Submission No 23

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Summary

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Personal injury compensation legislation

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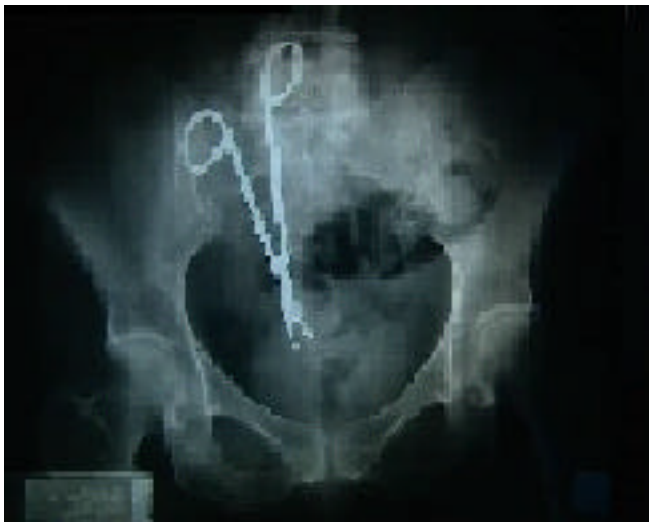
Pat Skinner

In 2001 Pat Skinner booked herself into St George hospital in Sydney for a routine operation to remove polyps in her intestinal tract. A healthy woman, Pat planned a European backpacking holiday for later in the year. But, Pat didn't make it to Europe. Instead she spent 18 months in mysterious pain.

Pat's GP finally referred her for x-rays. Nothing could have prepared her for what she was about to see.

Pat was immediately returned to St George hospital to remove the scissors that had been left inside her abdomen 18 months earlier. Leaving hospital, Pat wondered if anyone was going to tell her how such a dreadful accident had occurred and what they were going to do to ensure that it never happened again. It was to be a long battle. In the end, it seems that only threatened court action and media scrutiny caused the authorities to pay attention to Pat's case.

In commencing legal action, Pat was alarmed to learn of some recent changes to the law. Her claim for damages for the 18 months of pain she had endured was limited by the Civil Liability Act. A judge would have to assess her injury as a percentage of the worst cases. If she rated less that 15%, she would get no compensation, and only limited compensation if less than 34%.



Because Pat was a retiree at the time of the accident, and accessed public health throughout, she had incurred only limited out-of-pocket expenses. This produced a bizarre and unfair result. Because her claim was almost entirely for pain and suffering, which is limited, there was a real possibility that Pat's claim would amount to less than $100,000. In such 'minor' claims, only limited legal costs can be recovered, even if you win. Pat was worried that the hospital and its insurer would fight her all the way, inflating her legal bill. She faced the real possibility that she could win her case, but ultimately lose out financially.

Pat's case illustrates how recent changes to the law discriminate against children, retirees, students and the unemployed. Thankfully, Pat had the courage to fight her claim and achieved real change in the health system. But she took a big risk in doing so, one that recent changes to the law have made that much more severe.

Matt Davis

In May 2002 Matt Davis was travelling home from school by bus near Albury. He was 15 years old.

The bus driver suffered an epileptic fit and lost consciousness. The bus left the road and struck a tree at over 100km/h. The impact was so violent that the chairs were ripped from the floor of the bus. When rescuers arrived they found all the children piled up at the front of the bus, tangled amid a wreckage of torn steel. Four children died in the accident.

Matt snapped the femur of his right leg and his left shoulder. He suffered an injury to his right shin that doctors call 'de-gloving'. A blunt object entered his leg just below the knee and travelled under the skin down to the ankle. The result was a portion of loose skin and flesh into which you could put your arm. It was full of grit from the accident and became infected. Matt was in surgery for four hours on the night of his accident. At one point the surgical team called for a priest, he was so close to death.

Matt subsequently spent seven weeks in hospital and underwent nine operations. The treatment of his right leg and left shoulder involved steel plates and screws. Matt was in a wheelchair for three months and had to have the plates in his leg re-fitted when his recovery did not proceed as hoped, and he suffered a further fracture. The de-gloving of his leg required skin grafts.

As a consequence of his injuries, this fit young man is no longer able to do the things he enjoys. He can't climb or bushwalk or play sport the way he used to. He can't help out with heavy work on the family farm. He has an ugly and embarrassing scar the length of his right thigh and below the right knee. The injuries and their treatment are very painful. Matt continues to suffer pain from his injuries every day.

Matt's injuries were assessed according to NSW law, under the *American Medical Association Guides to the Evaluation of Permanent Impairment* (the AMA Guides). He rated 8%. When they heard this figure, Matt and his parents couldn't believe it. Neither could his treating orthopedic surgeon. Because he didn't rate more than 10%, Matt is not entitled to damages for pain and suffering.

