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REFORMING MOTOR ACCIDENT COMPENSATION SCHEME: A NO-FAULT LIABILITY OPTION FOR MALAYSIA

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INTRODUCTION

The compensation mechanism adopted for motor vehicle accident victims in this country has been dominated by tort law. The system has been extensively adopted throughout common law jurisdictions to determine liability and compensation issues stemming from personal injury cases. Judging from the experiences of these countries, it has become apparent that the tort system has by and large failed to address the concerns of personal injury victims of motor vehicle accidents witnessing a gradual erosion of public confidence and faith in its capacity as an effective compensatory model. Founded on the notion of fault, the system leaves an unsuccessful litigant completely uncompensated for his injuries and losses. Prolonged delays in obtaining compensation; doubts as to its deterrent effect; the restricted coverage of the mandatory third party liability insurance; the risks and uncertainties present in an adversarial system; a reduction made in awards to reflect the claimant's share of liability; inaccuracies with the 'once-and-for-all' lump sum awards; strict court rules and procedures; absence of rehabilitation of injured claimants; and exorbitant costs involved in the administration of the scheme have been some of the numerous criticisms that have been directed at the system.

Evidently, there has been widespread belief amongst nations that the present tort regime in its unaltered form is clearly an unsuitable compensatory system. There has developed a growing discontentment with the present compensation regime in this country.³ A different approach to these problems is timely and law reform is crucial in fulfilling modern society's demands and expectations. Concerns with its effectiveness had moved governments in a number of countries to intervene and implement measures that either completely abandon or limit the application of common law principles with an appropriate alternative compensation model. It led to the emergence of statutory no-fault compensation schemes whereby the payment of benefits to victims of negligent conduct was made not on the basis of fault but rather on the resulting injury and losses suffered.

The traditional values of society based on individual culpability and responsibility which was reflected in the tort of negligence introduced in the days of the horse and buggy was neither contemplated nor designed for the contemporary era.⁴ These values cherished in the medieval era have been superseded in the present day by principles of community care and responsibility which has become a prominent feature of modern compensation schemes where the focus has been on the injured victim being directed on his injury rather than on his culpability. In the pursuit of social justice and the advancement of community care and responsibility, a new basis of compensation constructed on the concept of no-fault liability can be expected to address the above shortcomings of the tort system.

A NO-FAULT SCHEME

A no-fault compensation scheme, as an alternative compensatory model, made its appearance as a consequence of the critique of the tort system. The scheme provided an entirely new dimension to the civil justice system in dealing with the plight of accident victims by replacing the traditional notion of individual liability with a pragmatic concept based on the responsibility of the community as a whole. Some of these new schemes operated as complementary to the existing tort law, while others involved tort law being completely replaced by the new compensation schemes. A fundamental feature of the opted compensation model was that an injured person does not need to prove that an accident was due to the fault of another in order to receive compensation.

Essentially, there are two approaches to no-fault liability schemes: a pure no-fault liability scheme under which all motor vehicle accident victims receive benefits but in which the right of a person to bring an action for damages at common law is extinguished,⁵ or a modified or 'hybrid' **no-fault scheme** that operates in addition to a claimant's right to bring an action in tort for damages not covered under the scheme. Under a pure no-fault system, compensation for personal injuries and death resulting from an accident is paid out from a fund without the need for the injured victim or the dependents of a deceased victim to prove the fault or negligence of the other as being the cause of their loss. Fault was not a pre-condition to liability which was the essence in a suit for damages under the tort action. A distinctive characteristic of a pure no-fault liability scheme is the abolition of the right of an injured person to bring a tort action for damages at common law caused by an accident.⁶ Compensation under a pure **no-fault scheme** is usually limited to economic losses, namely, for loss of earnings, both past and future, and medical and rehabilitation expenses. It excludes compensation for pain and suffering. Entitlement to benefits under such schemes is usually confined to limits where ceilings are usually imposed for claims for loss of earnings and loss of dependency or support.⁷

A 'modified' or 'hybrid' **no fault scheme** involves a combination of both no fault and common law benefits. While providing guaranteed minimal benefits to every injured person regardless of fault, it retains the common law action by allowing claimants who could prove fault to pursue further a claim for damages through the courts for pain and suffering, loss of enjoyment of life and past and future loss of earnings. The claimant's right to be able to sue and recover common law damages in excess of no-fault entitlements will nevertheless be

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subject to the fulfilment of certain conditions.⁸ For example, a victim who suffers economic losses recovers no-fault compensation benefits up to a 'cap' or threshold established by the no-fault programme and in cases where his injury exceeds the threshold, the victim has the opportunity to recover further economic losses by bringing a tort claim against the negligent motorist for pain and suffering which losses are not covered by a no-fault system. The threshold can be expressed either in a quantitative monetary form ('monetary threshold') of the costs of the medical services the victim receives on account of the accident or it can be in the form of a qualitative 'verbal threshold' that describes the seriousness of the victim's injury. The scheme retains the victim's right to recover compensation for pain and suffering only in circumstances where the victim has incurred a 'serious impairment of body function'.⁹ In essence, hybrid **no-fault schemes** have been designed to deal with less serious cases on a no-fault basis while restricting common law claims to the more serious injuries.¹⁰ The Victorian and Tasmanian arrangements are fine examples of well-functioning hybrid schemes which provide immediate no-fault benefits, such as care, medical treatment and financial support while at the same time retaining some of the strong advantages of the common law compensation mechanism.

