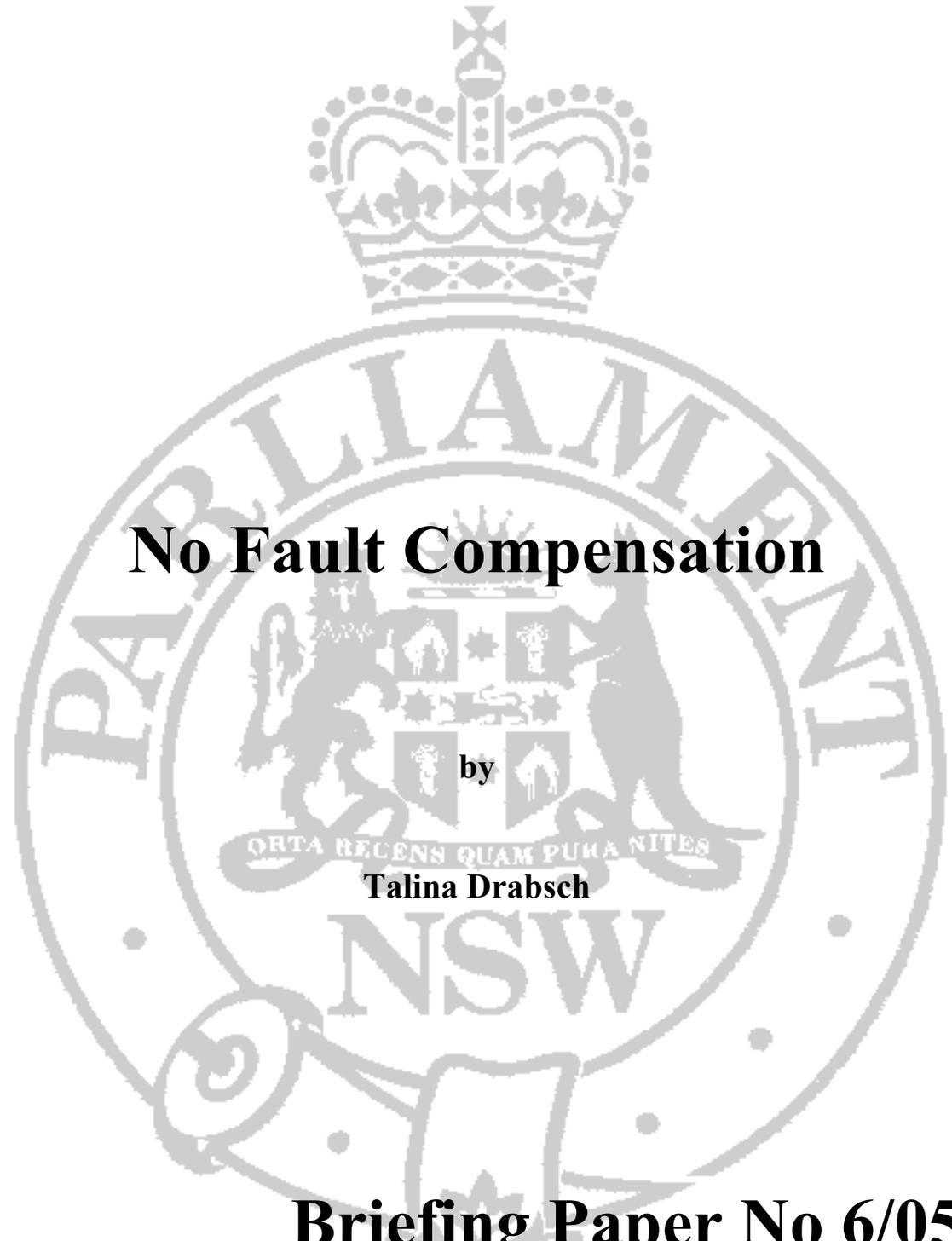


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No Fault Compensation

by

Talina Drabsch

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No Fault Compensation

by

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EXECUTIVE SUMMARY

This paper explores the possibilities of no fault compensation, where the entitlement to compensation is not linked to the ability to prove that a person's injuries were due to the fault of another. It is partly a response to the discussion that followed the recent decision of the High Court to reinstate the award of \$3.75 million in damages to Guy Swain, a man rendered quadriplegic after diving through a wave and hitting a sandbank at Bondi Beach in 1997. The tort law reforms in the last few years, and the 'insurance crisis' that preceded them, have received much recent attention as the impact of the reforms has begun to flow through. Some concerns have been raised that, as a result of the changes, some people with serious injuries receive little, if any, compensation, forcing them to rely on family, friends and social security.