Matt Davis was a kid coming home from school like thousands of others every day across NSW. He did nothing wrong. Somebody else made the mistake that caused his painful and debilitating injuries. After a fight with the insurer, Matt recovered some money for his parents' out-of-pocket medical expenses. Despite evidence that the bus company knew that the driver was prone to epilepsy, the insurance company is denying liability, calling the accident an act of god. Matt is still fighting the insurance company. If he wins in court, he might be compensated for the reduced work options he will have later in life.

But Matt's pain, the time he has had to spend in hospital, his scarring and the effect his disability will have on all aspects of the rest of his life are all worth nothing under current NSW law.

David Catsicas

David Catsicas was injured in a motor vehicle accident on 27 March 2001. As part of his claim, David was examined by MAS assessor, Dr Apler, on 7 August 2002, on referral from the MAA. Using the *AMA Guides* as required, Dr Apler certified David's whole person impairment (WPI) as 30%. His report and certificate were forwarded to the MAA on 9 August 2002. On 29 October 2002, the MAA 'wrote to Dr Apler requesting a review of sections of his report *that require some amendments*'.[1] Part of the letter reads:

> '1) on page 5, point 12, paragraph two of your report, you referred to his unusual presentation and of his carrying a list of the symptoms with him to medical appointments. Unfortunately, the parties may see this as bias and the whole paragraph is best removed from your report.
> 2) with regard to your assessment of impairment, page 7, social functioning, from MAA descriptors this sounds like it could be class 2? Could you please elaborate why you have assessed this as class 3 or change to class 2 upon your review?
> 3) on the bottom line of your table you have omitted to include %WPI. Could you please include?' [2]

In his revised report, Dr Apler complied with all the directions in the letter from the MAA, including that regarding the social functioning assessment. The change from class 3 to class 2 resulted in a decrease in his WPI assessment from 30% to 11%.

On 4 February 2004, following another examination by a doctor retained by the defendant insurer, David was again examined by Dr Apler. Again Dr Apler prepared a draft report and a certificate, which were provided to the MAA. Again the MAA wrote to the doctor requesting that he review the draft.

> 'On page 9 of your report, under concentration, persistence and pace, you have rated the claimant as class 2. I note that the claimant maintained memory and concentration throughout the appointment of one and a half hours duration, and that persistence and pace may be affected by the claimant's physical complaints. Given this information, the parties may question the rating given. Could you please expand on the reasons behind your decision.'[3]

Again Dr Apler heeded the direction from the MAA, changing his report to rate concentration, persistence and pace as class 1 rather than 2. The result of this last report was that David's WPI was now assessed as less than 10%. The 10% rating meant that David was not entitled to general damages.

Following her account of these events, the judge observed that the correspondence between the doctor and the MAA was "beyond power and unauthorized", "suggestive of bias on the part of the MAA", and resulted in "an absence of procedural fairness in the process of medical assessment of the plaintiff".[4]

The 10% WPI threshold required before general damages can be awarded in a motor accidents claim is onerous. More alarming is the potential for undue influence by the Motor Accidents Authority. Under the old system of medical assessment of degree of disability, the claimant had a doctor, the defendant had a doctor and the medical issues were resolved in court. David's case illustrates the potential for bias and influence in the motor accidents scheme, which could be avoided by abolishing the MAS system.

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[1] Newcastle District Court, No. 17 of 2003, per Sidis DCJ, Reasons for Judgment on Notice of Motion, 30 July 2004, p6 (Her Honour's emphasis).
[2] *Ibid.*
[3] *Ibid*, p7.
[4] *Ibid*, pp 8 and 9.

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Introduction

The subject matter of this inquiry falls squarely within the expertise of the Australian Lawyers Alliance. Nearly 500 lawyers who specialise in representing injured plaintiffs in compensation claims are members of the organisation in New South Wales. They practise in the statutory workers' compensation and motor accidents schemes, and file public liability and medical negligence actions in the common law jurisdiction. The Lawyers Alliance is uniquely placed to offer an expert legal view of the changes to personal injury compensation legislation that have occurred since 1999, and the effect of these laws have had on injured people's rights to compensation.

However, the terms of reference for this inquiry seek input in a number of areas beyond the scope of our expertise.

Terms of reference 1 and 2
The Lawyers Alliance will not be offering any comment on terms of reference numbers one, and two.

Term of reference 3
The Lawyers Alliance takes an interest in the insurance sector, and has collected some evidence concerning the availability of reasonably priced insurance. We are also aware of organisations with useful evidence relevant to this issue that the Committee may wish to call as witnesses. However, this written submission makes no comment on this issue.

Term of reference 4
This item invites speculation as to the availability of coverage and affordability of premiums in the workers' compensation and motor accidents schemes, had legislative changes in those arenas since 1999 not been made. The Lawyers Alliance does not offer a view regarding this term of reference and respectfully cautions the Committee against reaching firm conclusions based on such hypothetical speculation.

Term of reference 5
The fifth term of reference invites comment in other areas that the Committee may consider to be of relevance. In our respectful submission, the impact of changes to personal injury compensation legislation is felt most strongly by injured people. Given the role played by our members, we are well placed to comment on this issue. The bulk of our submissions are therefore focused on this question.

