Submission No 29

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary

The New South Wales Bar Association

NEW SOUTH WALES BAR ASSOCIATION
SUBMISSION TO
THE LEGISLATIVE COUNCIL STANDING COMMITTEE
ON THE
INQUIRY INTO PERSONAL INJURIES COMPENSATION LEGISLATION

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1. EXECUTIVE SUMMARY

1.1 The NSW Bar Association welcomes this inquiry into the operation of the legislation enacted in the years 1999-2002 which limited the rights of severely injured people to bring actions for damages.

1.2 The principal legislation to be examined by the Committee is the *Motor Accidents Act 1999*, the November 2001 amendments to the *Workers Compensation Act 1987* and the *Civil Liability Act 2002* (collectively 'the 1999-2002 legislation').

1.3 The 1999-2002 legislation sets up three inconsistent underwriter driven regimes for awarding compensation. These inconsistencies should be removed and one standard for the award of damages for personal injury should be enacted. Of the three schemes the Civil Liability Act most closely represents current community standards for the making of damages awards. Even the Civil Liability Act operates in ways that Parliament could scarcely have intended and needs further review.

1.4 All of the schemes operate too harshly and exclude legitimate claims for damages which the community would expect to be met. Senior judges have commented adversely that the schemes are operating unfairly to bar the genuine claims of severely injured people. The insurers participating in these schemes are now earning sustained super profits from them.

1.5 The NSW Bar Association makes practical suggestions for reform. These reforms should begin to restore the community's confidence in the coherence and fairness of the law relating to personal injuries in this State.

1.6 The reforms proposed by the Bar Association are organised under the three areas of legislation. Although the *Health Care Liability Act 2001* has now been

incorporated into the *Civil Liability Act* 2002, the reforms relating to its operation have been separately identified here.

The Motor Accidents Act

Repeal of MAS is Needed

1.7 That consistent with principle, damages for non economic loss in motor accident cases be assessed in the same fashion as with all other personal injury claims. Section 16 of the Civil Liability Act should apply to motor accident cases.

1.8 In the alternative it is recommended that the 10% WPI threshold be reviewed downwards, given a history of scheme insurer profits which are approximately three times those projected on scheme commencement.

Limit the CARS System

1.9 Limit the CARS systems to only the most straightforward and simple of cases.

The Discount Rate

1.10 Return to the 3% common law discount rate as recommended by the Ipp Panel.

The Definition of a Motor Vehicle

1.11 Amend the definition of motor vehicle within the Motor Accidents Compensation Act so that it only includes insured or insurable vehicles (including Nominal Defendant liabilities) and trailers.

Other Transport Accidents

1.12 That all transport accidents other than motor vehicle accidents be dealt with under the Civil Liability Act.

Rescuers

1.13 That the nervous shock provisions (now incorporated in the Civil Liability Act) be amended so that rescuers present at the scene after an accident are entitled to

recover where they suffer serious psychological injury. Rescuers should not be penalised for the contributory negligence of the victim to whom they provide assistance.

Death Benefits for Parents

1.14 That a lump sum death benefit for parents who have lost children in motor vehicle accidents be introduced based on the UK scheme which currently provides for such damages.

The Workers Compensation Act

1.15 Change the thresholds for recovery of damages for pain and suffering and loss of enjoyment of life in workplace cases to bring them into line with Civil Liability Act damages thresholds.

1.16 Equalize the maximum sum awarded to injured workers for pain and suffering and loss of enjoyment of life with the maximum set under the Civil Liability Act.

1.17 Restore the right of workers to damages for past and future medical care, and other care.

1.18 Maintain the right of workers to damages assessed for past and future economic loss.

1.19 Maintain the abolition of exemplary, punitive and aggravated damages where injury or death to a worker is caused by negligence.

1.20 Ensure that workers rights to compensation for work-related injury are determined in open, in courts, with access to legal representation.

1.21 Make juries available to determine workplace injury claims.

1.22 Reactivate the system of Philadelphia arbitration to assist the resolution of less complex cases and improve ADR procedures in all cases.

Health Care Claims Under The Civil Liability Act

Section 5O

1.23 Section 5O of the *Civil Liability Act 2002* should be repealed.

Medical Investigation Expenses and Costs limits

1.24 Constraints on the recovery of costs in medical negligence cases should be reduced from the current limit of awards of up to $100,000 to awards up to $50,000. This is subject to the more general submission in relation to costs in point 1.27 below.

The Civil Liability Act

1.25 A system of periodic reporting by insurers on primary premium and claims data concerning their relevant operations in NSW should be introduced into the *Civil Liability Act 2002* modeled on similar provisions in the ACT *Civil Liability (Wrongs) Act 2002.*

1.26 The following provisions of the Civil Liability Act should be reviewed or repealed: Sections 5L, 5M, 5N, 44, 45, 50 and Part 3 and a broader review of the operation of the Act should be conducted.

Artificial Constraints on Costs

1.27 Artificial constraints on costs by the *Legal Profession Act 1987* be abolished and the question of costs be left to the trial judge, who is in the best position to deal with the matter on a case by case basis.

2. INTRODUCTION

2.1 Background

2.1.1 Both the criminal law and the law of tort help maintain our personal security. They both provide remedies to protect us from intentionally or negligently inflicted harm. They both deter future misconduct and support those injured by past wrongdoing. The criminal law does this by punishing offenders and the law of tort by matching wrongful injury with proper compensation. Underlying both is the idea that our common right to personal security must have a remedy.

2.1.2 Measures which may devalue our right to personal security need careful justification and should only be cautiously undertaken. Between 1999 and 2002 the New South Wales Government introduced a series of legislative measures which had the effect of devaluing the right to personal security of all citizens of this State, whether workers in industry, road-users, patients of medical practitioners or people physically injured by other intentional or negligent conduct. Subsequent experience of this 1999-2002 legislation prompts the conclusion that the enactment of many of these measures was neither carefully justified nor cautiously undertaken.

2.1.3 The New South Wales Bar Association welcomes the present inquiry into the operation of this legislation. This inquiry provides a timely Parliamentary review of its effects, which can already be assessed as excessive. However pressing may have seemed the reasons for enacting these various pieces of legislation at the time, it can now be seen on several measures, that the result was an overreaction. By denial of suitable remedies to those injured by wrongful conduct, parts of this legislation have unacceptably devalued our common rights to personal security.

2.1.4 Any manifestly just and equitable system of compensation aims to put a person injured by a wrongful act in the same position, so far as money can do, as if the

wrongful conduct had not occurred. This is what a common law assessment of damages for the benefit of an injured person seeks to do. Compensation for wrongful injury based upon this or analogous principles is a fundamental component of the rights of citizens in most developed societies. To the extent that the 1999-2002 Legislation modified this principle it did so by preferring the interests of policy holders, green slip holders or the reduction of accumulated debt in the workers compensation system, to the common law entitlements of the injured. An adjustment now needs to be made to restore some of the rights of the injured.

2.1.5 This inquiry presents an opportunity to recommend adjustments to the 1999-2002 legislation for the benefit of the whole community. To that end the Bar Association here advances some concrete and practical proposals. It is hoped that these proposals will command bipartisan support in the Parliament. The opposition parties in this State did not contest the passage of most of this legislation between 1999 and 2002. The problems identified below are therefore the responsibility of all Members of the current Parliament including the independents. The Government, however, is in the immediate position to take the initiative and to fix them.

2.1.6 The insurance industry was also a proponent of most of these same legislative changes during the period 1999-2002. The insurance industry should publicly acknowledge the obvious, that parts of this 1999–2002 legislation have operated excessively in its favour ever since enactment. This submission suggests that the insurance industry cannot consistently with its declarations of concern for the best interests of our community fail to acknowledge the unexpected way that this legislation has contributed to sustained insurance super profits. In this submission the Bar Association has attempted to frame adjustments to this legislation whilst being mindful of the need to maintain thriving liability insurance markets.

2.2 Structure of these submissions

2.2.1 This submission looks at aspects of the enactment and operation of the *Civil Liability Act 2002*. That Act represents something of a baseline for comparison of the just or unjust working of other legislative changes made in the 1999-2002 period. Parts of the Civil Liability Act have not fulfilled community expectations and have resulted in an imbalance of community detriment over any benefit sought from its enactment. The community's original expectations of this legislation would be better satisfied by making some adjustments to the Civil Liability Act now proposed by the Bar Association, made with the benefit of seeing the Act in operation for 3 years.

