⁴⁶ As Osborne, *ibid.*, p. 545, asked: "Is there anything morally neutral about drinking and driving?"

⁴⁷ *Ibid.*, p. 546.

the previous Ontario studies,⁴⁸ that an educated public would understand and endorse no-fault once no-fault was explained to it. On the contrary,⁴⁹

... the public's sense of fairness will not be satisfied if fault is left to be dealt with solely through the criminal justice system and the premium rating system. The public's sense of what is right requires that fault be taken into account in the compensation process *and*, where required, in the criminal or quasi-criminal justice system.

These are fighting words which are likely to upset proponents of no-fault. Ultimately, it is the "justice and fairness" argument which is the most important in the fault/no-fault debate. It is my view that the Osborne Report's assessment is correct.⁵⁰

F. *The Problem of Delay*

One of the frequently raised criticisms of tort law is that there is an inordinate period of delay between the time of an accident and the receipt of compensation by the injured victim.⁵¹ This delay is seen predominantly as a hardship for the victim, and as an impediment to the victim's rehabilitation and recovery. It is also suggested that delay is a tactic employed by defendant insurers to force plaintiffs into low settlements.

While not disputing that delay is a problem in the payment of third party bodily injury claims, the Osborne Report made two important observations. The Osborne Report noted that the problem of delay is a frustration not only to victims but to insurers as well, who would prefer to close third party bodily injury files quickly. In fact, the Osborne Report stated that delay works to the disadvantage of insurers. More importantly, it traced the root cause of delay not to fault-based compensation, but to the lump sum damage award. This method of calculating plaintiffs' damages requires that plaintiffs wait until their medical condition has stabilized and can be assessed. The lump sum, "once and for all",

⁴⁸ Ontario Law Reform Commission, Report on Motor Vehicle Accident Compensation (1973); Ontario, Legislative Assembly, Select Committee on Company Law, The Insurance Industry. Second Report on Automobile Insurance (1978); Slater Report, *op. cit.*, footnote 3.

⁴⁹ Osborne Report, *op. cit.*, footnote 1, Vol. 1.

⁵⁰ I have written that the "justice" argument has dogged New Zealand's Accident Compensation scheme, and that until the public can be convinced that "fault" does not matter, a social insurance scheme which attempts to accomplish social insurance goals while at the same time catering to the demands of victims of faulty accidents, will fail. See L. Klar, A Commentary on the New Zealand Accident Compensation Scheme (1988), 26 *Alta. Law Rev.* 319, at p. 322.

⁵¹ See, for example, Ison, *op. cit.*, footnote 21, p. 25, where delay is said to be "[o]ne of the most frequent complaints against tort liability". Also see the Slater Report, *op. cit.*, footnote 3, which states that "under tort, there is enormous delay". The Report noted, at p. 14, that "it is not unusual for some cases to drag through the court system from 2 to 13 years."

method of calculating the damages has several serious drawbacks, foremost of which is the requirement that the courts predict a host of future, extremely uncertain, events. This approach guarantees that incorrect predictions will be made and that victims will ultimately either be over or undercompensated.

What must be highlighted, however, is that the lump sum method is not a necessary component of a fault-based compensation law. There is no ideological or philosophical reason why fault-based compensation cannot co-exist with alternative methods of damage assessment, such as variable periodic payments, if these other methods are preferable. This is an issue which has been studied frequently, and is not a topic covered in the Osborne Report. It is important however not to lay the ills of the lump sum method at the feet of tort law.

G. *The Litigation Process*

As with the lump sum method of awarding damages, the defects of the civil litigation process are frequently used to attack fault-based compensation and to support non-litigious no-fault. The litigation process has been accused of being slow moving, expensive, risky and embittering.⁵²

There are two responses to this type of criticism. The first is to channel one's efforts into improving the court process in order to eliminate, or at least lessen the problems that exist. In this respect, the Osborne Report has made some important observations and recommendations. It recommended specific changes to the Rules of Civil Procedure to simplify and make pleadings more useful, a more effective use of pre-trials, a better use of medical and other experts' reports, new rules to encourage settlements, and so on.⁵³ There is no doubt that experienced and intelligent people can come up with ways to improve vastly the litigation process, if that is indeed their objective. It is also clear, however, that proponents of no-fault dislike tort not merely because of the administrative and other practical problems with civil litigation, and thus "tinkering" in this area will not satisfy their basic ideological problems with fault-based compensation.

The second point of note made by the Osborne Report in relation to the litigation problems of tort is that, as has been shown by all studies, litigation is the rare exception in the resolution of motor vehicle accident claims. The Osborne Report's figures indicate that only between two and three per cent of motor vehicle related bodily injury claims go to trial in Ontario. The vast majority, over ninety per cent, are resolved without any action being commenced. The two to three per cent that do go to trial are not, in absolute numbers, insignificant, of course. The

⁵² See, for example, Woodhouse, *op. cit.*, footnote 8.

⁵³ Osborne Report, *op. cit.*, footnote 1, Vol. 1, pp. 30-37.

figures provided in the report indicate that in the years 1982 to 1985 inclusive there were a total of 4,383 motor vehicle accident trials in the Supreme and District Courts.⁵⁴ It is thus important to improve the litigation process with respect to these cases.⁵⁵

Conclusions

The Osborne Report has recommended the continuation of Ontario's mixed system of fault and no-fault based compensation as the best method of compensating victims of automobile accidents. As stated by Osborne:⁵⁶

A motor vehicle accident compensation system should deal humanely with all those who are injured, and provide reasonably generous rehabilitation and long-term care benefits on a no fault basis while at the same time preserving a compensation distinction between those who cause accidents and those who do not.

To further this objective the Osborne Report concluded that what is required in Ontario is a substantial expansion of no fault benefits and in the eligibility criteria for these benefits. The report, for example, recommended a substantial increase in rehabilitation benefits, both in terms of their amount and the time during which they would be available, and increased long-term care benefits. Due to cost savings which would ensue from some of Osborne's other recommendations,⁵⁷ the report predicted that in the end result, "Ontario's motorists will be the beneficiaries of substantially increased no fault benefits at moderately reduced cost and without the collateral sacrifice of any right to individual compensation under tort law".⁵⁸

I am sure that the Osborne Report's recommendations and its findings, especially those which relate to costs and economics, will be carefully scrutinized and challenged by others. All recommendations will not be accepted. What is important from the perspective of the fault/no-fault debate, however, and especially from the perspective of those committed to some form of fault-based compensation, is the Osborne Report's strong endorsement of the values and virtues of our present mixed system. This in itself is a reversal of the stance taken by several of Ontario's earlier studies. The ball is now in the court of those who see nothing of value in maintaining fault-based compensation. Proponents of no-fault have long acted as if the fault/no-fault debate is over and as if tort law were dead. The Osborne Report has put an end to that rumour.

⁵⁴ *Ibid.*, p. 363.

⁵⁵ The Osborne Report did not consider court congestion to be a problem in Ontario. It was Osborne's impression that "motor vehicle accidents do not seem to place an undue burden on the courts"; *ibid.*, p. 361.

⁵⁶ *Ibid.*, p. 567.

⁵⁷ The Report recommended, for example, the elimination of the "collateral benefits" rule. This recommendation is bound to be quite controversial.

⁵⁸ *Op. cit.*, footnote 1, Vol. 1, p. 585.