THE RECOMMENDED NO-FAULT SCHEME FOR MALAYSIA

A new basis of approach to compensation for accident victims is recommended to address the injustices perpetuated by the existing system. The move may involve radical changes in government policy and it necessitates the introduction of specific legislation to be called the Motor Accidents Compensation Act. The following are among the salient features to be incorporated in the proposed new Act to be introduced by the government. The hybrid or modified no-fault compensation scheme which is currently in operation in the State of Victoria, Australia will be the preferred choice of scheme. Such a scheme would guarantee minimum benefits to every person injured in a motor vehicle accident regardless of fault while at the same time, offers innocent victims the opportunity to have access to limited common law benefits. Hence, the law will preserve the right of those who could prove fault to pursue further a tort claim in court for damages for pain and suffering and loss of enjoyment of life subject, however, to a statutory maximum. The access will be restricted

only to those persons who have suffered serious injuries, thus eliminating all cases involving minor injuries which are dealt with on a no-fault basis. A qualitative verbal threshold will be set designed to limit tort action to the more serious injuries and unless the claimant meets the defined criteria for a 'serious' injury, he or she is precluded from bringing an against the defendant driver.

In principle, the hybrid scheme would involve a trade-off between no-fault and common law arrangements for injuries that result in permanent and serious physical impairments. While a system that offers only common law coverage can produce unjust results, a hybrid system which guarantees no-fault entitlements is able to combine the best of both approaches in one system. As a general rule, the major differences that exist in hybrid no-fault systems largely depend on the weight accorded to an innocent or non-negligent injured person's right to sue for pain and suffering against the limitations placed on those rights by the **no-fault scheme**. The new scheme shall endeavour to balance the rights of the innocent injured person with the need for no-fault benefits. It is proposed to apply exclusively to matters relating to compensation arising from motor vehicle accidents, thus removing and preventing reliance on the provisions of any existing written law which is found to be inconsistent with the Act. The statutory provisions will prevail despite any term to the contrary found in any contract or agreement.

MANAGEMENT OF THE SCHEME

A Motor Accident Corporation ('the corporation') will have to be created pursuant to the provisions of the Act. The purpose of the corporation would be to establish, administer and operate a motor vehicle accident compensation scheme in respect of death or personal injury arising from or as a result of a motor vehicle accident that occur in the country regardless of fault, allowing limited common access to common law rights. The corporation will set out the available benefits and prescribe the rates of compensation to be paid and will work to ensure that appropriate compensation is delivered as expeditiously as possible and in the most socially desirable and economically feasible manner with minimum formality placing its emphasis on effective rehabilitation of claimants who suffer serious impairments and disabilities. The corporation will be a body corporate, having perpetual succession and a common seal and may sue and be sued in its corporate name. It will have extensive powers with the capacity of doing all acts and things which bodies corporate may normally by law be allowed to do and which are considered necessary or expedient in the proper performance of its functions and exercise of its powers.

Being a statutory body, its powers and functions will be defined by the Act. The corporation will be responsible to a relevant Minister who will be answerable to Parliament for the performance of its functions and in the exercise of its powers. The Minister must have regard to the public interest and, in particular, the interests of all stakeholders, namely, taxpayers, motor vehicle levy payers, claimants and potential claimants and the government. Operating as a commercial insurer, the corporation will be tasked to be managed efficiently, effectively and fairly, while at the same time demonstrating independence, transparency and accountability for all its actions and decisions. Strict supervision is crucial in scrutinising its operations and the appointment of a person like the Auditor General of the Government to perform this role would be most appropriate. The outcome of its activities and financial performance must be published in its annual reports made available in its official website for public inspection and scrutiny.

A remarkable feature of the scheme is that the corporation will enjoy the status of a monopoly public-provider conferred with the sole authority of issuing no-fault motor vehicle accident insurance policies to all registered motor vehicle owners in respect of death or personal injury arising as a result of a motor vehicle accident. Involvement with the private sector or insurance companies is strictly discouraged. The potential benefits, if any, of a privately operated scheme must be weighed against the potential for problematic consequences resulting from private providers and the business' primary objective to maximise profits at the costs of community welfare. Pursuit of self-interest and risks associated with business may create financial problems that generate uncertainty in the uninterrupted supply of services forcing the government, in the public interest to eventually come to their rescue.¹¹ They operate on a large scale, avoid duplication of services and wastage of resources and maintain a fair balance between maximising community welfare and financial viability. Being profit orientated, private insurance companies will frustrate the very purpose of the corporation's goal of serving the community. Community interest is likely to be harmed with business interest taking precedence over public benefit and in the absence of regulatory groups to monitor their activities, there is likely to result a lack of accountability on the part of the board of directors to the public. The New Zealand, Victorian and

Tasmanian schemes are operated by state owned corporations.¹² Moreover, being a sole-provider and engaged on a much larger scale, the corporation would tend to reap the economies of large scale production the benefits of which can be passed on to motorists in the form of more attractive benefits at lower charges.