2.2.2 This submission also undertakes an analysis of other legislation passed in 1999-2002 and covered by the Committee's terms of reference, the *Motor Accidents Act 1999* and the November 2001 amendments to the *Workers Compensation Act 1987*. This other legislation is compared with provisions of the Civil Liability Act. Particular adjustments which need to be made to this other legislation are also identified. Making these adjustments will ensure that in this State, the right to personal security is restored to its proper value with full and effective remedies. This legislation is considered below in the order, the Motor Accidents Act, the Workers Compensation Act, health care claims under the Civil Liability Act and the Civil Liability Act.

2.2.3 The operation of the Dust Diseases Tribunal has not been considered in this submission for two reasons. First, the common law entitlements available within the Tribunal have not been the subject of major legislative reduction during the period under review by the committee. Second, the New South Wales Government is presently undertaking a review (the Sanderson-Glanfield review) of legal costs in the conduct of actions before the Tribunal. It is appropriate to await the outcome of that review before any useful submission could be made impacting on that jurisdiction.

2.2.4 The detailed provisions added in November 2001 into the *Workers Compensation Act 1987* creating new procedures for the determination of injured workers' rights are also not considered in this submission. The procedural problems arising from these 2001 amendments are real but would require a more specialised inquiry to deal with them. The New South Wales Bar Association's present submission on the Workers Compensation Act relates to questions of general principle, not questions of detailed administration of the Act.

2.2.5 This submission also does not address the impact of the recent amendments to the Civil Liability Act in relation to persons serving terms of imprisonment. Whilst the Bar Association has grave concerns about this legislation, those concerns should be considered with the wider questions of prisons policy rather than in this inquiry.

2.3 The Role of Barristers and the Bar Association.

2.3.1 The objects of the Bar Association (Constitution of the New South Wales Bar Association Clause 3.1 Statement of Objects) are relevantly 'to seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community' and 'to make recommendations with respect to legislation, law reform...'. The New South Wales Bar Association also promotes the interests of its members. In this submission it speaks in all these roles.

2.3.2 The Association is in a special position to contribute to the work of the Committee. The Association's members appear in court on a daily basis in legal controversies involving the recovery of damages for personal injuries. Every day barristers advise and appear for plaintiffs or defendants in such cases. Through that daily work they can see how these various legislative regimes impact upon the seriously injured. Barristers have also experienced the operation of the common law and statutory regimes which existed before the legislative

constraints which reduced the recovery of damages for personal injury were introduced during the period 1999-2002.

2.3.3 Of course members of the Bar Association earn income in the course of gaining the very professional experience which enables them to contribute to the work of this Committee. Barristers' paid (and pro bono) professional experience qualifies them to speak both about the rights of the seriously injured and about maintaining a sustainable system of compensation for wrongful injury in this State. Except perhaps through the union movement, those who are at risk of future injury in our society do not have representatives to speak for them as a group. Barristers are one of the few groups with the professional experience that enables them to do so in the current debate.

3. REACHING THE PRESENT SITUATION

3.1 Introduction

3.1.1 In order to better understand the issues which the Committee is considering, it is necessary to revisit some of the public debate which led to the passing of the 1999-2002 legislation and the subsequent commercial effect of that legislation.

3.2 Judicial Concerns and two Main Themes of this Submission

3.2.1 New South Wales has undoubtedly been the leading proponent among the States of Australia of the civil liability changes effected throughout many States of Australia in 2002. At the time of those changes the Chief Justice of New South Wales, the Honourable J.J. Spigelman AC, cautioned that after proper deliberation, a principled approach should be taken to the reform of civil liability in the area of personal injuries which was independent of the underwriter-driven special liability and compensation regimes which apply in this State with respect

to motor vehicles, industrial accidents, medical negligence and, to an extent, public liability. He warned in 2002[1]:

> An approach that restricts liability and damages in a principled manner is capable of resulting in the same degree of control of insurance premiums as that achieved by the special schemes. Such an approach would, in my opinion, achieve that result in a manner more likely to be regarded in the long term as fair and, therefore, to receive broad community acceptance.

3.2.2 The New South Wales Bar Association maintained during the debate in relation to the Workers Compensation changes of 2001 and the Civil Liability Act in 2002 that only principled reforms should be undertaken. The Bar advocated access to full common law entitlements, access to courts for their determination and access to independent legal advice and representation for the pursuit of those entitlements.

3.2.3 Despite the Chief Justice's warning, the *Civil Liability Act 2002* introduced a series of measures which excluded claims related to a particular category of risk or quantum of damage. A demanding threshold of impairment was introduced before entitlements to general damages could arise.

3.2.4 The Chief Justice of New South Wales is in a unique position to make observations about the fairness of this legislation as he is in a special position to observe the effects of its operation. Late last year, some two years after the Civil Liability Act came into operation, the Chief Justice made the following judgment about its operation[2]:

> In particular, the introduction of caps on recovery and thresholds before recovery – an underwriter driven, not principled change – has led to considerable controversy. The introduction of the requirement that a person be subject to 15% of whole or body impairment – that percentage is lower in some states – before being able to recover general damages has

[1] An address on 27 April 2002 'Negligence: The Last Outpost to the Welfare State'
[2] An Address on 14 September 2004, 'The New Liability Structure in Australia – Swiss Re Liability Conference'

> been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.
> ...
> Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation.

3.2.5 These extra judicial comments by the Chief Justice identify two of the fundamental themes of this submission. The first theme is that the community's sense of the coherence and the value of the law is diminished by inconsistency between underwriter-driven liability schemes. A genuine objective in future law reform should therefore be the restoration of overall consistency in all types of awards of compensation for personal injuries. The second theme is that legislated thresholds for the award of damages which operate to exclude claims for serious injury devalue our common right to personal security. The present operation of those thresholds should be now carefully scrutinized and reviewed with a view to downward adjustment. Some downward adjustment is urgently needed to restore fairness to compensation for personal injury in this State. The financial position of insurers indicates that there is ample scope for such downward adjustment.

3.3 The Position of Insurers

3.3.1 The theme of this section is that in propounding the 1999-2002 legislation, the insurance industry and the New South Wales Government made a classic managerial mistake which can now been seen very clearly in hindsight. They used a long term solution to address a short term problem. The long term solution was legislating away rights to compensation. The short term problem they were facing was some temporary tightness in the insurance market. The objective financial evidence that this was only a short term problem is now overwhelming. Here is what happened.

Background to the Civil Liability 'Crisis'

3.3.2 Much was made during the introduction of the *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002* as to a developing crisis in public liability insurance.

3.3.3 It is not disputed that there were significant increases in public liability insurance premiums during 2001 and 2002. However, the causative factors behind these increases were not well examined or explained at the time. It was far easier to blame a developing 'litigation culture' and 'Santa Clause Judges' than to look at the significant and, in many ways, unique factors which contributed to the sudden premium increases at the time. The Law Council of Australia warned in early 2002 of the complexity of the factors contributing to these increases. It cautioned a steady and principled reaction to the tightness in insurance markets. The Law Council of Australia's counsel was not heeded.

3.3.4 There were four significant factors which combined to culminate in significant increases in public liability insurance during 2001-2002.

The Cyclical Nature of Personal Injury Insurance

3.3.5 Public liability insurance is by its nature a 'long tail' business. Unlike property damage or home contents claims, resolution of the majority of cases takes upwards of three or four years after the insurance premium is first written. Indeed, catastrophic injuries involving infants may take many years to resolve.

3.3.6 An insurer is required to estimate at the time of writing the premium the amount that will be needed to cover all future liabilities including estimating the cost of those catastrophic children's claims when they finally resolve in five, ten or fifteen years time.

3.3.7 The actuarial guesswork tends to run in a cyclical pattern. Insurers will for a period underestimate their capital requirements for future claims and reduce

premiums in an effort to obtain market share. Once the actuaries recognise the impending shortfall, there is an over-correction and premiums are rapidly increased for a period. Further on in the cycle, actuaries will again determine that sufficient funds are available to cover future liabilities and again premiums are cut in pursuit of market share.

3.3.8 This cycle is typical not only of insurance markets in Australia but abroad.

The HIH Collapse

3.3.9 HIH was Australia's largest public liability insurer when it was placed into liquidation in March 2001. The HIH Royal Commission demonstrated that for years HIH had been writing public liability insurance premiums with little regard to ultimate claims costs or proper actuarial considerations. The business appeared to operate with little regard to the need to maintain adequate reserves to meet future liabilities.