Structure
The stories of injured people at the beginning of this submission provide illustrations of the impact of recent changes to personal injury compensation law.[5] The section that follows sets out a brief summary of the operative changes to the law since 1999 in the various jurisdictions, and an analysis of the impact that those changes have had on injured people.

[5] Gathering these stories from people who have first-hand experience of compensation law is a difficult task. Injury is traumatic. Confronting the party that caused the injury and fighting for compensation only adds to that trauma. Articulating their experiences for the benefit of the Committee is another step that some injured people are reluctant to take.

The Lawyers Alliance has asked a number of people to allow us to reproduce information regarding their claim for compensation, to give the Committee a real insight into the plight of such people. We have endeavoured to find people whose claims illustrate the range of injustices that recent changes to the law have created. If people whose stories would illustrate other issues come forward during the life of this inquiry, we will seek to place that additional evidence before the Committee.

Injury compensation law in NSW - background

Historically, liability for physical or psychiatric injury has been governed by common law principles. Over time however, the NSW parliament has created statutory schemes to cover certain areas of liability, and created new ones in particular areas.

Crimes compensation is a good example of a new area. State revenue provides compensation in circumstances where criminals, though liable under common law, would often not have the resources to satisfy an award of damages. This system provides compensation where the common law could not.

Workers' compensation on the other hand, is a prime example of an area previously governed by common law. Now governed by a specialised statutory scheme, WorkCover provides for no-fault benefits for all workers, in return for which most common law rights have been extinguished.

Over time, the ambit of the common law has been reduced by statute, with special statutory regimes being introduced in a number of areas. But the areas that have not been covered by statutory schemes remain within the old common law rules. The analysis set out below reflects this history.

Personal injury compensation law is also affected by two other isolated issues.

First, the legal costs that a successful claimant can recover from the defendant may determine whether a claim is viable. Despite the justice of a claim and the real loss and pain of the injured person, there is no sense pursuing a good claim if the costs will exceed the award of damages. Legal costs are significantly affected by the *Legal Profession Act 1987* (LPA), which is also discussed below.

Second, the NSW workers' compensation and motor accidents regimes make use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (*AMA Guides*) in evaluating injuries. The *AMA Guides* provide a simple percentage figure, which operates as a threshold that a claimant must meet before any general damages can be claimed.

Different areas of law

Substantive personal injury compensation law falls into four areas.

Motor Accidents Authority (MAA)

For injury and death arising from the negligence of the owner or driver of a motor vehicle, the *Motor Accidents Compensation Act 1999* (MACA), administered by the MAA, provides a special scheme, with most entitlements governed by statute and only limited rights to sue at common law.

WorkCover

For personal injury claims against an employer, WorkCover administers the *Workers Compensation Act 1987* (as substantially amended). This provides statutory benefits on a 'no-fault' basis, meaning that the worker does not need to prove negligence on the part of the employer to gain access to benefits. A nominal right to common law is practically impossible to access.

Medical negligence	Liability of healthcare providers still essentially falls within the common law. No statutory system has been developed for this area, as in the case of motor accidents and workers' compensation. However, common law rights were modified first by the *Health Care Liability Act 2001* (HCLA), and subsequently by the *Civil Liability Act 2002* (CLA), which contained many of the provisions from the HCLA.
Public liability	Liability of occupiers of property, that is: government agencies; local councils and privately administered sites to which the public have access – building sites, supermarkets, fairs and markets, for example - also remains outside a statutory scheme, but common law rights are circumscribed by the CLA.

An analysis of these four areas, plus the impact of legal costs rules and the *AMA Guides*, are set out in detail below. The AMA Guides interact with both the statutory schemes. They are considered first. An analysis of the statutory schemes themselves follow. The submission concludes with the remaining areas of common law and the impact of legal costs rules.

AMA Guides - disability v impairment

Historically, common law principles guided the assessment of the degree and impact of injury. Judges would consider evidence from doctors as to the degree of the injury and then take evidence as to the specific impacts of the injury in the context of the work and general life of the claimant.

This assessment of 'disability' was informed by the basic principle of compensation in the common law: that the negligent party should return the injured party to the position they would have occupied (so far as money can do so), had the negligence never occurred. This can only be achieved if the process of assessment considers the specific impact of the injury on the life of the claimant.

In recent years, various statutory schemes have adopted a different system for assessing the degree of injury: 'whole person impairment' (WPI). Impairment assessments evaluate the degree of permanent impairment on the function of the injured person's body. The chief distinction from disability assessments is that impairment measurements make no attempt to assess the impact of the injury in the context of the injured person's life and work.

Consider an example. The loss of one eye means a truck driver can no longer do their job. A politician with a similar injury can still read documents and debate issues. A disability assessment would rate the truck driver's disability more highly compared to the impact on the politician. But an impairment assessment makes no distinction.