The current means by which personal injuries are compensated in NSW are discussed in section 2 (pp 4-19). An overview is provided of the law of negligence, including the recent changes in 2002. Information on the workers' compensation and motor accidents compensation schemes is also included, as is a description of victims' compensation.

Section 3 (pp 20-32) examines the history of no fault compensation in Australia, with particular attention given to the Australian Woodhouse Report and subsequent National Compensation Bill 1974, as well as the 1984 report of the NSW Law Reform Commission that proposed a transport accidents scheme for NSW. A summary of the current no fault compensation schemes that operate in relation to motor accidents in Victoria, Tasmania and the Northern Territory is also included.

A number of no fault schemes exist throughout the world, including in New Zealand, the United States of America and Scandinavia. Section 4 (pp 33-46) includes a detailed overview of the accident compensation scheme in New Zealand, a comprehensive no fault system that has operated for more than 30 years. Information on the provision of no fault compensation for babies with birth-related neurological injuries in Virginia and Florida is also included in this section. Finally, some additional schemes operating in various countries are briefly noted.

Further analysis of the concept of no fault compensation is provided in section 5 (pp 47-53). This section highlights some of the debates that surround the relative worth of no fault compensation as opposed to the common law, including the role of fault, and issues of fairness, certainty, efficiency, the accuracy of monies received, and rehabilitation.

1 INTRODUCTION

There are various types of no fault compensation schemes. Some operate in addition to the common law whilst other schemes completely replace it. In a no fault compensation scheme a person does not need to prove that an accident was due to the fault of another before receiving compensation. A number of no fault schemes were established in Australia and internationally in the 1970s and 1980s, largely in relation to medical injuries and accidents involving motor vehicles.¹

On 10 February 2005, the *Sydney Morning Herald* reported that the Premier of NSW, the Hon Bob Carr, had announced that the Government is working on a plan to care for the catastrophically injured, regardless of fault.² Cabinet is to consider a no fault scheme covering the lifetime cost of caring in the home for victims of severe accidents. The purpose of this proposal is to provide relief for persons who cannot prove fault or whose potential claims were prevented by the changes to the tort system in 2002. It is anticipated that such a scheme would be funded through third party vehicle insurance and also by workers' compensation premiums.

Catastrophic injury has been described as covering:

a broad spectrum of injuries and medical conditions. It includes brain injury, spinal cord injury, serious neurological disorders, accidental amputation, multiple fractures, severe burns and significant psychological disorders. Catastrophic injuries may be caused as a result of a sudden accident, or may develop over a period of time. They often cause severe disruption to the central nervous system and [are] often associated with loss of movement, sensation and cognitive abilities. The injury or illness may affect respiration, circulation, the urinary system, the gastrointestinal system, the skin and other body systems. [Medical] management of those injuries is often complex and usually requires the expertise of a range of medical and paramedical specialists, such as specialist nurses, therapists and counsellors. Most catastrophic injury cases involve significant permanent disability and often a reduced lifespan.³

The catalyst for Premier Carr's announcement appears to have been the decision of the High Court on 9 February 2005 in *Swain v Waverley Municipal Council*.⁴ The case arose from events that occurred on 7 November 1997 when Guy Swain, then aged 24, diving through a wave at Bondi Beach was rendered a quadriplegic after striking a sandbar. The beach was supervised by three lifeguards at the time and was under the care, control and management of Waverley Council.

¹ Cane P, 'Reforming tort law in Australia: a personal perspective', *Melbourne University Law Review*, 27(3) December 2003, p 654.

² 'Carr's softer line on accident claims', *Sydney Morning Herald*, 10/2/05, p 1.

³ Davies D, 'Damages for catastrophic injury', *Catastrophic Injury*, Legalwise Seminars, Queensland, 2004, p 19.

⁴ [2005] HCA 4 (9 February 2005)

Mr Swain subsequently sued the Council for an alleged breach of duty of care. He argued that the Council had failed to take reasonable care in positioning the flags that induced him to swim where he did. As an alternative argument, Mr Swain argued that the Council had been negligent in failing to warn swimmers of the sandbar. A judge and jury of four tried the action in the NSW Supreme Court. The jury found the Council to be negligent and a verdict and judgment was entered for Mr Swain for \$3.75 million, after taking his contributory negligence (25%) into account.