3.3.10 To maintain cash flow, HIH was a market leader in discounting premiums. Other more responsible insurers in the market were nevertheless forced to try and match HIH price cuts to maintain some market share.

3.3.11 Unsurprisingly, with the collapse of HIH, the artificial depression in the market was removed. The remaining insurers acted to adjust premiums to more realistic levels.

The September 11 Terrorist Attacks

3.3.12 All Australian insurers rely upon international reinsurance to minimise their exposure to a single incident. The potential for massive payouts following a terrorist attack sent shivers through the international reinsurance market following 9/11. These concerns were passed on directly to Australian insurers with significantly increased reinsurance rates. These reinsurance price rises were in turn passed on to consumers via increased premiums.

Low Interest Rates

3.3.13 Insurers derive a profit in two ways. First, there is underwriting profit from insurance activity. Second, there is investment profit from using the money generated by writing premiums for the period between collecting the premium and paying any claims on that premium.

3.3.14 For long periods during the 1990's, record stock market returns ensured that insurers made significant investment profits. In those circumstances there was significantly less pressure on the insurer's underwriting division to also return a profit.

3.3.15 The most significant characteristics of 2001 and 2002 were that they were the only two years in the past 15 where the Australian stock market declined over the course of 12 months. Ordinary people had the experience of their superannuation funds returning negative growth. Insurers had no opportunity to make significant investment profits.

3.3.16 Under those circumstances it is little wonder that insurers perceived themselves to be facing an insurance crisis. Generating higher profitability out of their underwriting divisions became an imperative. Over the past 30 months all of the major Australian insurers have declared record profits.

3.3.17 The 'crisis' generated by the above factors has largely resolved. The Australian insurance market has stabilised post HIH. International reinsurance markets have stabilised with many policies now carrying terrorism exclusion clauses. Boom times on the stock markets have again seen insurers making significant profits from their investment divisions. Just how robust these profits have actually been can be seen from the following tables.

IAG and Suncorp

Insurer	Year ended 30.06.02	1/2 year as at 31.12. 02	Year ended 30.06.03	1/2 year as at 31.12.03	Year ended 30.06.04	1/2 year as at 31.12.04
IAG	$25m loss	$62m	$153m	$302m	$665m	$446m
Suncorp	$311m	$155m	$384m	$281m	$618m	$413m

QBE and Promina

Insurer	Year ended 31.12.02	1/2 year as at 30.06.03	Year ended 31.12.03	1/2 year as at 30.06.04	Year ended 31.12.04
QBE	$279m	$241m	$572m	$320m	$820m
Promina	$307.3m loss	No info avail	$271.8m	$204m	$458m

3.3.18 The convergence of the four factors set out above in 2001 and 2002 will probably be unique within our lifetimes. It seems unlikely that we will again see a convergence of so many decisive factors affecting insurance premiums at the same time. Now that the short term crisis has passed, rational minds can return to the important long term problem of assessing what a system of tortious compensation ought properly provide to the seriously injured.

3.4 Making the Insurance Industry Accountable - Some Disclosure Requirements

3.4.1 This short history of scare-driven legislation, especially the *Civil Liability Act 2002*, followed by years of insurance industry super profits and premium rigidity, suggests that some minimal financial accountability in relation to insurers performance under this legislation during the last 3 years should now be given. The insurance industry can and should give an account of whether the Civil Liability legislation it promoted in 2002 as indispensable to the provision of future public liability insurance to many parts of the marketplace was based on false assumptions about the viability of this insurance class. The immediate and compulsory disclosure of basic market, premium, claims and liability data to the Parliament will ensure that Parliament and the public can consider and debate any further changes to the current mix of legislative constraints on personal injuries

liability on a properly informed basis. Because of the speed with which it was enacted, the people of New South Wales did not have the benefit of such information when the Civil Liability legislation was debated in 2002. History suggests that the same mistake should not be made again.

3.4.2 There is an immediately available model for legislative measures to require insurance industry accountability. When the Civil Liability legislation was introduced into the Australian Capital Territory[3], the ACT Government included statutory provisions requiring insurers operating in the ACT to report to the relevant Minister each 31 July about key insurance data for the previous financial year in relation to the operation of the legislation. Insurers operating in the ACT are required to report '*about insurance policies held by the insurer at any time in the financial year ending on the previous 30 June*'. For each class of insurance the report must disclose premiums paid, numbers of claims, numbers of claims paid and refused and anything else required under the regulations. The Minister then reports to the Parliament on the disclosed data by the following 31 October. Similar provisions were not introduced into the New South Wales Act in 2002. Their introduction into the ACT suggests that they are a not unreasonable measure to maintain insurance industry accountability. They should now be introduced in New South Wales. They will enable a fair and open debate about the adjustments to the Civil Liability and other legislation now proposed by the Bar Association. No doubt adjustments will be proposed by other parties.

3.4.3 Based on the ACT model, the legislation should now require disclosure of relevant insurance data for the last three years as well as the disclosure of future claims and premiums related data on a periodic six or twelve monthly basis. Even whilst this Parliamentary Inquiry is underway, the Bar Association suggests that the same information can perhaps be obtained by summons issued by the committee.

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[3] *The Civil Law (Wrongs) Act 2002*

3.4.4 The insurance industry cannot resist production of this material on the basis of commercial sensitivity. The ACT legislation provides a regime[4] to protect the commercial sensitivity of data supplied by individual insurers. The data is aggregated or published so as not to identify the insurer to which it relates. The ACT legislation provides penalties for non compliance with its provisions[5].

4. THE MOTOR ACCIDENTS ACT

4.1 Introduction

4.1.1 The *Motor Accidents Compensation Act 1999* (MAC Act) is the sixth motor accident scheme to operate in NSW since 1984. Very little of the seemingly endless tinkering over the last 20 years has been based on principle. Rather, the primary emphasis in restricting and regulating the awarding of damages has been to *'keep the CTP premium affordable'*. The 1999 MAC Act was not introduced to rectify any significant crisis in the CTP scheme. Industry observers (with the exception perhaps of the CTP insurers) widely agreed that amendments to the *Motor Accidents Act 1988* introduced in 1995 were proving effective in stabilising premiums. Nonetheless, the 1999 Act was introduced on no more principled basis than to *'cut $100 from premiums'*.

4.2 Features of the MAC Act 1999

4.2.1 The principal mechanisms by which premiums were to be reduced by the MAC Act of 1999 were as follows:

- Benefits for non economic loss were to be reduced by $100 million per year, principally by the introduction of the 10% Whole Person Impairment (WPI) threshold. Measurement of the impairment threshold was removed from the

[4] Section 204 of *The Civil Law (Wrongs) Act 2002*
[5] Sections 203 and 205 of *The Civil Law (Wrongs) Act 2002*

hands of judges and placed with doctors retained by the Medical Assessment Service (MAS).

- Legal costs were to be reduced by 50%. This was to be achieved by the introduction of restrictive costs regulations and the creation of a new, more informal dispute resolution mechanism, the Claims Assessment and Resolution Service (CARS) to be administered by the Motor Accidents Authority (MAA).

4.2.2 The objects clauses of the 1999 Act state that the intention of the Act is preserving the benefits of the more seriously injured.

4.2.3 One of the less publicly stated objectives of the new scheme was to restrain insurer profit as a percentage of gross premium written. Under the 1988 Act insurers had retained on average about 10% of the premium written. The MAA was of the view that the minimum level of profit required to keep insurers in the scheme was about 5.5% of gross premium.[6]

4.2.4 In short, one of the intentions of the new scheme was to return insurer profit to approximately 6-8% of premium written, that being considered a reasonable level of profit.

4.3 Outcomes

For the Insurers

4.3.1 In terms of the stated intention of reducing insurer profit as a percentage of premium written, the MAC Act has been a failure. The most recent figures available from the MAA disclose that insurers are likely to have made windfall profits from the first four years of operation of the new scheme.[7]

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[6] Evidence of the General Manager of the MAA, Mr. David Bowen to the Standing Committee on Law & Justice on 16 February 2004.
[7] From MAA Annual Report for 2003-4 page 104.

Projected Insurer Profit as a percentage of Premium Written

PremiumYear (ending 30 Sept.)	Premium Written ($ million)	Target Profit- 8% of Premium	Estimated Profit ($ million)	Excess Profits ($ million)	% of Premium retained as Profit
2000	$1325	$106	$315	$209	23.77%
2001	$1321	$105	$282	$177	21.34%
2002	$1342	$107	$277	$170	20.64%
2003	$1388	$111	$217	$106	15.63%

4.3.2 On current projections, the first four years of operation of the new scheme will deliver approximately $650 million in excess profits (i.e. above 8% of premium written) to the CTP insurers.