Impairment assessments in NSW are based on an American system contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (*AMA Guides*). There are several problems with the use of the AMA Guides, the first of which is that the guides assess impairment only, not disability. As the introduction to the *AMA Guides* itself says:

> 'Impairment percentages derived from the Guides criteria ***should not be used as a direct estimate of disability***. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities ***requires individual analyses***. ***Impairment assessment is a necessary first step*** in determining disability.' [6]

The second problem with the *AMA Guides* is that rather than considering a finger or back injury only, they attempt to evaluate an injury to one part of the body in terms of the impairment caused to the body as a whole – thus 'whole person impairment', or WPI. Of course this type of approach calls for a complex calculus according to which an injury in one part of the body is translated into a WPI percentage. Here's a sample calculation taken from a *Medical Journal of Australia* article:[7]

> '…estimate severity of sensory deficit or pain according to Table 11a and that of motor deficit according to Table 12a; multiply the severity of the sensory and/or motor deficit by the appropriate [sic] percentage from Table 13; combine the sensory and motor impairment percentages using the Combined Values Chart to obtain the total upper extremity impairment; convert the upper extremity impairment to whole person impairment using Table 3…'

[6] *AMA Guide*, 5th Edition, p13 (emphasis added).
[7] Dr. Milton I Cohen reviewing AMA 4 and 5 for the *Medical Journal of Australia,* available online at: www.mja.com.au/public/bookroom/1998/cohen/cohen.html

The third problem with the *AMA Guides* is that they lack objectivity. While they consider the injury without subjective input related to the impact of that injury on the claimant, there is no guarantee that two doctors assessing the same patient will arrive at the same WPI percentage. Indeed, anecdotally, it is said that one doctor assessing the same patient on different days will arrive at different percentages.

The *AMA Guides,* and various versions of them adapted to statutory compensation schemes, have radically altered the availability of general damages. They are flawed in that they do not contextualize the injury, as the AMA Guides themselves say is a necessary assessment step; they employ an obscure, arbitrary and complex calculus to convert isolated injuries into WPI percentages, and they allow subjective interpretation by doctors.

The story of David Catsicas, in the opening pages of this submission, demonstrates these difficulties with the *AMA Guides*. Besides difficulties with objectivity, David's case also illustrates the extent to which bureaucratic influence cal also be brought to bear on doctors using the *AMA Guides*.

Motor vehicle accidents

The *Motor Accidents Compensation Act 1999* (MACA) applies to motor vehicle accidents that occurred in NSW from 4 October 1999.

It is a significantly different regime for third-party cases in NSW to the previous scheme (*Motor Accidents Act 1988*). It allows for a system of enforced mediation before a claim goes to trial, and requires the degree of injury to be assessed not by competing doctors providing evidence to a court, but by an assessment of MAA appointed doctors under the Medical Assessment Scheme (MAS).

While there are a number of problems with the MACA regime and its administration by the MAA, by and large it is a satisfactory system. The Lawyers Alliance has participate in the annual review of the MAA over recent years. We can, on request, readily supply copies of the more detailed submissions that were made during those reviews.

One significant effect of the MACA is to greatly diminish the availability of compensation for non-economic loss (NEL); that is, pain and suffering. The Act limits access to NEL by imposing a 10% WPI impairment threshold. Lawyers practising in this area agree that this issue is the overriding concern with the equity and fairness of the motor accidents regime.

Under the previous scheme compensation for non-economic loss (NEL) was subject to a judicial assessment of the plaintiff's injuries on a percentage of 'a most extreme case'. The same style of assessment operates under the *Civil Liability Act*. Furthermore, NEL compensation covered disabilities, changes to lifestyle, pain, depression and other psychological sequelae. Each case was assessed on an individual basis. The introduction of the *AMA Guides* and WPI assessments has changed all this.

Under the MACA, there is no entitlement to damages for NEL unless the claimant's injuries are assessed as greater than 10% WPI. The *AMA Guides* ignore disabilities, adverse changes to lifestyle, depression and other psychological sequelae, pain and future deterioration, even when the deterioration is inevitable.

Despite the fact that section 5(1)(e) of the MACA provides that one of the objectives of the Act is to preserve principles of full compensation for those with serious injuries involving ongoing impairment and disabilities, at least 90% of negligently injured road accident victims receive no compensation for NEL at all.

In recent years the private insurers operating within this scheme have banked profits in excess of the roughly 10% margin considered appropriate by the MAA. It is difficult to understand why the harsh *AMA Guides* continue to be used when they deny compensation to many, in the process providing large profits to the insurance industry. Modifying the MAS system, or returning to a disability measurement of injury, could be managed without a resultant lowering of insurer profitability beyond the point where private underwriting was viable.

Workers' compensation

Workers injured in NSW have access to benefits under a no-fault workers' compensation scheme. As a consequence of amendments to the *Workers Compensation Act 1987*, made in 2001, injured workers in NSW have limited access to what are now very restricted common law damages.