It will be the duty of the corporation to design and promote a program to secure the early and effective medical and vocational rehabilitation of persons who have been injured with serious impairments and disabilities. The rehabilitation or disability services may be provided by the corporation or by any person or body acting on its behalf. It will also provide assistance in finding suitable employment for injured persons so that they can return to normal life as soon as practically possible. A board of management will be set up, entrusted with the overall responsibility of ensuring proper management of the corporation. The board will stipulate general directions as to the performance of the Corporation's functions and the achievement of its objectives. The membership of the board would consist of not less than four, and not more than seven directors appointed by the Chairperson, nominated by the Minister. It must include among them a member who had been in practice as an advocate and solicitor to provide advice and guidance on matters involving legal issues. To complement the board, a panel of doctors would also be appointed.

BENEFITS UNDER THE SCHEME

The proposed scheme will provide benefits to all persons who have suffered personal injury, and in the case of death, loss of dependency or support as a result of a motor vehicle accident. The entitlements under the scheme are provided automatically regardless of who was responsible for the accident thus avoiding the need for costly and potentially stressful and lengthy litigation in order to obtain compensation. Victims who suffer injuries as a result of their own negligence will be treated in the same manner as victims who are injured through the negligence of others. The entitlements would include benefits for loss of earnings and loss of earning capacity, death benefits, medical and rehabilitation costs and cost of nursing care in appropriate circumstances. Benefits are also available to the spouse and dependants of a deceased person. Information on the schedule of available benefits provided under the scheme will be given wide publicity in the media and in the corporation's official website to allow injured victims to be aware of their rights and entitlements under the scheme.

Loss of earnings benefits will be payable based on the injured claimant's monthly wages at the time of the accident. Those who derive earnings from commissions, profits, and part-time earnings would have their average monthly loss calculated by reference to earnings over a period of 12 months. Their income tax returns declared by the claimant to the Inland Revenue Department would be a good indicator of their earnings. Since coverage of persons under the scheme would be wider where benefits are extended to all injured persons on a no-fault basis, it is only prudent that limits be placed on the extent of these benefits in comparison to fault-based tort benefits. Monthly loss of earnings compensation will be payable up to a maximum of 80% of pre-accident loss of income throughout the period of the disability.¹³ The reduction is necessary as it acts as an incentive to injured victims to exercise their own initiative and responsibility to speedier recovery to make an early return to work.¹⁴ It also represents the savings from expenses incurred during the injured person's employment. There will also be a limit on the maximum amount payable on the claimant's loss of earnings. The corporation would not replace a claimant's monthly loss of earnings beyond twice the average per capita income for the nation published by the International Labour Office.¹⁵ Annual adjustments in the payment of benefits will be made to reflect the movements in the consumer price index.

Those with earnings beyond the capped amount would be expected to insure the excess earnings privately through, perhaps, a personal accident policy, something that a considerable number of high income earners already do through private personal accident or disability insurance. Non-earners, like children, students, housewives and retirees would not qualify for loss of earnings benefits. However, those who are temporarily unemployed may qualify to receive benefits if they are able to produce evidence in support of their claim. There will be a minimum waiting period of one month after the accident before payments begin and employers should be responsible for paying loss of earnings suffered by the injured employee during this period.¹⁶ The proposed Act would also stipulate the duration for the payment of compensation related to the claimant's age. The entitlement for loss of earnings would end when the claimant attains the national retirement age of 60 years, which is currently applicable to both public and private sector employees. The minimum retirement age for private sector employees has been raised to 60 years as well.¹⁷

Under the proposed Act, all expenses reasonably and necessarily incurred by the injured person or on his behalf for the provision of medical treatment in any government hospital or a hospital which has been approved by the corporation situated within Malaysia would be payable by the corporation. Treatment sought at hospitals situated outside Malaysia will not be covered by the corporation. The medical treatment would cover the following: medical or surgical treatment by or under the supervision of a medical practitioner; therapeutic treatment obtained on the advice of a medical practitioner; psychological services provided by a registered psychologist; dental treatment by a registered dentist, an examination, test or analysis carried out on an injured person at the request of the registered medical practitioner, psychologist or dentist and the provision of a report of such an examination, test or analysis. It would also cover mental injury or nervous trauma suffered by an injured person as a result of a physical injury. However, secondary victims, who suffer purely mental injury as a result of witnessing an accident to another, would be excluded from coverage. Their remedy is to claim damages for nervous shock at common law from the civil court. The benefits would also include the payment for nursing care reasonably required for an injured person and expenses incurred for the provision of artificial limbs or prostheses, medical or surgical aids or appliances which are necessary to alleviate the effect of the personal injury. Reasonable transport expenses incurred by the injured person for the purposes of obtaining medical treatment are also payable.