For the Injured

4.3.3 Unfortunately the outcomes for injured claimants have been nowhere near as favourable. On top of having benefits reduced, claimants have been subject to extended delays from the MAS and CARS processes. Given that the minimum processing time to have a matter determined by MAS is 6 months and the minimum processing time for CARS is 4 months on average, it is likely to be quicker to litigate in the District Court where a standard timetable provides for a matter to be dealt with in 9 months, and where the median time to finalisation of actions in 2002 was 11.3 months and in 2003 14.4.months.[8]

4.3.4 Reductions in premiums and high insurer profits from the CTP scheme are being funded by the injured, 90% of whom no longer receive any benefits for non economic loss and almost none of whom recover sufficient payment for costs to actually cover the provision of the legal assistance necessary to manoeuvre through what has become an increasingly complex and bureaucratic claims system.

[8] District Court of New South Wales Annual Reviews 2002 and 2003. Official figures for 2004 are not yet available.

4.4 Why Change the Current Scheme?

4.4.1 Endless readjustment of the motor accidents scheme is obviously undesirable. However, the operation of the current scheme since 1999 has now provided sufficient evidence to Parliament for it to consider immediate intervention. Insurers are continuing to earn profits from the scheme which are many multiples of the profits projected upon commencement. At the same time, the deserving injured go under-compensated or uncompensated.

4.4.2 There is ample evidence to illustrate the injustices of the present scheme. Take the example of 'Julie' (not the claimant's real name but authenticating material can be supplied on request):

> Julie was a 16 year old student on the Central Coast when a car collided heavily with her school bus, throwing her out of her seat and injuring her back.
>
> Unfortunately Julie suffered a prolapsed invertebral disc in her low back (L5/S1) which in turn caused nerve root compression at S1. Impingement on the nerve root causes radiculopathy in the form of sciatica (shooting pain) in the legs. In accordance with the AMA IV Guides, Julie was assessed at DRE Category III which in turn provides for 10% WPI. As Julie's injury does not exceed 10% WPI she receives no compensation for her pain and suffering.
>
> Julie will shortly turn 20. For the rest of her life she will be unable to jog or run. Julie will never be able to bend comfortably at the waist. Julie will be unable to engage in any employment which requires any significant amount of bending or lifting. Julie is likely to experience complications during pregnancy and will be unable to bend and pick up any children she may have.

There is no dispute about the nature and extent of Julie's injuries. Unlike a soft tissue whiplash injury there are clear and objective radiological findings to support Julie's evidence as to the pain she experiences. Nonetheless, the MAA has drawn the rules for compensation (through their employment of the AMA IV Guides) such as to deny Julie any compensation for her pain, suffering and the destruction of her lifestyle. It is both puzzling and bizarre to think that were Julie to have suffered the same injury to her upper spine or neck (i.e. disc prolapse with impingement and radiculopathy), then her injuries would have been assessed as exceeding 10% WPI.

Julie's is by no means an isolated case of those suffering significant injury not receiving compensation for non economic loss. As the CTP insurers are projected to make excess profits of over $150 million for the year in which Julie suffered her accident, it is difficult to understand why Julie was not entitled to a lump sum to compensate her for her pain and suffering.

Four years after her accident, Julie's case is only now close to resolving. Julie will receive some compensation for her loss of future earning capacity. However, out of these damages Julie will have to pay her legal costs as the sum which Julie's lawyers can recover from the CTP insurer for preparing and presenting Julie's case can only be described as inadequate. If Julie recovers $100,000 her lawyers can recover $11,600 to cover three years of taking Julie's case through MAS and CARS. Julie is likely to face losing anywhere between $10,000 to $20,000 of her damages to cover the real costs of preparing her case. There is nothing Julie can do to avoid this costs consequence.

4.5 What Should Change?

4.5.1 The *Motor Accidents Act 1999* represented a radical change to the method by which motor accident claims are assessed. The time has come to recognise it as a

failed experiment. To date, the single outstanding achievement of the 1999 Act has been to deliver record profits to insurers at the expense of the injured.

Repeal of MAS is Needed

4.5.2 The MAS system has proved to be time consuming, inconsistent and unjust to the point of capriciousness in its outcomes.

4.5.3 The inconsistency is demonstrated by the case of Mr. Mihalopoulos[9]. Mr. Mihalopoulos' claim has been assessed by MAS on three separate occasions producing results of 12% WPI then 2% WPI and finally 9% WPI. Far from being objective and neutral, MAS assessments utilising the AMA IV Guides have produced continuing inconsistency and uncertainty.

4.5.4 Administration of MAS by the MAA has also come under criticism. In *Catsicas v Mullaney*, Judge Sidis sitting in the District Court Newcastle reviewed correspondence between MAS and a doctor carrying out psychiatric assessments on behalf of MAS. Judge Sidis set aside the MAS certificate pursuant to s61(4) of the MAC Act on the basis that the correspondence from the MAA *'constituted an absence of procedural fairness in the process of medical assessment of the Plaintiff'*. Judge Sidis also found the correspondence to be *'beyond power and unauthorised'* and *'suggestive of bias on the part of the MAA'*.

4.5.5 During 2004 the MAA commissioned the Justice Policy Research Centre to survey scheme users. To date the survey has been limited to MAS and CARS assessors and the CTP insurers. The survey report from the MAS assessors contained the following comment:

> *A significant minority voiced disquiet about the 10% WPI threshold describing it as unjust, arbitrary and difficult to apply with precision.*

[9] MAAS Bulletin, November 2004.

4.5.6 The anecdotal evidence of many medical practitioners who are involved in these assessments is that the 10% WPI threshold and the content of the guidelines they are required to follow limit their medical discretion and produce unfair results. They are equally concerned about their lack of training and lack of proper materials to undertake what is essentially a judicial fact-finding task, not a medical task.

4.5.7 Even the CTP insurers proved to be no strong supporters of MAS:

> *Although they rated the system as fair, many interviewees commented on the unfairness of the 10% WPI threshold or the method of assessing it.*

4.5.8 As against this background it is not surprising that MAS has few supporters. It would be popular with scheme stakeholders and consistent with principle to assess non economic loss in motor accident cases in the same way as it is assessed in other civil liability claims.

Recommendation

4.5.9 **That consistent with principle, damages for non economic loss in motor accident cases be assessed in the same fashion as with all other personal injury claims. Section 16 of the Civil Liability Act should apply to motor accident cases.** Accordingly, the 10% WPI threshold and assessment by MAS should be repealed.

4.5.10 **In the alternative it is recommended that at the very least the 10% WPI threshold be reviewed downwards, given a history of scheme insurer profits which have turned out to be approximately three times those projected on scheme commencement.** There would appear to be no threat to the stability of the scheme by reducing the WPI threshold to 8% in order that accident victims such as Julie can be properly compensated. If scheme stability is said to be threatened by such a WPI threshold reduction, then scheme insurers would need to justify the existence of the threat.

Limit Use of the CARS System

4.5.11 Users of the CARS system are becoming increasingly dissatisfied with its operation. What was intended to be a quick cheap and easy system has become increasingly bureaucratic:

- Personnel at the MAA now regularly reject CARS applications for minor technical deficiencies in form.
- There are still 2,000 cases awaiting determination by CARS from 1999-2000.[10]
- CARS assessors regularly require the provision of chronologies, schedules of damages, statements from all witnesses and written submissions. There is now more legal work required to prepare a CARS application than to run a District Court case. Complexity and delay will be further enhanced if the MAA proceed with their scheme to provide for CARS assessors to have further powers to order the production of documents – something akin to the power of subpoena.
- Even the insurers are dissatisfied with CARS citing inconsistency in decision making from CARS assessors, delays and the absence of substantive appeal rights.

4.5.12 CARS is a prime illustration of how efforts to introduce what was proposed as a low cost and easy alternative dispute resolution system, has become tied down in bureaucratic procedures.

Recommendation

4.5.13 **Limit the CARS systems to only the most straightforward and simple of cases.** Larger cases can be more quickly and efficiently disposed of in the District Court.

[10] MAA Annual Report 2003-4 as tabled in Parliament in November 2004.

4.5.14 For those cases that do remain within CARS, proper allowance should be made for the recovery of costs. Prescribed legal fees have not been indexed or increased in the five years of the Motor Accidents Compensation Act despite continued assurances from the MAA that costs would be reviewed.