No-fault benefits

An injured worker in NSW has rights under the no fault system to the following:

i. Weekly payments of compensation

For the first 26 weeks of incapacity, an injured worker can receive payments at his or her pre-injury award rate of pay.

After the first 26 weeks of incapacity, where the injured worker is partially incapacitated and the employer is unable to provide suitable light work, an injured worker is entitled to up to another 26 weeks at 80% of his or her pre-injury rate of pay.

An injured worker with an ongoing total incapacity is thereafter entitled to receive weekly compensation at a set statutory rate of approximately $320 per week. This entitlement continues until the worker turns 66. Additional payments may be received if the worker has dependants.

An injured worker with an ongoing partial incapacity may also be entitled to continue to receive this statutory rate, provided it is less than the difference between his or her pre-injury average weekly earnings and the worker's present assessed earning capacity.

ii. Medical expenses

A worker is entitled to payment of all reasonable medical and therapeutic expenses. This is a lifetime entitlement. There are some caps in relation to individual expenses incurred by the worker, but no overall limit on expenditure on expenses over the course of the claim.

iii. Lump sum payments

An injured worker in NSW is entitled to a lump sum payment for permanent impairment. Where the impairment exceeds 10% WPI, a further payment for pain and suffering is available. This further payment is capped at $50,000. Impairment is assessed using the fifth edition of the *AMA Guides*.

Common law claims

Access to common law is nominally still available in NSW, but is severely restricted. Proceedings may be commenced once a worker has a certificate from an Approved Medical Specialist that their WPI assessment exceeds 15%. Common law proceedings may then be commenced for lost income only. Payment for pain and suffering is made under the no-fault system. Successful recovery at common law precludes the payment of future medical expenses. This is a significant disincentive to seriously injured workers, which results in very few claimants electing to pursue common law claims.

The dispute resolution process in NSW

The NSW Act provides for an insurer to commence provisional payments of compensation, on notification of an injury, for a period of up to 12 weeks. This is the case unless an insurer can provide a reasonable reason to oppose such payment. Disputes are referred to the Workers Compensation Commission. This consists of a President and two Deputy Presidents and approximately 80 Arbitrators.

Disputes are referred by the Commission registry to an Arbitrator. If the dispute relates to the extent of the worker's permanent impairment, the Arbitrator is then required to refer it for assessment by an Approved Medical Specialist. The findings of the Approved Medical Specialist are, for most practical purposes, unappealable.

An appeal lies from the decision of an Arbitrator to a presidential member of the Commission. Appeals lie both in respect of matters of facts and law. However, the amount in dispute must exceed $20,000, or more than 20% of the amount claimed.

The NSW Court of Appeal retains a right of review.

Difficulties with the NSW system

Arbitrators

There have been significant issues with the pool of Arbitrators. Some have had significant experience in the jurisdiction prior to their appointment. However, many have not. Given inconsistencies in approach by Arbitrators both procedurally and substantively, the number of appeals that have fallen to be determined by presidential members has increased dramatically, to the point where the delay in having an appeal from an Arbitrator determined now exceeds 12 months.

From the perspective of an injured worker it is unacceptable, first, that the decision-making process of the Arbitrators would be flawed to the extent that such a volume of appeals has accumulated, and second, that from the time it became apparent that the volume of appeals was increasing significantly, no steps have been taken to deal with appeals in accordance with the stated intention of the Workers Compensation Commission – that is, to determine issues more fairly, faster and more cheaply.

Costs limitations

The provision for paying worker's legal costs under the Workers Compensation General Regulation remains a significant issue. The costs recoverable in respect of a claim where the amount in issue is less than $1,000 are prohibitive, and an injured worker would be extremely unlikely to obtain legal representation in respect of such an issue. This has allowed a situation to develop where – as regards a worker's medical expenses - insurers have applied the $1,000 costs limit as a *de facto* excess.

In respect of proceedings before the Commission generally, it is clear that the cost regulations enable costs to be recovered only for work done in simple and straightforward claims. In any matter where the worker may has more than one injury, where any legal issue of any complexity arises, where more than one employer or insurer is involved, or where the nature of the injury sustained by the worker is unusual (such as in the case of a chemical exposure) legal representatives for the worker will be in effect acting on a *pro bono* basis. This means that workers most in need of representation are least able to access it.

AMA Guides

The further issue that continues to provide significant difficulties for injured workers remains the imposition of the *AMA Guides* as the means of assessing the extent of impairments suffered. It is freely acknowledged by practitioners practising in the area that

the *AMA Guides* remain an unsatisfactory mechanism by which to interpret impairment. The *AMA Guides* are also described by medical practitioners as riddled with errors. That injured workers are subjected to assessment using a document both unsuited to the purpose and inherently flawed is clearly unacceptable.