An outstanding feature of the modern compensation models is the provision of rehabilitation¹⁸ and long term care and assistance to accident victims thus resulting in a significant transfer of resources towards the prevention of accidents¹⁹ and minimisation of its consequences through rehabilitation.²⁰ A care-based scheme would be fundamentally different from a compensation model which is concerned with making good a loss as far as possible with money aimed at restitution. It is backward looking. Whereas, a care-based model, on the other hand, is concerned only with the present and the future of the accident victim by the provision of services and long-term attendant care aimed at maximising recovery and alleviate suffering. A major component of a care-based system is rehabilitation. This trend has been observed in both the New Zealand and Australian schemes.²¹

Rehabilitation of the injured person would be a significant component of the corporation's function. Rehabilitation services will be provided to the injured person depending on the nature of injuries in order to assist in restoring the injured person to return to a normal life as expeditiously as possible. To avoid financial worries and emotional distress during the rehabilitation process, the corporation ensures that the claimant receives a fair weekly compensation. It will be necessary for assessments to be conducted at regular intervals by the corporation aimed at monitoring and evaluating the progress of the claimant to the treatment and in determining whether he would require further rehabilitation. Under the scheme, death benefits will be payable where a deceased person is survived by one or more dependants but payment will be limited to a defined period of time. The surviving spouse will be paid a monthly compensation from the date of death at the rate of 80% of the loss of earnings of the deceased person for a specific duration. The deceased's living expenses at the time of his death will be deducted from his monthly earnings before loss of dependency or support payments are made to the dependants. The corporation will only take the amount relating to the deceased's earnings at the time of death and will not take into account any prospect of future earnings of the deceased person being increased. A funeral grant to cover burial and cremation expenses will be paid to the lawful widow of the deceased or the personal representatives of the deceased together with a sum as bereavement. There will be a payment for bereavement but this will only be for the benefit of the spouse of the deceased and where the deceased person was a minor and never married, it will be for the benefit of his or her parents.

There are, however, certain situations in which compensation will not be paid by the corporation: where compensation is payable under the Employees' Social Security Act 1969 to a person in respect of an injury or death resulting from a motor vehicle accident which has arisen in the course of employment, the claimant will be excluded from similar benefits under the scheme. Compensation under the SOCSO scheme covers accidents that happen while travelling to and from home to an employee's place of employment.²² The same prohibition will apply to exclude the case of a workman who receives comparable benefits under the Workmen's Compensation Act 1952.

Benefits will be excluded to an injured person who was involved in an accident as a driver or passenger in a motor vehicle while participating as a spectator, official, organiser or was in any way assisting in an organised motor-car race or a speed trial. Under these circumstances where the injured person was involved in

an activity that is dangerous, he or she is understood to have freely and voluntarily consented to the obvious risks that flow from the person's participation and would therefore be expected to have personal protection against such incidental risks. Moreover, it is often the contractual duty of event organisers to shoulder responsibility for such foreseeable risks of harm resulting from such an event and provide the injured participants the necessary cover. The same principle would extend to apply to a person who engages in a conduct that creates a substantial risk of injury and recklessly ignores that risk, notwithstanding whether the injured person is a driver, passenger, pillion rider, pedestrian or cyclist. This would include offences for causing death by dangerous and reckless driving under the Road Transport Act 1987. It is an offence to drive while under the influence of intoxicating liquor or drugs and where the injured person is convicted of such an offence under the Road Transport Act 1987, he or she will not be entitled to certain benefits like loss of earnings while other benefits like medical and rehabilitation benefits will be reduced.²³

The exclusion will also extend to include persons found driving an unregistered or uninsured motor vehicle on private land.²⁴ Coverage is limited to injuries that result from an accident on a public road which is accessible to all motorists. Accidents must be reported to the police. Where the registration fee or road tax has been unpaid for a period six months or more or where the driver was unlicensed or the vehicle was uninsured, coverage may be excluded. A person who, at the time of the accident was found not to have been wearing a seat belt or safety helmet as required under the Road Transport Act 1987, the loss of income payable to the person will be reduced by an amount ranging from 15% to 25% of the statutory amount otherwise payable. This will not be applicable to persons who have been exempted from wearing a seat belt or safety helmet under the Road Transport Act 1967.

Nonetheless, where an injured person receives contractual monetary benefits or compensation from a personal accident insurance policy taken from a private insurer or any sum paid out of any statutory fund or otherwise, in addition to the statutory benefits provided under the scheme, the value of such contractual benefits will not be taken into consideration when assessing the compensation to be paid by the scheme.²⁵ People are encouraged to take additional insurance to protect them from personal injury and death as the scheme operates as a community welfare scheme providing extensive coverage with reasonable but guaranteed benefits to all persons injured in motor vehicle accidents.

Instead of denying victims the right to redress the wrong done to them, the proposed scheme partially retains the individual's right to sue and recover common law damages that are excluded under the statutory scheme while at the same time ensuring that basic protection was guaranteed to every injured person under a no-fault liability scheme. The scheme being in the nature of a hybrid compensation system where both no-fault and common law benefits co-existed, balances the rights of the individual with that of the community. Every injured person was entitled to benefits notwithstanding fault and those who suffered injuries due to the fault of another and could prove that the fault was permitted to pursue further a common law claim through the court for damages for pain and suffering, loss of enjoyment of life and loss of earnings, benefits which were not available under the statutory **no-fault scheme**.