4.5.15 Moreover, there are no provisions within the Costs Regulations to allow a claimant to recover proper party/party costs where the claimant exceeds a prior offer to the insurer on assessment. Unlike the District Court and Supreme Court Rules, there is no incentive for a claimant to make reasonable offers of settlement in the hope of ensuring a favourable costs outcome. However, a Defendant can argue to have a claimant's costs reduced where a claimant did not accept a reasonable offer from the insurer. The one way nature of these provisions is unfair, inefficient and calls for adjustment.

The Discount Rate

4.5.16 One of the objectives of the motor accidents scheme is to ensure full and proper compensation for the seriously injured. However, the most significant impact upon awards of damages for future economic loss and future care is the 5% discount rate.

4.5.17 The 'discount rate' is an actuarial model which allows calculation in today's dollars of a sum which will generate a steady income over a given period of the remainder of a person's life. It has been used for decades by Courts and is well understood.

4.5.18 The Commonwealth Review of Negligence by a Panel of Eminent Persons (the Ipp Panel) recommended a 3% discount rate for common law claims. The UK government has recently reduced the discount rate in personal injury claims to 2%.

4.5.19 The 5% discount rate cannot be justified on any current actuarial basis as fairly reflecting investment returns available to the injured. The discount rate is an artificial mechanism which punishes the seriously injured by reducing their damages.

Recommendation

4.5.20 **Return to the 3% common law discount rate as was recommended by the Ipp Panel.**

4.6 Additional Technical Reforms

4.6.1 Though the Bar Association submits that major change is required to MAS and CARS, whatever happens as a result of the work of the Committee, these schemes need technical improvement in a number of areas. The Bar Association recommends that the following further reforms would be manifest improvements to the current motor accidents scheme. If requested by the Committee there are other less significant technical reforms which the Bar Association can advance.

The Definition of a Motor Vehicle

4.6.2 At present the Motor Accidents Compensation Act applies to all motor vehicle accidents. A motor vehicle is broadly defined to include golf carts, go carts, ride-on lawn mowers, motorised scooters and the like. Most of these vehicles do not have registration and any liability for their use should not be subject to the bureaucratic provisions of the MAC Act. Where no CTP insurer (or the Nominal Defendant) is involved, these claims should logically be dealt with under the Civil Liability Act rather than the MAC Act.

Recommendation

4.6.3 **Amend the definition of motor vehicle within the Motor Accidents Compensation Act so that it only includes insured or insurable vehicles (including Nominal Defendant liabilities) and trailers.**

Other Transport Accidents

4.6.4 At present an anomaly exists whereby some rail and ferry services fall within the scope of the MAC Act and others do not. The Government has legislated so that the MAC Act applies to public transport accidents where the Government would be liable. This provision would appear to serve no other purpose than to save the Government money. However, when tested by the tragedies of both the Waterfall and Glenbrook train disasters, the Government waived the application of the Motor Accidents Compensation Act so that the claims could be dealt with under the common law. The Government should be judged by its own conduct, which shows that it recognises that current community expectations of what is fair compensation are far closer to those provided for in the Civil Liability Act than in the Motor Accidents Act.

4.6.5 If the CTP scheme is to be maintained as a separate and independent statutory regime, then principle and consistency would dictate that all other transport accidents (where no CTP premium is involved) should be dealt with under the Civil Liability Act.

Recommendation

4.6.6 **That all transport accidents other than motor vehicle accidents be dealt with under the Civil Liability Act.**

Rescuers

4.6.7 At present rescuers who assist at the scene of an accident can only recover for the psychological trauma they suffer where they witness the accident itself rather than its aftermath. Further, the rescuer who witnesses the accident can have his or her damages reduced as a consequence of any contributory negligence on the part of the injured or deceased to whom they provide assistance.

4.6.8 Neither of these provisions can be justified on any principled basis. Nor do they encourage a community response to assist those in need. The rescuer is a hero to be admired and should be so treated by the law, especially if he or she suffers injury as a result of volunteering to help.

Recommendation

4.6.9 **That the nervous shock provisions (now incorporated in the Civil Liability Act) be amended so that rescuers present at the scene after an accident are entitled to recover where they suffer serious psychological injury. Rescuers should not be penalised for the contributory negligence of the victim to whom they provide assistance.**

Death Benefits for Parents

4.6.10 For over 10 years the United Kingdom has had a scheme that provides a lump sum death benefit for parents who have lost children in accidents where they would not otherwise qualify for any damages for nervous shock.

4.6.11 The assessment of psychiatric injury for parents who have had children killed in accidents in NSW is punitive. It is very difficult for any parent who must discharge an ongoing responsibility to care for surviving children ever to clear the 10% WPI threshold.

4.6.12 The costs of such a scheme have been assessed by the MAA and are modest.

Recommendation

4.6.13 **That a lump sum death benefit for parents who have lost children in motor vehicle accidents be introduced based on the UK scheme which currently provides for such damages.**

5. THE WORKERS COMPENSATION ACT

5.1 Background to the November 2001 Amending Legislation

5.1.1 Notions of equity in personal injury compensation would ordinarily be predicated upon equal treatment of individuals. In Australian society, equity includes the idea that personal responsibility should be recognised and acted upon by the courts in deciding both civil and criminal cases. This is reflected in the common law's application to claims for damages for personal injuries.

5.1.2 The common law awards damages only in the presence of fault. This gives moral content to imposing liability on the one hand and providing compensation on the other. The concept of fault operates as a device for rationing the scarce compensation dollar and ensures that the idea of taking personal responsibility is reaffirmed in workplaces.

5.1.3 In contrast to the position at common law, the entitlement to statutory benefits under the Workers' Compensation scheme operates regardless of fault. The more recent statutory approaches to reform of the common law, such as the *Civil Liability Act 2002*, maintain fault as the basis of the decision to award damages but modify the available damages.

5.1.4 Prior to November 2001 the law in New South Wales covering employment injury was based upon a hybrid of the two – fault based common law damages and no-fault statutory benefits. Common law damages (modified and reduced), identified unsafe workplaces and compensated the individual according to demonstrated criteria including fault and severity of injury. Damages were reduced to reflect the degree of individual fault on the part of the worker. The statutory scheme remained only as a safety net.

5.1.5 The practical effect of the November 2001 amendments was to eliminate the place of fault in workplace injury claims. In most cases it also eliminated, at the same time, the idea of personal responsibility. Although legally a form of damages for negligence was preserved, the purpose of the amendments was to strongly discourage common law claims. What is left of them is virtually unrecognisable as a common law action for damages. The November 2001 amendments have had their intended effect. They have virtually eliminated the common law action for damages.

5.1.6 Although preceded by an inquiry, the November 2001 amendments were introduced before legislative thinking about the proper role of the common law in providing compensation had caught up with current community expectations as it did in the *Civil Liability Act 2002*. As reflected in the Civil Liability Act current community expectations are that fault will remain the basis on which damages will be awarded.

5.2 Readjusting the November 2001 Amending Legislation

5.2.1 The community already has an understanding of Court awarded lump sum damages. To the extent that tabloid criticism of apparently generous judgments has gained traction in the public mind the Government has responded. Regrettably there has been little or no public commentary focussing upon Appeal Courts overruling first instance judges which has operated as a significant check on generous judgments in any event. There is little or no understanding of the way in which the *Health Care Liability Act 2001* and the *Civil Liability Act 2002* work. Equally there is no understanding except by victims of the unfair systems in workplace and road users' negligence. Whilst, as a matter of principle the Bar Association has consistently opposed the use of caps and thresholds, it accepts the political reality that they are here to stay. Consequently, in order to overcome the

problems with the whole person impairment approach we have highlighted above and to promote consistency, the Bar Association advocates a return to the tried and tested approach which underpinned the Health Care Liability Act and underpins the Civil Liability Act assessments of damages for non economic loss. These Acts (which are now merged into one), together with the former *Motor Accidents Act 1988* and the former ss151G and 151H *Workers' Compensation Act 1987*, operated on a system of thresholds and caps. Damages were not unlimited. The judges were compelled to award each individual an amount which gauged them against a most extreme case. The appeal courts had established that quadriplegic and paraplegic injuries were included. This accords with community perceptions. Age and other factors relating to the situation of the individual plaintiff were taken into account in this process, once again reflecting community values. As was acknowledged in the New South Wales Parliament by the then Health Minister, Mr. Knowles, introducing changes to the law of medical negligence, and by the Premier in introducing the *Civil Liability Act 2002*, this approach to assessment of damages for non economic loss discouraged small claims, redirected compensation to the more seriously injured, and indirectly reduced legal costs. Actuarial evidence obtained by the Government demonstrated real and significant savings from this legislation. The reported drop of some premiums in the general insurance industry has been established and reported in financial media. Reform has worked. There seems no good reason not to continue the process and reinstate fairness in workplaces and on the road.