The regime in NSW for resolving disputes concerning workers' rights has been subject to significant change. These changes were designed to provide a simpler dispute resolution mechanism. Unfortunately, the legislation that gives context to these disputes, and under which these disputes arise, has grown increasingly complex and voluminous. It remains to the extreme disadvantage of injured workers in NSW that the simplification of the dispute resolution process and the reduction in their access to legal representation was not accompanied by amendments to the legislation enabling their rights more easy to ascertain and determine.

Medical negligence

NSW personal injury compensation legislation affecting medical treatment began with the *Health Care Liability Act 2001.* However, that Act has been subsumed by the *Civil Liability Act 2002* (CLA), which adopted most of the operative provisions of the earlier Act.

The chief effect of the CLA that concerns the Lawyers Alliance is one that affects not just medical negligence claims but all claims under the CLA. It is the 15% threshold for general damages. The operation of this threshold and related issues are discussed in some detail below, as are a number of separate issues that affect medical negligence claims.

Defining the term 'professional'

Division 6 of Part 1A of the CLA defines professional negligence. The definition of negligence itself produces no issue of concern. However, the term 'professional' is not defined, which renders application of the law uncertain. Do the provisions of Division 6 Part 1A extend to iridologists, naturopaths, alternative medicine practitioners and the like? As the public increasingly embraces these areas of alternative medicine, it is important for the law to be clear as regards the liability of such practitioners.

Evidentiary alterations in respect of failure to warn (informed consent) claims

Some claims in medical negligence are about the materialisation of an inherent risk in a procedure or treatment. There is no negligence on the part of medical practitioners unless they failed to warn their patients of the risk, and then obtained properly informed consent.

In a failure to warn claim, as in most tort claims, an onus lies on the plaintiff to prove that the alleged negligence caused them loss or damage. In a failure to warn case, causation is established if the plaintiff can show that they relied on the negligent warning in deciding to proceed with treatment but, had they been properly informed, they would not have proceeded. If the plaintiff would have proceeded in any event, it is unreasonable to blame the medical practitioner for failing to warn – since such warning would not have prevented the injury.

Historically the way to prove this causation was simply to ask the plaintiff what they would have done, had they been properly advised of the risks.

However, section 5D(3) of the CLA provides as follows:

> '(3) *If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*
>
> *(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and*
>
> *(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.'*

If a plaintiff is heard to say that they would have gone ahead anyway, that is admissible against them. But the injured person is prohibited from telling the court about their own intentions, and about their own expectations about the procedure, on the basis of which they decided how to instruct the medical practitioner.

Surely a person ought be able to state simply what they would have done, if warned. The court can assess such a statement as self-serving and accord it a lower evidential

weighting, if appropriate. But to deny a person injured in such a way the right simply to express their own intentions seems an unreasonable denial of natural justice and procedural fairness.

Ad hoc restrictions on classes of claimant (the mentally ill and prisoners)

Division 5 Part 7 of the CLA limits rights to recover personal injury compensation where the injury was caused through criminal acts, or by a person suffering a mental illness. There are a number of aspects of these provisions that are offensive to basic legal principles. In this section, only the medical negligence aspect of the provision is relevant.

Section 54A provides that a mentally ill person who commits acts that are assessed, *on the civil rather than criminal standard of proof,* to be criminal offences, and suffers injury while doing so, is entitled to extremely limited damages.

This provision would apply in circumstances where the acts of the mentally ill person occurred through the negligent treatment or management of that person's care by a medical practitioner or institution.

Most legal consideration of persons suffering a mental illness properly acknowledge the mental condition as an illness. Criminal law is modified in such circumstances, and where an offence has been committed, the sentencing response is more in the nature of treatment than of punishment. The CLA departs radically from this accepted treatment of mental illness in the law.

Section 54A recasts the action of the mentally ill person, placing it in the same category as criminal actions. If a person suffers from a genuine mental illness and is allowed to commit violent or other criminal actions only through the negligence of a treating doctor or facility, then to deny just compensation for such negligence is manifestly unfair, and ignores the fact that only poor treatment of the condition allowed the commission of the deemed 'offence'.

Ad hoc restrictions on damages (cost of raising a child)

The ad hoc alteration of the law in section 71 of the CLA concerning claims for the cost of raising a child is not principled. It unfairly deprives parents in such circumstances of compensation for an expense that they would undoubtedly not have incurred but for negligent medical treatment.

Mothers who sensibly choose to seek medical treatment (for example, sterilization) and pay a medical practitioner for the competent performance of that service are nonetheless deprived of the major component of any compensation entitlement, regardless of how egregious the negligence may be.

The combination of CLA section 71 with the 15% threshold, which is further exacerbated by the LPA costs recovery restrictions for claims under $100,000 (see below), effectively deprives the victim of almost all compensation. Medical negligence claims tend to be hard fought, and invariably involve complex and expensive expert evidence taken over long and equally expensive trials. The combined effect of the CLA and LPA creates a situation where, although a claimant would almost certainly win in any court action, they would nevertheless lose money fighting the claim.