The proposed Act would allow the injured claimant restricted access to the Accident Compensation Court established under the Act for benefits that are supplementary to those provided under the **no-fault scheme**. Their common law right to sue the alleged negligent motorist or the party responsible for the accident for recovery of damages under the law of torts will however be subject to the legal and evidential burden of proof of fault. Access to the court may however be limited to the following circumstances:

- (a) the corporation is satisfied that the injury suffered by the claimant is a serious injury; and
- (b) issues to the claimant a certificate in writing consenting to the bringing of the proceedings; or
- (c) the court, on the application of the claimant, grants leave to bring the proceedings. A copy of the application must be served on the Corporation and on each person against whom the applicant believes to have a cause of action. On the part of the court, it must not grant leave to commence proceedings unless it is satisfied that the injury is a serious injury.²⁶

To constitute 'serious injury', the claimant must have suffered permanent total body impairment in excess of 30% as a consequence of the injuries sustained in the accident. A certificate will have to be issued by the corporation confirming the degree of impairment which must be attached as an exhibit to the claimant's application to the court for leave to file the action. Guidelines for the assessment of injuries and the degree of permanent impairment resulting from those injuries may be adopted from the American Medical Association

Guides and the World Health Organisation's International Classification of Functioning, Disability and Health. Claims for damages pursued under common law will be restricted to pain and suffering and loss of amenities and the Act will further stipulate a ceiling on the maximum permissible amount. A study of the guide on judicial awards on personal injury prepared by the Bar Council Malaysia, indicates that the award for the most serious type of injuries, namely, a fracture of the vertebra causing paraplegia ranges from RM180,000-RM250,000 depending on the degree of severity and for a person who as a result of a brain injury, is completely bedridden with awareness, the award ranges from RM250,000 to a maximum of RM300,000. Following this guide, it would not appear unreasonable to limit the jurisdiction of the court in awarding damages under this head to a maximum of RM300,000.

Persons suffering from minor injuries are therefore excluded from common law damages. Compensation for exemplary or punitive damages is also excluded. Being a negligence action, the claimant will be required to prove the element of negligence or fault on the part of the offending driver as well as causation, damage and foreseeability of harm as a precondition to liability and compensation. The award of damages to a claimant will be proportionately reduced by the extent, if any, of his share of responsibility for the accident and the amount recoverable from the corporation by way of indemnity will be reduced by the same proportion.²⁷ All claims will have to be filed at the corporation, which will set up a separate division to administer common law actions. The corporation will therefore act as a 'one-stop' centre for all road accident claims. A registrar of the court will be appointed to be in charge of all administrative matters involving common law claims and he will report to the judge of the Accident Compensation Court, who will assume overall responsibility for all administrative and judicial matters of the court.

THE ACCIDENT COMPENSATION COURT

A prominent feature of the Act would be the establishment of a court, to be known as the 'Accident Compensation Court'. The court will have exclusive jurisdiction over all matters concerned with compensation arising from motor vehicle accidents in the country, thus removing the jurisdiction of the civil courts over such matters. The court will hear and determine claims from qualified claimants for damages for pain and suffering and loss of amenities under the law of negligence. It will also determine appeals from any person who is dissatisfied with a decision of the corporation. The corporation may, on its own volition refer to the tribunal any matter affecting the right of any person to a benefit, or the amount of a benefit.

The court will be presided by a judge. To be qualified to be appointed as the judge, a person must for seven years preceding the appointment, be an advocate and solicitor within the meaning of the Legal Profession Act 1976 or be a member of the judicial and legal service of the country. The judge will hold office for a term not exceeding three years and will be eligible for reappointment upon the expiry of the term of office but he or she must not be appointed for more than two consecutive terms. The proposed Act will define the role and function of the court and set down broad rules and regulations for its proper administration. Where it is silent and where the matter has not been expressly provided for, the judge may regulate the procedure and proceedings of the court as he or she thinks fit, and make rules governing such procedure and proceedings.

A timeframe will be set for an aggrieved person to refer a matter to the court. A person who is dissatisfied with a decision of the corporation must within 30 days after being notified of the decision, refer the matter to the court which will hear the matter and make such determination as it considers just and proper in the circumstances. Any decision of the court will be binding on the corporation. The judge, claimant, lawyers, officers of the court, witness or other persons appearing before the court would have the same privileges and immunities from action and prosecution as if the proceedings were proceedings of a sessions' court. In the event an agreement is reached between the parties during the proceedings before the court or before proceedings are commenced, the judge will record the terms of the agreement as a consent judgment. Any award, decision or order of the court will be final and conclusive and cannot be challenged, appealed against, reviewed or quashed in any court of law. Before the court makes an award on a matter referred to it by the corporation or which had arisen in the course of proceedings, it may refer to the High Court any question of law and the court will then make its award in conformity with such decision.

FUNDING OF THE SCHEME

For the purposes of the Act, a fund will be established to finance the operation of the scheme. The fund will comprise of money earned from the sale of motor vehicle accident insurance policies; money earned from

any property, investments, mortgages, charges or debentures acquired by or vested in the board; indemnities recovered from any persons or corporations; and all other sums or property which may in any manner become payable to or vested in the board in respect of any matter incidental to its powers and duties. The insurance policies will be purchased by motorists when registering a motor vehicle in the Federation of Malaysia. The policies will be issued by the corporation which undertakes to cover the insured policy holder and those driving the insured vehicle with his express or implied permission against injuries and death arising from a motor vehicle accident. The policy will extend to cover injured passengers and pillion riders, in the event of a motor vehicle accident.