Waverley Council appealed the decision and the Court of Appeal entered judgment for the Council. Handley and Ipp JJA held there to be no evidence upon which the jury could find the Council negligent in placing the flags. They determined that it was not open to the jury to find that the flags suggested that the patrolled swimming area was safe for diving, and considered the dangers associated with diving into the surf to be obvious. All judges held that there was no evidence to support a verdict based on the failure of the Council to warn that it was dangerous to dive in the surf because of sandbanks.

Mr Swain appealed to the High Court. He claimed that the Court of Appeal had erred in finding there to be no evidence that the Council was negligent in placing the flags where it did. The majority of the High Court (Gleeson CJ, Gummow and Kirby JJ) allowed the appeal and reinstated the award of \$3.75 million to Mr Swain (Heydon and McHugh JJ dissented). However, Kirby J noted that, 'in some ways, the jury's verdict in this case was a surprising one'.

According to Premier Carr, Mr Swain would not have been able to sue Waverley Council had his injury occurred after the reform of personal injury law in 2002 as the risk of injury could be seen as inherent or obvious.⁵ Therefore, despite being catastrophically injured, he would not have been eligible for damages as compensation. Mr Swain's case also illustrates some of the difficulties faced by defendants in such situations. There have been reports in the media of complications arising over payment of the \$3.75 million damages.⁶ Waverley Council, together with Randwick, Woollahra, Manly and Wollongong Councils, belonged to an insurance pool known as Premeure, which covered all public liability claims of more than \$1 million. Premeure covered these claims with policies from four insurers, one of which was Independent Insurance. Unfortunately, Independent Insurance went into liquidation in 2001 and it is believed that this has left Waverley Council with a shortfall of approximately \$1 million. The Mayor of Waverley Council, Peter Moscat, claimed that the Council's capital works program would be affected, thus reinforcing the desirability of a no fault claims system.

A number of organisations have voiced their concern regarding the possible introduction of a no fault compensation scheme for the seriously injured. Eva Scheerlinck of the Australian Lawyers Alliance (previously known as the Australian Plaintiff Lawyers Association) has

⁵ 'Carr's softer line on accident claims', *Sydney Morning Herald*, 10/2/05, p 1.

⁶ 'Neighbours to pay as \$1m insurance bill floors council', *Sydney Morning Herald*, 2/3/05, p 7; Waverley Council, 'Statement on the Guy Swain case', *Media Release*, 4/3/05.

expressed apprehension about the potential impact of such a scheme. She fears that people with catastrophic injuries will end up on pensions in nursing homes for the remainder of their lives.⁷ John North, President of the Law Council, is also uneasy at the prospect of a no fault compensation scheme, arguing that no fault compensation schemes do not provide full compensation whereas common law damages enable people to live independently.⁸ The Council of Social Service of New South Wales (NCOSS) remains wary. Whilst it accepts that a catastrophic injury scheme will assist some injured persons, it believes that some people with quite serious injuries will still be excluded. NCOSS suggests that a wider accident compensation scheme be implemented, such as in New Zealand.⁹

⁷ Australian Lawyers Alliance, 'Carr forcing accident victims on to welfare', *Media Release*, 10/2/05.

⁸ Law Council of Australia, 'No-fault scheme no answer to tort reform damage done by Premier Carr', *Media Release*, 10/2/05.

⁹ Council of Social Service of New South Wales, *Submission to the Legislative Council General Purpose Standing Committee No 1 Inquiry into Personal Injury Compensation Legislation*, March 2005, p 5.

2 PERSONAL INJURY COMPENSATION IN NSW

More than 3.5 million people in Australia had a disability in 1998, with an accident or injury being the cause of the main condition associated with the disability of 590,000 people.¹⁰ More than half of those with a disability who live in a household require assistance with such everyday tasks as:¹¹

- moving around;
- going out;
- bathing;
- meal preparation;
- housework;
- property maintenance;
- paperwork; and/or
- communication.

However, less than two-thirds of people in need of assistance have their need fully met, with the burden of assistance generally falling on family and friends.¹²

The long term care needs of injured persons can be much broader than simply requiring aid with basic tasks. The Motor Accidents Authority has previously identified some of the long term care needs of people who have been severely injured. These needs include:¹³

- extended case management;
- support in community accommodation;
- leisure/recreational and community access programs;
- respite;

¹⁰ Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings*, cat no 4430.0, ABS, Canberra, 1998, p 24.

¹¹ *Ibid*, p 8.

¹² *Ibid*.

¹³ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Interim Report*, December 1996, p 126.