Caps and thresholds

Section 16 of the CLA provides as follows:

16 Determination of damages for non-economic loss

"(1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.

(2) The maximum amount of damages that may be awarded for non-economic loss is $350,000, but the maximum amount is to be awarded only in a most extreme case.

(3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table:

Table

Severity of the non-economic loss (as a proportion of a most extreme case)	**Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)**
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%-100%	34%-100% respectively

(4) An amount determined in accordance with subsection (3) is to be rounded to the nearest $500."

The $350,000 cap on general damages is indexed and currently sits at $400,000.

The percentage of a most extreme case is arrived at by a judge considering the most extreme result possible given the plaintiff's injury. In many cases, quadriplegia or gross traumatic brain injury will constitute the most extreme case. However, in many cases it is difficult to see how the test should be applied. In the case of Mrs Skinner (set out at the beginning of this submission), what is the most extreme case of having surgical instruments left inside your body? The Committee will no doubt be aware that the Chief Justice of the Supreme Court himself has expressed some concern that the threshold is operating unfairly to exclude some meritorious claims.

Usually the threshold under the CLA is considered to be 15%. Certainly that is the point below which no general damages are available at all. However, 10% of the current maximum cap on general damages is only $40,000, and is available only where the injury is assessed at 27% of the most extreme case. In practice therefore, section 16 operates to impose quite radical limits on general damages all the way up to injuries assessed as 25% or 30% of the most extreme case.

The operation of the threshold, on its own, unfairly restricts compensation, including for victims of negligent medical treatment, by excluding too great a severity of injury from entitlement to NEL damages.

While unfair for all injured people, these provisions are particularly harsh in the medical negligence field, because proving hard-fought cases against doctors or hospitals is a comparatively expensive legal exercise. To understand how the cost of legal proceedings impacts on the threshold to make some cases impossible to pursue, we need also to consider costs limitation in the *Legal Profession Act 1987*. An analysis of these rules follows the section on public liability below.

Entrepreneurial medicine operations

The CLA relevantly extends to all personal injury damages, which by definition encompasses all medical and similar treatment. However, there are some areas of medical treatment that ought be distinguished as commercial operations driven by advertisements promoting non-essential medical procedures.

Prime examples include cosmetic surgery (such as liposuction, breast surgery, facelifts) cosmetic treatments (such as laser, botox injections) and laser eye surgery. The medical press currently carries advertisements promoting finance packages for breast augmentation surgery. Surely some of the provisions in the CLA designed to insulate the medical professional and government health agencies from a perceived rash of 'minor' claims should not operate to protect entrepreneurial medical practices that provide cosmetic and other non-essential treatments.

Such operations display an inherent and unavoidable tension between the legal requirement to properly inform the client and the desire to sell a service or product for profit. If treatment is provided negligently, in almost all such cases the operation of the CLA threshold will be such as to leave the victim with no viable remedy.

The effect of the CLA for breast augmentation surgery, for example, is practically to remove any civil liability for a negligently performed operation. No social benefit exists in subsidising such operations by depriving the victims of negligent treatment of a legal remedy.

Public liability

Once motor accidents and workers' compensation are removed from the common law system, and medical negligence claims considered separately, the remaining areas of common law negligence are treated under the rubric of 'public liability'. Such claims include actions against occupiers of land, and statutory authorities. Public liability claims are also now regulated under the CLA.

There are a number of isolated issues of concern within the CLA. Again, as is the case in medical negligence cases, the thresholds and caps in section 16 place limitations on recovery for NEL (see above).

Pure mental harm arising from shock
Witnesses or rescuers suffering post-traumatic stress after seeing an horrific accident are subject to Division 3 Part 3 of the CLA. Section 30(3) provides that any entitlement to general damages for the post-traumatic stress is discounted according to the contributory negligence of the primary plaintiff.

If a local council's negligence leads to a violent accident damaging a person coming onto council-controlled property, the person injured may have a claim. A person coming to the rescue of the injured person will also be entitled to sue the council for any post-traumatic stress. Oddly, if the injured person contributed to the accident through their own negligence, thereby discounting their own claim, that discount applies also to the rescuer.

Limited liability for the actions of third parties
Section 43 of the CLA provides that public authorities – which category now extends to certain private institutions such as private schools – are not liable for any failure to control the activity of a third party. A teacher who witnesses a dangerous game being played in the schoolyard is not liable for their failure to intervene and prevent injury.

Liability for actual knowledge only
The law has long acknowledged two standards of knowledge, implied and actual. A person can be liable for failing to act in the light of actual knowledge: for example, a doctor attempting a blood transfusion knowing that the patient's blood type was incompatible with that transfused. A person can also be liable where the court finds that, though there was no actual knowledge, a reasonable person should have known of a fact. The doctor in the example should have known to check the patient's blood type and not transfuse non-compatible blood.