5.2.2 In reviewing the patchwork approach to statutory reform which has characterised statutory change to the common law in the personal injuries field, the opportunity now exists to bring fault based damages in the workers' compensation area into line with the benchmark established by *Civil Liability Act 2002*. Although the next point of these submissions argues that even that benchmark needs some adjustment and further review. The Bar Association submits that the following changes to workers compensation legislation are necessary to recapture the balance which has been largely achieved by the Civil Liability Act:

- **Change the thresholds for recovery of damages for pain and suffering and loss of enjoyment of life in workplace cases to bring them into line with Civil Liability Act damages thresholds.** This involves rejection and replacement of the entire notion of Whole Person Impairment Assessment. This American evaluation system penalises injured workers and injured road users alone. It is recognised to be inappropriate for every other person in New South Wales injured as a result of fault.
- **Equalize the maximum sum awarded to injured workers for pain and suffering and loss of enjoyment of life with the maximum set under the Civil Liability Act.** This follows upon rejection of the Whole Person Impairment approach to assessment of damages and embraces the idea that all citizens should be equal before the law in asserting rights to compensatory damages for injury inflicted through fault, whatever the circumstances in which they were injured.

5.2.3 The Whole Person Impairment concept is novel and untested. At the time the Whole Person Impairment approach was adopted and introduced to Parliament no detailed analysis was undertaken to demonstrate why in principle or policy it was superior to the tried and tested method of measurement against a most extreme case. In particular, no attempt was made to demonstrate that it was more effective in delivering appropriate compensation to the more seriously injured. The Whole Person Impairment regime has almost completely eradicated the damages entitlements of injured workers. WorkCover will readily have data to demonstrate the actual number of workplace injury common law cases commenced since November 2001. This information would illustrate the true effect of the Whole Person Impairment concept better than any other. The Motor Accidents Authority likewise has data upon the number of people satisfying the threshold. The Bar Association suggests that the Committee requests these two authorities to provide that data.

5.2.4 **Restore the right of workers to damages for past and future medical care, and other care.** To ensure that reasonable limits are in place for domestic care awards, however, stringent thresholds for gratuitous home care should apply such as those incorporated into the Civil Liability Act.

5.2.5 **Maintain the right of workers to damages assessed for past and future economic loss.** This reflects a fundamental component of a fair compensation regime for workers but should be subject to proper limits.

5.2.6 **Maintain the abolition of exemplary, punitive and aggravated damages where injury or death to a worker is caused by negligence.** This is consistent with the provisions of the Civil Liability Act. Punishment for contravention of legislative standards of workplace safety should be the preserve of Occupational Health and Safety legislation. Fault-based awards of compensatory damages are another important way that our society can ensure that personal responsibility is taken in workplaces, but actual punishment must follow criminal legal processes.

5.2.7 **Ensure that workers' rights to compensation for work-related injury are determined in the open, in courts, with full access to legal representation.** The public and therefore transparent determination of matters of profound significance to seriously injured workers is essential to maintaining community confidence in the fairness of our workers compensation system.

5.2.8 **Make juries available to determine workplace injury claims.** The expense of summoning a jury can be borne by a 'court users' fee calculated as a percentage of any verdict or settlement. This fee is not to constitute a head of damage. Juries reflect community standards and act as a constant reminder to all participants in the decision-making process that awards of compensation must reflect community values.

5.2.9 **Reactivate the system of Philadelphia arbitration to assist the resolution of less complex cases and improve ADR procedures in all cases.** With suitably qualified arbitrators, the Philadelphia arbitration system has worked well in the past to reduce claim costs. Already the protocol negotiated between the unions and Amaca Pty Limited for dealing with asbestos claims in the Dust Diseases Tribunal has shown how effective ADR techniques can be in reducing the costs of claims.

6. HEALTH CARE CLAIMS UNDER THE CIVIL LIABILITY ACT

6.1 Introduction

6.1.1 The principles for the award of damages for personal injuries enacted in the *Health Care Liability Act 2001* were essentially reproduced in the *Civil Liability Act 2002* but with some amendments. The New South Wales Bar Association submits in the next section that, subject to some adjustments, the Civil Liability Act is an appropriate benchmark of current community standards for the award of damages. Nevertheless, there are two separate issues of concern raised by the amendment of the Health Care Liability Act upon the introduction of the Civil Liability Act. The first relates to the reintroduction of the Bolam Test. The second relates to the punitive effect of costs limitations because of high investigation expenses in smaller cases.

6.2 Section 5O

6.2.1 Section 5O of the *Civil Liability Act 2002* inserted in December 2003 re-instates the Bolam or 'peer opinion' test for medical negligence which was rejected in June 2001 because it was 'medically paternalistic', had 'ceased to be acceptable'

and was recognised as 'not in the interests of safeguarding the community': Second Reading Speech to the *Health Care Liability Act 2001*.

6.2.2 The legislature has sought to attenuate the damage that might be done by its introduction of an outmoded standard of negligence for medical negligence cases. It has added a statutory rider that peer professional opinion cannot be relied upon if the court considers that the opinion is 'irrational'.[11] This rider is of no assistance and simply creates further uncertainty and creates a risk of random results.

6.2.3 The effect of s5O in the long term may be to permit another Chelmsford to occur without the victims having any right to redress in damages. Even the Minister introducing the Health Care Liability Act admitted the medical profession 'does not always get it right': Second Reading Speech – *Health Care Liability Act 2001*.

6.2.4 **Section 5O of the *Civil Liability Act 2002* should be repealed.**

6.3 Medical Investigation Expenses and Costs limits

6.3.1 **Constraints on the recovery of costs should be reduced from cases up to $100,000 to cases up to $50,000.** Investigation and preparation of medical negligence cases require high front end costs before any decision can be made about prospects of success. The difficulty created by the *Legal Profession Act 1987* costs limitations has a disproportionately adverse effect on small to medium awards of medically complex cases where only modest damages for non economic loss are expected. This is in turn a function of the modern complexity of medical scientific knowledge and procedures. Some of the complexity is the product of pre-existing medical conditions which complicate investigation of questions of causation and damage.

[11] Section 5O(2) of *The Civil Liability Act 2002*

6.3.2 The *Legal Profession Act 1987* restricts the recovery of costs in claims where less than $100,000 in damages is awarded. This acts as an excessive deterrent to the commencement of meritorious and significant claims for medical negligence. The Review of the Law of Negligence Report of September 2002 ('Ipp' Report) at paragraph 13.18 recommended that limits on the recovery of costs should only apply up to awards of damages of $50,000. Subject to the more general submission in relation to costs made in section 8 below, the Bar Association submits that the Legal Profession Act would operate less unfairly if the thresholds were amended to conform with the Ipp Report recommendations.

7. THE CIVIL LIABILITY ACT

7.1 Introduction

7.1.1 In the discussion above of the Motor Accident Acts and the Workers Compensation Act, the provisions of the *Civil Liability Act 2002* have been used as something of a benchmark of current community standards. This is so first, in its retention of fault-based liability for injury, and second, in its rejection of obstacles to fair assessments of damages created by high thresholds and requirements for Whole Person Impairment. Over time, even the present provisions of the Civil Liability Act may need review in the light of better information and more experience. The immediate concern of this section is the form of parts of the current legislation.

7.1.2 In the Second Reading Speech introducing the *Civil Liability Amendment (Personal Responsibility) Bill 2002* the Premier described the introduction of the bill as a *'triumph for commonsense'*. The Civil Liability Act was also publicly heralded as presenting a cure to a developing litigation culture in NSW and as

curbing judicial enthusiasm for finding fault which was out of step with community expectations as to personal responsibility.

7.1.3 The New South Wales Bar Association has long maintained that claims for damages for personal injury should be determined according to current community standards of personal responsibility and fairness. It is for this reason that the Bar Association has supported the retention of juries to determine these actions. The Bar Association does not take issue with the general intent of this legislation. The problem is in the execution of this general intent.

7.1.4 The Bar Association has two principal concerns regarding the legislative reforms introduced by the Civil Liability Act.