- vocational support;
- transport;
- crisis management;
- vocational/social skills development;
- psycho-social/behaviour modification programs;
- self help/self advocacy; and
- community education.

A significant number of people who are injured in an accident do not receive any compensation. For example, each year approximately 220 people with an acquired brain injury and 40 people with a spinal cord injury require long term care services following a motor vehicle accident in NSW.¹⁴ However, just over half of those injured in a road accident receive some form of compensation, with the remainder being forced to rely on family and friends, and/or the government through social security.¹⁵

Personal injury law provides a remedy for some injured persons. Victims of a personal injury may, depending on the cause of their injury, pursue compensation through a number of avenues, including the common law. A number of statutory schemes also exist, and damages in certain cases are to be determined in accordance with particular legislation. Relevant legislation includes, amongst others, the *Motor Accidents Compensation Act 1999*, the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*, and the *Civil Liability Act 2002*. Data has shown that 61% of catastrophic injuries in Australia come under the motor vehicle scheme, 13% are part of workers' compensation, 11% are due to medical negligence, and 15% fall under public liability.¹⁶ The following sections will explore some of the available legal remedies.

2.1 The law of negligence

The tort of negligence consists of three elements:

1. A duty of care must be found to exist.

¹⁴ Hon J Della Bosca, *Review Motor Accidents Compensation Act 1999*, Tabled in the Legislative Council, 24 October 2002, p 44.

¹⁵ Luntz H and Hambly D, *Torts: Cases and Commentary*, Fifth edition, LexisNexis Butterworths, Chatswood, 2002, p 8.

¹⁶ Senator the Hon H Coonan, 'Long-term care scheme still firmly on the agenda', *Media Release*, 7/8/03.

2. The duty of care must be breached.
3. Damage or injury, not too remote, must result from the breach.

In NSW, substantial changes have been made in recent years to the law of negligence. The end of the twentieth century and the initial years of the twenty-first century saw the development of what became known as a public liability and professional indemnity insurance crisis as premiums dramatically increased and the availability of insurance rapidly decreased. This impacted on sporting and community organisations as well as professionals such as doctors who had difficulty obtaining professional indemnity insurance.

There was extensive debate over the cause of the insurance crisis. Some argued it was the result of the increased litigiousness of Australian society. Others cited the impact of the September 11 terrorist attacks on the US, the collapse of HIH, fluctuations in the insurance market, or a combination of all of these and other factors. The Law Society of NSW argued that:

For all the inflamed rhetoric about an insurance ‘crisis’ and ‘litigation explosion’, it is now clear from the subsequent data that the perceived crisis in availability and price of insurance in the 1999-2002 period was largely due to cyclical factors affecting the insurance market exacerbated by one-off events, and not due to excessive litigation or compensation payouts.¹⁷

According to the Law Society, court judgments had already swung in favour of defendants and the upsurge in litigation was due to impending changes to personal injury law.¹⁸

The NSW Government made substantial changes to personal injury law in NSW.¹⁹ The changes, many of which are now embodied in the *Civil Liability Act 2002*, were designed to limit both the number and size of claims. The Act commenced retrospectively from 20 March 2002. The Negligence Review Panel, chaired by Justice Ipp, published its review of the law of negligence in September and October 2002.²⁰ The terms of reference for the review noted that, ‘The award of damages for personal injury has become unaffordable and unsuitable as the principal source of compensation for those injured through the fault of another’. The review sought to determine the most suitable method of reforming tort law so that liability and the quantum of damages would be limited. The *Civil Liability Amendment*

¹⁷ Law Society of NSW, *Submission to the Legislative Council General Purpose Standing Committee No 1 Inquiry into Personal Injury Compensation Legislation*, March 2005, p 5.

¹⁸ *Ibid*, p 6.

¹⁹ For further information on the public liability insurance crisis and the legislation that followed see: *Public Liability* by Roza Lozusic, NSW Parliamentary Library Briefing Paper No 7/02 and *Public Liability – an update* by Roza Lozusic, NSW Parliamentary Library Briefing Paper No 11/02.

²⁰ Negligence Review Panel (Chair: Ipp J), *Review of the Law of Negligence: Final Report*, September 2002.

(Personal Responsibility) Act 2002 executed the second stage of reforms in NSW, implementing some of the recommendations made by the Negligence Review Panel.

The *Civil Liability Act* provides for the recovery of damages for death or personal injury caused by the fault of another. However, it does not apply to acts done with the intention of causing injury or death, sexual assault, claims in relation to dust diseases, damages in relation to the use of tobacco products and workers' compensation.²¹ Motor accidents are also largely excluded from its operation.