In the case of public road authorities, section 45 of the CLA now allows liability only for actual knowledge. The practical effect of this section is to encourage road authorities not to actively inquire as to the state of public highways. If they check the roads, find a fault but don't fix it, they may be liable for any injury that it subsequently causes. But if the authority simply avoids checking at all, no concept of implied knowledge can be raised to support a claim.

Discount rate
The common law acknowledges that persons awarded lump sum compensation gain control of a sum of money that can be substantial. Although the money is awarded in lieu of many years of lost income or large future medical costs, the award provides all the money at once rather than over time. Arguably the plaintiff will be able to invest the money earning interest at a rate that inflates the total value of the damages awarded.

To account for this factor, the common law developed the notion of a discount rate. Any award of damages for long-term care or future economic loss is reduced by a small percentage to account for the earning potential of an invested lump sum. The principle

went to the High Court in the case of *Todorovic v Waller,*[8] in which the court commented that 3% was an appropriate reduction.

Recent review of the rate in the UK has prompted the Lord Chancellor to reduce the relevant rate from 2.5% to 2%.

The Ipp review recommended 3%.

The CLA rate in section 14 is 5%.

The discount rate produces pronounced effects only in cases that involve a large claim for future care and lost income. The resulting large damages awards occur only in cases of catastrophic injury and are intended to provide for all the day-to-day and special care needs of the injured person for their entire life. The change from 3% to 5% produces profound effects in the life of the managed trust that administers the lump-sum award. The fund can run out years earlier under a 5% rate, perhaps while the injured person is still alive and very much in need of care.

Most of the CLA reforms were targeted at so-called 'minor' claims. The change to the discount rate affects only very serious claims, made by those whose need for a damages award is greatest.

Obvious risks

Part 5 of Division 1A governs liability where there is an obvious risk. Introduced under the rubric of 'personal responsibility', these provisions can produce unintended consequences.

The Lawyers Alliance knows of a case in which a woman attended a corporate training session, in which a range of risky activities were engaged in as team-building exercises. The woman fell, suffering a severe ankle injury.

Arguably the responsible company is insulated from any liability. In any event the company was insolvent and had no insurance, leaving the injured woman without a remedy. It is possible that the company carried no insurance on legal advice that its liability was extremely limited.

Where an inherent risk of a dangerous activity materialises through no fault of the party carrying on the activity, there is an argument for the person choosing to engage in that activity to bear the loss. But where the activity is provided as part of a business venture, and the accident occurs through the negligence of the corporation or person organising the activity, what possible rationale is there for insulating such activity from any liability?

[8] (1981) 150 CLR 402

Legal costs

The *Legal Profession Act 1987* (LPA) sets a maximum on recoverable costs from a defendant in personal injury damages claims only. The restrictions do not apply to other types of claim.

Section 198D of the LPA provides that where damages agreed or awarded are equal or less than $100,000, then the plaintiff's maximum recoverable legal costs are limited to 20% of the amount recovered or $10,000, whichever is the greater.

Personal injury claims tend to be complex, as compared to some types of debt recovery and contract disputes. Medical evidence is usually required and a trial of three days or more common. Where a claim is vigorously defended, the costs of bringing expert witnesses to court and retaining barristers and solicitors can run to tens of thousands of dollars. $30,000 would not be an uncommon estimate of the costs involved in litigating a three-day personal injury trial in the District Court. Such high fees can be forced on a plaintiff regardless of the merits of their claim. Even where negligence is very clear on the facts, a defendant can force the issue to trial, thereby putting the plaintiff to unwanted expense.

The case of Mrs Skinner set out at the beginning of this submission illustrates how the CLA and LPA costs provisions work together to render even a clear-cut case of negligence difficult to sustain. Mrs Skinner reportedly settled her case, on confidential terms, but it is useful to consider her position had she been forced to go on to court.

As a retiree, Mrs Skinner had limited economic losses. Her pain and suffering claim – NEL – would have been limited by the table in section 16 of the CLA. There was a real risk, very difficult for her lawyer to assess, that her injury would rank low on the percentage of a most extreme case, and her NEL damages therefore fall below $100,000. In that case, her claim for legal costs against the other side, assuming that she won, would be limited to $10,000, or 20% of the award.

If Mrs Skinner had spent $30,000 litigating her case against the strong defence of an insurance company and a hospital, and was found to have suffered an injury 23% of the most extreme case, she would have been awarded 5% of the maximum damages allowable: $20,000. With a $10,000 award for her legal costs, she'd just break even. If her injury had been assessed anywhere below 23%, she would have lost money, even though her claim was one of such manifest negligence.

The provisions of the LPA operate to exacerbate the limitations in the CLA. Taken together they keep many meritorious claims out of the courts, and affect the rights of unwaged citizens disproportionately. There is no sound principle for granting a limited immunity from the usual legal costs rule in such cases. If the insurance company in Mrs Skinner's case wanted to fight her through the courts – in spite of the clear facts of her case – then the additional costs she incurs should be met by them, not Mrs Skinner.

The Australian Lawyers Alliance

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.