7.1.5 First, strictly many of the substantive legal changes which were introduced by the Civil Liability Act were not necessary. Prior to both the enactment of the *Civil Liability Act 2002*, effective March 2002, and the *Civil Liability Amendment (Personal Responsibility) Act 2002*, December 2002, Courts had already moved to reassert the need for the application of a *commonsense* approach to the finding of fault and the assessment of damages under the common law. Whilst this concern does not infer the wholesale repeal of the Civil Liability Act, it does give confidence that some of the more rigid provisions of the Act can be relaxed without opening up floodgates of new litigation.

7.1.6 Second, in endeavouring to prescribe by legislation the determination of negligence with the emphasis on *'personal responsibility'*, the Bar Association is concerned that there has been a thorough abandonment of much *'corporate responsibility'* and *'governmental responsibility'*. The Bar Association's concern is that insufficient consideration has been given to the consequences of the operation of many provisions of the Civil Liability Act. It urges that the legislation be revisited and redrafted to remove its potentially capricious effects. There is a real public interest in simple and clear legislation in this field. It

reduces legal costs and increases certainty for litigants. With a further review, this can be achieved.

7.2 The Judicial Experience

7.2.1 The 1980's and early 1990's did see many appellate decisions which could be interpreted as significantly liberalising the rules of negligence and access to damages at common law. However, by the late 1990's the trend in judicial decisions was already running heavily in the opposite direction.

7.2.2 The common law has long valued notions of personal responsibility for one's behaviour. The legislative drive to inject personal responsibility into fault finding and the assessment of damages, is not introducing something new to the common law. A few examples will illustrate this. Consider *Havenaar v Havenaar* [1982] 1 NSWLR 626 in which the Court of Appeal considered a case where damages were claimed by a man injured in a motor car accident, including damages consequential upon the development of pancreatitis caused by excessive drinking due to the accident. As Hutley JA stated (at 627-8):

> *...the legal system is built upon the retention of some measure of individual responsibility and it has not been wholly abolished in the law of torts. A foreseeable deliberate and voluntary act, not part of the treatment prescribed, recommended or reasonably undertaken, of a victim of an accident does not in my opinion, sound in damages because it is not part of the legal consequences of the accident.*

7.2.3 This view was reinforced by the Court of Appeal in *Reynolds v Katoomba RSL All-Services Club Ltd* (2001) 53 NSWLR 43. Mr. Reynolds suffered from an addiction to gambling and would frequently cash cheques at the Defendant club to fund his habit. The cheque cashing continued even after requests from Mr. Reynolds' family that the club cease providing that service. Ultimately Mr. Reynolds lost nearly everything.

7.2.4 Mr. Reynolds sued the RSL Club asserting that it owed him a duty of care. The case failed both at trial and on appeal. Chief Justice Spigelman found that the actions of Mr. Reynolds in gambling reflected a choice by him and the law not only recognises but protects his individual autonomy from which flowed individual responsibility.

7.2.5 There is no shortage of other examples of the Court's asserting individual responsibility, in particular in relation to activities voluntarily undertaken:

- In *Agar v Hyde*[12] and *Woods v Multi-Sport Holding Pty Ltd*[13] the plaintiffs had suffered injury whilst playing rugby and indoor cricket respectively. In each case the High Court found for the Defendant on the basis of either an absence of duty of care or the obvious nature of the risks involved in the activity.
- In *Van der Sluice v Display Craft Pty Ltd* [14] the Plaintiff was injured when he fell off a ladder whilst installing Christmas decorations for the Defendant. The Plaintiff regularly carried out this kind of work. The Court of Appeal held that the risk of injury when standing on the upper rungs of a ladder was obvious and that the Defendant was entitled to expect that the Plaintiff was aware of the risk and would take steps to avoid injury. Justice Heydon stated (at para 74):

  > *All citizens can safely and reasonably assume that each normal adult human being acting autonomously and voluntarily, will not incur unnecessary and blatantly obvious risks.*

- In *Romeo v Conservation Commission of the Northern Territory* [15] the High Court found for the Defendant in circumstances where the intoxicated Plaintiff had wandered over a cliff in a coastal reserve whilst intoxicated. The High Court held that there was no failure to warn of the obvious risk posed by the

[12] (2000) 201 CLR 552
[13] (2002) 208 CLR 460
[14] [2002] NSWCA 204
[15] (1998) 192 CLR 431

cliff or any failure to fence off the relevant area. This finding is consistent with the longstanding common law position that there is no duty of care in relation to obvious and apparent hazards[16].

- In *State of NSW v. Godfrey* NSWCA 7 April 2004 the Court of Appeal held that the Department of Corrective Services were not liable for the disability suffered by a prematurely born child. The child's mother had been shocked during an armed hold up by an escaped prisoner. The prisoner had escaped through the admitted negligence of the Department. The court held the damage suffered to be too remote to be causally connected.
- In abolishing the nonfeasance rule, the High Court still provided protection to road making authorities by providing that there would be no liability in circumstances of obvious risk to a pedestrian taking reasonable care for their own safety[17].
- There is no special duty of care owed to the intoxicated who make deliberate decisions to drink to excess and suffer injury as a result of their own intoxication[18].
- Section 124 of the MAC Act currently provides that claimants cannot recover the first week of their economic loss. The presumption is that this loss is usually covered by sick leave. The Bar Association submits that this provision should be repealed as it hurts those least able to afford the loss. The costs savings to insurers from the provision would most likely be negligible.

7.2.6 Much of what the Parliament has intended to do in the Civil Liability Act is to codify the above principles which were already being enforced by the common law. However, as illustrated below, the removal of jury and judicial discretion by codifying principles relating to risk, fault and damages, has been done in a clumsy fashion with potentially undesirable consequences.

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[16] See *Phillis v Daly* (1988) 15 NSWLR 65; *Bardsley v Batemans Bay Bowling Club* (unreported NSWCA 25.11.96); *Jaenke v Hinton* [1995] Aust Torts Reports 81-368 (QLD) CA; *Riley v Francis & anor* [1999] NSWCA 52

[17] *Brodie & anor v Singleton Shire Council; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512

[18] *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113, subsequently upheld by the High Court – [2004] HCA 29

7.3 The Civil Liability Act – Some Illustrations of Potentially Unjust Results

7.3.1 The Bar Association's principal concern about the Civil Liability Act is its capacity to generate unjust results arising from legislative provisions which attempt to codify principles of tort. Some illustrations appear below.

7.4 Section 5L - Obvious Risk of Dangerous Recreational Activities

7.4.1 Section 5L of the Civil Liability Act provides that a Defendant is not liable in negligence for harm suffered by another (the Plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the Plaintiff. The section applies whether or not the Plaintiff was aware of the risk.

7.4.2 People should take principal responsibility for risky recreational activities in which they partake. The High Court has held as much in *Agar v Hyde* and *Wood v Multi-Sport Holdings*. However, the regrettable effect of s5L is that it places no responsibility whatsoever upon the corporate supplier of recreational activities.

7.4.3 Take the example of a recreational parachutist who must be aware of the obvious risk of a parachute failing to open. It is one of the risks of the sport.

7.4.4 However, imagine that the company organising the activity and supplying the parachute had not properly packed the parachute prior to supplying it to the Plaintiff. The parachute fails to open (due to being miss-packed). The Plaintiff is killed or badly injured.

7.4.5 Arguably, the application of s5L would result in there being no liability on the part of the Defendant despite its own clear gross negligence. What occurred was

the materialisation of an obvious risk associated with a dangerous recreational activity. Whilst it may be fair to expect the Plaintiff (or the plaintiff's family in the case of death) to assume the risk associated with accidental parachute failure, it is perfectly legitimate to ask the question why should the Plaintiff bear all of the risk associated with this gross corporate negligence? It is far better to address such questions now rather than after unjust results have been generated by this legislation.

7.5 Section 5M – Risk Warnings and Recreational Activities

7.5.1 Section 5M creates a regime whereby the Defendant who warns of a risk associated with a recreational activity cannot be liable in negligence provided a broad warning of the risk is given. Shortcomings in the drafting include the following:

- A risk warning is deemed to be understood even though the person concerned may not have actually understood the written warning. A not insignificant portion of the adult population with literacy problems are nonetheless deemed to have comprehended a sign which they cannot read. Those who cannot read English are also deemed to understand the English language warning.
- Children are caught by the risk warning provided they are capable of understanding the words on a warning sign even though they may not appreciate the legal rights they forsake by undertaking the activity concerned.
- It is quite legitimate to now ask whether sporting organizations should be able to deliberately provide unqualified coaches, incompetent referees and known substandard playing surfaces provided they have warned participants (including children) of the broad risk of injury? This hardly represents current community standards and expectations.
- Can landlords supplying commercial premises for recreational activities now avoid all liability for ramshackle and unsafe buildings provided they have warned of the risk of entry?