However, damage that is caused to the insured's motor vehicle and damage caused to another's motor vehicle or property, including theft of a person's motor vehicle will not be covered by the policy. Motorists requiring additional comprehensive coverage, including liability insurance for damage to vehicles and other property, and top-up insurance or takaful cover for life or personal accident coverage will have to purchase them from private insurers. It should be noted that the scheme is designed to provide adequate protection and not full compensation for loss and injuries suffered. In addition, the Scheme will be funded by a fuel tax where a premium is paid on a percentage of the amount of litres of petrol and diesel purchased at the petrol kiosks which premium will be incorporated in the price of the fuel like all indirect taxes levied, for example, on cigarettes and liquor. The Inland Revenue or the Customs and Excise Department will be the relevant authority responsible for collecting the fuel tax proceeds from petrol kiosk owners and transferring the amount to the fund. A part of excise duty on petrol and diesel representing, for instance, two cents for every litre of motor fuel in which duty is payable shall be paid from Ministry of Finance/Treasury to the corporation.²⁸

The 'pay-at-the-pump' concept is based on the premise that the primary determinant of accidents is the miles driven. The fuel charge would impose costs on those who drive more and hence more likely to be involved in accidents. It equates partly the costs of the scheme to the miles driven by the motorists. However, opponents to a fuel tax argue that miles driven do not play a major part in the cause of accidents. They argue that such a system tend to treat all drivers alike by making the amount of petrol a person uses as a determinant of the likelihood of the person being involved in an accident. The driver's driving experience, driving record and the type of vehicle that the person uses are not taken into consideration. Public buses, school buses and taxis are all treated the same. Drivers and passengers in small engine capacity vehicles that consume less petrol than multi-purpose vehicles, vans and buses are more likely to suffer serious injuries in a collision. Besides, such a system tends to place a burden on those who have to drive long distances to get to work. It does not make a distinction for such drivers who could end up paying much more than those living and working in cities where claims could be higher because of the congestion in city areas compared to the suburbs.

Despite these objections, such a system of collection of funds would have the support of environmental activists, advocates of public transportation and those concerned with promoting energy-efficiency as such a system tend to discourage driving, encourage the purchase of more fuel-efficient vehicles and persuade people to commute using the public transport system.²⁹ The fund will include appropriations made by the government to cover the costs of injuries suffered by pedestrians, passengers, pillion riders, students, housewives and non-motorists. This portion of the appropriation may come from a fraction of the premiums or charges (road tax) payable by the owners of registered motor vehicles when renewing the road tax on the vehicle and fees paid by holders of driving licences and renewal of driving licences of drivers plus fees from the issue of provisional driving licences.

To generate additional income from its surplus funds, the board may invest moneys belonging to the fund in the following manner: to be deposited in Bank Negara Malaysia or in commercial banks duly licensed under the Banking and Financial Institutions Act 1989; to be invested in shares of any public company listed on the Malaysian stock exchange and the purchase of new shares; or debentures of any public company; in Government Securities and Bonds; and, with the written approval of the Minister, invest in any other form of investment. The scheme should be managed and operated to be self-sufficient and to be fully funded. A grace period of ten years may be allowed for the scheme to stabilise its operations and achieve self-sufficiency. The revenue collected from the proceeds of the sale of insurance policies, fuel tax proceeds, revenue from indemnities recovered from any persons or corporations who were liable for the accidents, and income gen-

erated from investments of its surplus funds should be sufficient not only to cover the annual costs of injuries but also the future costs of longer term injuries.

LIABILITY OF THE CORPORATION TO INDEMNIFY

It will be the statutory duty of the corporation to indemnify the insured owner or driver of a registered motor vehicle under the policy of insurance issued by the corporation in respect of any judgment obtained by a person for damages for pain and suffering against the insured or driver in respect of bodily injury and death to a person arising out of a motor vehicle accident. The judgment creditor is entitled to automatic recovery of the judgment sum from the corporation and its liability to satisfy the judgment sum will not be affected by the death of either the insured or driver or, in the case of a corporation, which has been wound up, before the proceedings have commenced.

The corporation may undertake the settlement of any claim. In doing so, it will have to take into consideration a number of factors when assessing a claim for compensation for pain and suffering for the purpose of making a formal and realistic offer to settle the claim for a specified amount to the prospective plaintiff. Such factors will include: the nature, extent and combination of injuries, the extent and duration of the injuries, and the effect the injuries would have on the plaintiff's lifestyle. In its offer of settlement, the corporation may include a time limit for acceptance. It is envisaged that most matters will be amicably settled by the parties thus diluting the number of matters that are eventually left to be litigated in court. Where an agreement has been reached between the parties concerned on the quantum of award, a release or discharge document will be sent to the plaintiff or his lawyer outlining the terms of the settlement and requiring the plaintiff to release the defendant and corporation from any liability for the plaintiff's injuries and relinquish any rights to pursue a further personal injury claim arising from the motor vehicle accident against them. The corporation will not be required to pay interest on the settlement amount for pain and suffering and loss of amenities.

However, in the event the matter is litigated, the corporation will be required to pay interest both, pre-trial from the date of the accident to the date of the commencement of the proceedings and on post-judgment until the date of full payment of the judgment sum.³⁰ The corporation will defend or conduct such proceedings in the name of the owner or driver and on their behalf, and, if need be, without their consent and it must indemnify them against all costs and expenses incidental to any such proceedings.

A person (the indemnifier) is liable to indemnify the corporation for statutory benefits paid to another person in relation to death or bodily injuries arising from a motor vehicle accident if the accident involved a motor vehicle registered in a foreign jurisdiction and the indemnifier under common law has been liable in damages in tort for the death or injury arising from the motor accident. The same would apply to a driver of an unregistered motor vehicle and a driver who has been convicted of an offence that involved intentionally, recklessly or dangerously causing the death of, or bodily injury to, a person or a person driving while under the influence of intoxicating liquor or a drug. The indemnifier's liability to the corporation would be reduced in proportion to the injured person's liability on account of contributory negligence. The corporation may recover an indemnity under this section as a debt owed to the corporation by the indemnifier.

LIMITATION PERIOD

A claim for benefits should be made as soon as it is practicable after the date of the accident giving rise to the claim and a timeframe will be prescribed for such claims. The corporation may refuse to consider a claim made later than six months after the accident and in exercising its powers under the Act, it may consider the circumstances of a particular claim and where it considers fit, extend the time limit for the claim to be made. The corporation shall however refuse to consider claims for benefits made after the expiry of three years from the date of the accident giving rise to the claim.³¹

CONCLUSION

Tort's purpose of awarding damages aimed at restoring the injured claimant to the position he had been in had the relevant tort not been committed, known as the principle of *restitutio in integrum* will not be practical under the new scheme. Instead, consistent coverage and guaranteed minimum benefits, care and support would be made available to injured victims in an expeditious and problem-free fashion rather than ensuring that the claimant is given full and fair compensation for his injuries. The same money that would otherwise be fed into a tort system with all its weaknesses will be diverted away from the system and made available to

accident victims expeditiously with a minimum of formalities.³² Being an Act aimed at promoting social justice and overall welfare of its injured citizens, individual and private interest must to some extent be compromised for the public benefit and greater good of the nation. It is therefore vital that everyone play a positive role in contributing to bring about the transformation in the legal structure of compensating injured claimants when the nation initiates a move away from the traditional moral based fault regime towards a social justice **no fault scheme**.

The emphasis of the **no-fault scheme** will be on the injury suffered by the claimant and to put in place a redress mechanism that would allow the claimant's concerns to be addressed in a speedily, inexpensive and effective manner without investigating into the blameworthiness of his conduct. Claimants are spared the risks involved in litigation and the uncertainties in the outcome of their claim. The strict court rules and procedures which compound the difficult task of having to prove fault is no longer necessary. It will remove the financial hardship and distress to the families of unfortunate accident victims during the period of incapacity with guaranteed benefits enabling them to preserve their quality of life and human dignity. The savings that result from excessive administrative costs and legal fees can be passed on to be enjoyed by claimants in the form of improved benefits at lower cost. The backlog of cases that clog the courts will be reduced drastically to free court staff to attend to other matters. The injured claimant would receive immediate attention to his medical and rehabilitation needs. The new scheme will extend its coverage of benefits to all injured persons, including the insured driver, his permitted driver, motor cyclists and pillion riders, passengers and drivers, family members and friends travelling in a vehicle, including passengers taking free lifts and those self-employed persons travelling under a contract for employment and not travelling pursuant to a contract of employment who have all been excluded under the present fault system. If society in the last century, and in Malaysia 43 years ago, had demonstrated its willingness to accept responsibility for injured workers and surrender its right to prosecute the alleged negligent employer, it can be said that it is very likely that a society in today's modern era holding firm beliefs of an injured individual's right to receive immediate care and treatment to alleviate financial hardship and suffering coinciding with community's responsibility to provide such care, would readily accept an extension of the no-fault liability coverage to include motor vehicle accident victims.

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3 The Consumer Association of Penang, a strong campaigner of consumer rights in the country, in expressing dissatisfaction with the present fault based compensation scheme, in a strongly worded press statement, had reasserted its position calling for the scheme should be scrapped and be replaced by a no fault liability system. See: Consumer Association of Penang, *No Fault Liability is the Better Scheme*, Press Statement, 15 September 2011. Official Website at <http://www.consumer.org.my>. See also its earlier Press Statement, *Clear the confusion over motor policy*, issued on 18th May 2011.

4 Report of the Committee of Absolute Liability 1963, New Zealand, para 5, Appendix G, p 44; Puteri Nemie Jahn Kassim, 'Medical Negligence Litigation in Malaysia: Whither Should We Travel' *The Journal of Malaysian Bar*, (2004) xxxiii No 1.

5 Allen M, Linden, *Canadian Tort Law*, (4th Ed), Butterworths, 1988, at p 589.

6 A similar provision is found in s 317(1) of the present Accident Compensation Act 2001, New Zealand (formerly known as the Injury Prevention, Rehabilitation, and Compensation Act 2001).

7 A comparable scheme was introduced in Australia by the Northern Territory Motor Accidents (Compensation) Act 1979. The Canadian provinces of Quebec and Manitoba have similar arrangements. See Quebec's Automobile Insurance Act 1977 RSQ Chapter A-25, s 83.57, ss 5-6; and ss 72-73 of the Manitoba Public Insurance Act 1994. See also Schnoor, J, 'No-Fault Automobile Insurance in Manitoba: An Overview', (1998), *The Manitoba Experience*, 33.

8 Victoria has restricted access to common law damages to cases involving serious injury which has been defined by the Act to mean a degree of impairment of 30% or more or a serious long-term impairment or loss of body function or permanent serious disfigurement. See s 93(3) of the Transport Accident Act 1986, Victoria, Australia.