- Can the Mall owner abandon all requirements to provide cleaning and security services for recreational shoppers provided there is a warning at the entry to the Mall stating 'We make no guarantee as to the safety of these premises – there are slipping and tripping hazards – enter at your own risk'.

7.5.2 Many organizations provide sporting and recreational activities for profit. Section 5M allows these corporate entities to waive all responsibility and liability for the consequences of these activities by merely providing a generalised warning as to the risk of harm. It is not difficult to imagine the unfairness which will be created by this provision in the future. That obvious unfairness should be addressed now.

7.5.3 Provisions such as s5M do not even attempt to strike a balance between personal and corporate responsibility – the onus is shifted entirely to the individual and away from the corporation. Even the most conservative judges of the mercantile era would have hesitated to provide such an easy escape for corporations responsible for gross negligence.

7.6 Section 5N

7.6.1 Compounding the difficulties created for consumers by s5M are the contractual waiver provisions of s5N. Suppliers of recreational services can specifically contract to exclude any liability for a failure to provide services with reasonable care and skill. Moreover, s5N(2) provides that no other NSW law should be used to render such a contractual term void or unenforceable. The beneficial provisions of the *Contracts Review Act 1980*, the *Fair Trading Act 1987* and the *Sale of Goods Act 1923* appear to have been overridden in one legislative stroke. The effect is as follows:

- A contractual waiver entered into by a child undertaking a recreational activity would appear enforceable to exclude all liability.

- A contract with print too small to be properly read by the human eye will nonetheless be enforceable to exclude liability for gross negligence on the part of the supplier of a recreational service.
- A dive boat operator can now incur no liability for abandoning divers in the ocean, provided a contractual waiver is held.
- A child badly burnt when using a defective merry-go-ground is unprotected where a contractual waiver has been executed by a parent.

7.6.2 One of the purposes of the law of torts is to impose the burden of liability upon negligent corporations as a mechanism to encourage corporate responsibility. Section 5N of the Civil Liability Act removes any burden of corporate responsibility and places sole responsibility upon the consumer. It apparently does not matter to the legislature that the consumer concerned may have some form of disability, for example they may be young, infirm, illiterate, blind, or someone just tricked into executing a contractual waiver.

7.6.3 Again it is legitimate to ask what is the legal, moral or political justification for overriding the Contracts Review Act in such circumstances? Why should the legislature render legally sound, what would otherwise be an unenforceable contract due to unconscionable conduct, merely because the contract relates to a recreational activity?

7.7 Part 3 - Mental Harm

7.7.1 Our society does and should recognise the value of rescuers providing assistance to those in peril. Unfortunately, one of the predictable by-products of such heroism can be deep trauma and distress for the rescuer exposed to horrific injuries.

7.7.2 Part 3 of the Civil Liability Act specifically excludes a rescuer who was not present when the actual injury occurred from recovering damages for mental harm upon going to provide assistance to the injured.

7.7.3 It is understandable that the Parliament may wish to restrict claims for nervous harm from all those who come across an accident scene. However, it hardly represents current community standards for rescuers to be left without remedy for such mental harm. Rescuers are deserving of special treatment. Part 3 of the Act should be amended accordingly.

7.8 Section 44 – Public Authorities

7.8.1 Section 44 of the Civil Liability Act provides that a public authority is not liable for the failure to exercise or consider exercising any function of that authority. The definition of 'public authority' has been extended by regulation to include both government and non government schools.

7.8.2 A broad interpretation of s44 would mean that schools could not incur any civil liability for failing to supervise students whether before, during or after school. Section 44 could be deployed in complete defence of a school which failed to provide any playground supervision during a lunch hour when a student was injured.

7.8.3 The public is entitled to rely upon government authorities (including schools) carrying out the duties which the public expect of them. One of the community's expectations of a school is that it will regulate lunchtime activity. The absence of any regulation ought not to allow a school to escape liability for what would otherwise be considered gross negligence towards the students under its care. Perhaps this surprising result can be refined by the subtleties of judicial interpretation over the years. In the meantime, much injustice is likely to occur.

It would be far better to cure the problem now by a balanced amendment to the Civil Liability Act.

7.9 Section 45 – The Nonfeasance Rule

7.9.1 Following the High Court's decisions in *Brodie* and *Ghantous* the Parliament has acted through s45 of the Civil Liability Act to introduce full nonfeasance protection for road authorities in NSW in the absence of actual knowledge.

7.9.2 Whilst this position might be defensible in relation to potholes in roads, it is very difficult to see how a council should still escape liability in the circumstances of Mr. Brodie's accident.

7.9.3 Mr. Brodie was driving his truck across a wooden bridge when the bridge collapsed beneath him. The reason the bridge collapsed was that borers had attacked the wooden support structure. The local council must have known of the risk of borers attacking the wooden structure. However, the council had in place no program whatsoever for the inspection of the bridge to ensure its ongoing safety. There was documentary evidence at the trial that all timber bridges were usually inspected about four times per year (206 CLR 512 at headnote 513.1). Any competent council would have had such a program in place.

7.9.4 Section 45 actually discourages a council from making inspections. Where the council has actual knowledge of a particular risk, then s45 does not provide protection. As a result of this legislation, a council is better organising itself so that it remains ignorant of hazards to the public which it has created thereby gaining the protection of s45, rather than carrying out inspections in order to determine what work needs to be carried out and prioritising it. This is the reverse of encouraging socially responsible conduct by public authorities.

7.9.5 If it is not the intention of Parliament to encourage councils to abandon inspection programs so as to maintain the necessary ignorance to draw protection under s45, then this provision needs urgent amendment.

7.10 Section 50 – No Recovery if Intoxicated

7.10.1 The Bar Association is aware of only one case to date where s50 has been utilised. The case resulted in the Trial Judge referring her decision to the Attorney General for consideration of amendment of the Section.

7.10.2 In *Russell v Edwards*[19] The Plaintiff was a 16 year old boy who suffered significant injury having dived into the shallow end of a backyard swimming pool at the home of a friend's family during a birthday party. The Plaintiff was at the time affected by alcohol, some of which had been provided by the Defendant home owner but most of which had been provided by a friend who brought a bottle of bourbon to the party. The Plaintiff conceded that but for his intoxication he would not have dived into the shallow end of the pool.

7.10.3 Judge Sidis found that had the case been determined at common law the Plaintiff would have succeeded, albeit with a deduction for contributory negligence which was assessed at 25%. However, applying s50 of the Civil Liability Act Judge Sidis found that there was no liability as the Plaintiff's intoxication had led to his injury.

7.10.4 Section 50 denies recovery of damages where a person suffers injury and is intoxicated to the extent that their capacity to exercise reasonable care and skill was impaired. It is the inflexibility if the provision and its incapacity to work justly in every case which would prompt reasonable minds to consider its urgent reconsideration. This is just what the trial judge did.

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[19] Unreported NSW District Court at Newcastle, judgment of Sidis DCJ of 23 November 2004

7.10.5 Whilst reasonable minds may disagree about the responsibilities of a 16 year old who drinks liquor brought to a party by a friend, consider an alternate set of circumstances. What if the Plaintiff had only been 12 and was nonetheless intoxicated on liquor that had been exclusively supplied by the parties' host. Section 50 of the Civil Liability Act would still operate to deny that claimant any damages. Is this what the Parliament intended?

7.11 A Broader Review of the Civil Liability Act

7.11.1 The Bar Association has here brought to attention some of the more obvious examples of the potentially unjust working of the Civil Liability Act. There are others. The Bar Association submits that these issues cannot be dealt with piecemeal but that a major review of this legislation is called for. Though the legislation is young, it is the haste with which it was enacted which makes this necessary.

8. ARTIFICIAL CONSTRAINTS ON COSTS

8.1 It is artificial to constrain costs solely by reference to an arbitrary figure of $100,000 as the *Legal Profession Act 1987* provides. Such an approach ignores the fact that, in many cases, significant injuries are suffered which, because of the absence of economic loss, do not attract awards of damages in or over that amount. In the result, those injured people either lose the opportunity to recover damages altogether, or are forced into otherwise unfavourable settlements. The Bar Association recommends that this arbitrary constraint be removed and the question of costs in these circumstances be left to the trial judge or a costs assessor, who is in the best position to assess whether the costs have been properly incurred.