9 Gary T Schwartz, 'Auto No-Fault And First Party Insurance: Advantages and Problems' (2000) *South California Law Review*, Vol 73 at p 611. www-rcf.usc.edu/usclrev/pdf/073303.

10 Similar hybrid schemes operate in Tasmania, Australia (s 22 of the Motor Accidents (Liabilities and Compensation) Act 1973 and Saskatchewan. However, since 2003, Saskatchewan permits customers to choose between fault and the modified **no-fault scheme** for their vehicle insurance. See Marc Gaudry, 'DRAG Model-based Aggregate Road Safety Targeting and Policy Evaluation in Quebec', (2005), University de Montréal, Version 4, pÅ 3.

11 See for example the collapse of two of Australia's major insurers, the HIH insurance group (which was probably the largest public insurer in Australia, taking about 30% of the market) and United Medical Protection (UMP) referred to by Harold Luntz, *The Australian Picture* [2004] Legal Studies Research Paper No 78, The University of Melbourne. <http://ssrn.com/abstract=556924>

12 Mathew Hitzhusen, 'Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?' (2005) *Arizona Journal of International & Comparative Law*, Vol 22, No 3, p 649. See also Ambiga Sreenivasagam, 'Memorandum on the No-Fault Liability Scheme' (2007), Bar Council Malaysia.

13 This ends the much criticized practice of paying damages in one lump sum, the only form of compensation known to the common law. See also paras 12 and 293 of the Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967), more commonly known as the 'Woodhouse Report'.

14 Ken Oliphant, 'Beyond Woodhouse: Devising new principles for determining ACC Boundary Issues', (2004) 35 *VUWWLR*, 915 at p 931.

15 The current average monthly wage rate for the year 2011 is USD961 (RM2,931 at exchange rate: 1 USD = RM3.05). Source: International Labour Organisation. Accessed: <http://www.ilo.org>

16 Employees are entitled to 14-22 days of paid sick leave and sixty days of hospitalisation benefits under s 60F of the Employment Act 1955.

17 Section 4(1) of the Minimum Retirement Age Act 2012. The Act is expected to come into force from 1 July 2013.

18 Complete rehabilitation, both physical and vocational, has been cited by the Woodhouse Report as among the five guiding principles that an award of compensation to injured persons under a no-fault compensation scheme would be required to conform. See Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967), paras 4 and 55. Rehabilitation of the injured aim to achieve a reasonable quality of life through the provision of benefits that seeks to restore the claimant's health, independence, and participation to its maximum.

19 In Malaysia, the Road Safety Department, established in 2004 as a leader in road safety advocacy to increase the awareness among road users on the importance of road safety.

20 See also the Woodhouse Report's third guiding principle for the proposed system that stresses physical and vocational recovery of its injured citizens. Part 2, para 55.

21 See Mark Anthony Robinson, *Accident Compensation in Australia: No-Fault Schemes*, Legal Books Pty Ltd 1987 at p 77.

22 See s 24 of the Employees' Social Security Act 1969.

23 See ss 41-45 of the Road Transport Act 1987 for driving offences.

24 An 'unregistered motor vehicle' is a motor vehicle which has never been registered under the Road Transport Act 1967 and in respect of which the prescribed registration fee under the Act was not paid.

25 See a similar provision in s 62(i)(a) of the Transport Accident Act 1986, Victoria.

26 See s 93(3) of the Transport Accident Act 1986, Victoria, Australia.

27 See also s 12 of the Civil Law Act 1956.

28 In New Zealand, to finance the cost of entitlements for motor vehicle injuries, a petrol levy of 9.9 cents per litre is paid annually by the government to the corporation. Charging a levy on petrol makes it affordable to those on low incomes. Those who do not register their vehicles cannot avoid the petrol levy. Owners of two or more vehicles who do not use more than one vehicle at a time are not unnecessarily burdened. It also allows those on low incomes and retirees to alter their behavior to reduce levy payment. See: Minister for Accident Compensation Corporation, 2012/13 ACC Levies, New Zealand Department of Labour. Accessed: <http://www.dol.govt.nz>.

29 See Stephen D Sugarman, *'Pay at the Pump' Auto Insurance: The California Vehicle Injury Plan (VIP) for Better Compensation, Fairer Funding and Greater Security*, Institute of Governmental Studies Press, University of California, Berkeley, 1993, Chap 3, pp 15-19.

30 The rate of post-judgment interest may be left to be determined by the judge from time to time according to prevailing market rates. The practice under O 42 r 12 of the Rules of Court 2012 may be adopted. The post judgment interest rate was reduced from the traditional 8%-4% since 29 June 2011 but increased to 5% effective 1 August 2012 vide Practice Direction 1/2012.

31 See s 7(5) of the Civil Law Act 1956 the limitation period for a dependency claim is 3 years from the date of death. However, for a personal injury claim, the limitation period is 6 years -- s 6(1)(a) of the Limitation Act 1953. Section 22 of the Motor Accidents (Liabilities and Compensation) Act 1973 of Tasmania limits claims to be filed within 3 years from the date of the accident.

32 See Geoffrey Palmer, 'Accident Compensation in New Zealand: Looking Back and Looking Forward'(2008), NZ Law Review, p 81.