Some of the major changes in relation to the award of damages under the *Civil Liability Act* include:

- The damages that may be awarded for non-economic loss are capped at \$350,000 (indexed annually): sections 16 and 17. The cap was increased to \$400,000 from 1 October 2004.²²
- A 15% threshold applies so that no damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of that of a most extreme case: section 16. A sliding scale then applies until the severity of the non-economic loss reaches 33% of the most extreme case.
- The damages that may be awarded for past or future economic loss are capped at three times the average weekly earnings of all employees in NSW: section 12.
- The discount rate for future economic loss increased to 5%: section 14.
- No exemplary, punitive or aggravated damages may be awarded where the act or omission that caused the injury was negligence: section 21.
- The damages that may be awarded for gratuitous attendant care services are limited to circumstances where the services are provided for more than six hours per week and for more than six months: section 15.
- Damages awarded for the birth of a child cannot include damages for economic loss for the costs associated with rearing or maintaining the child or any loss of earnings by the claimant while he or she rears or maintains the child: section 71.²³

The *Civil Liability Act 2002* inserted section 198D into the *Legal Profession Act 1987* so that legal costs for personal injury claims are limited in cases where the award of damages does not exceed \$100,000. In these circumstances, maximum costs are fixed at 20% of the amount recovered (or sought to be recovered) or \$10,000 whichever is the greater.²⁴

²¹ Section 3B *Civil Liability Act 2002*

²² NSW, *Government Gazette*, No 143, 10/9/04, p 7509.

²³ Sections 70 and 71 were inserted by the *Civil Liability Amendment Act 2003*.

²⁴ Following its commencement, section 338 *Legal Profession Act 2004* will replace section

2.1.1 *Impact of tort law reform*

The changes to personal injury law were designed to encourage personal responsibility and to limit the number and size of claims. Whether the reforms have achieved these purposes is a matter of some debate. The NSW Government has indicated that it considers the tort reforms to have been successful. Premier Carr believes that the major reforms to public liability laws in 2002 have worked, as the number of civil cases filed in the District Court has declined and premiums for public liability insurance have stabilised.²⁵ He has also drawn attention to the fact that CGU Insurance has cut its commercial public liability rate by 10% in NSW. The Legislative Council General Purpose Standing Committee No 1 is currently conducting an inquiry into personal injury compensation legislation in NSW in relation to the operation and outcomes of the tort law reforms introduced in 2002. Submissions for the inquiry closed on 11 March 2005 and a public hearing was held on 2 May 2005.

Some would argue that it is still too early to assess the full impact of the changes to tort law. However, the Law Society of NSW believes that 'enough data is now available to begin an objective assessment of both the rationale that underpinned the changes to personal injury laws, and the real impact of those changes'.²⁶ The number of statements of claim filed in the District Court of NSW has dramatically fallen each year since 2001.

Civil matters registered in the District Court of NSW

Year	Number
1998	12,500
1999	14,261
2000	15,070
2001	20,784
2002	12,686
2003	7,912
2004	6,275

Source: Law Society of NSW, *Submission to the Legislative Council General Purpose Standing Committee No 1 Inquiry into Personal Injury Compensation Legislation*, March 2005, pp 30-31.

As the above table demonstrates, in 2001 there were approximately 20,000 claims filed, compared to about 13,000 in 2002 and 8,000 in 2003.²⁷ However, it is not certain whether

198D.

²⁵ Carr R, 'Public liability reform', *Media Release*, 9/2/05.

²⁶ Law Society of NSW, above n 17, p 5.

²⁷ District Court of New South Wales, *Annual Review 2003*, p 13.

the reduction is due to the effectiveness of the new laws or the rush to file claims before they commenced. The Law Society of NSW has argued that ‘far from there being an actual litigation explosion requiring a legislative response, the only sudden upsurge in litigation was in fact prompted by the legislative change itself’.²⁸ Nonetheless, it seems that tort reform has had at least some influence on lowering the number of claims.²⁹

According to Chief Justice Spigelman of the Supreme Court of NSW, the introduction of the 15% whole person impairment threshold for general damages is responsible for the dramatic decrease in the number of claims filed in the District Court.³⁰ He argues that the introduction of this threshold has meant that some seriously injured people are unable to sue. However, Spigelman CJ acknowledges that the number of claims is also affected by other factors, particularly changes in the attitude of the courts towards plaintiffs and defendants. Luntz detected an attitudinal change when examining the pattern of High Court decisions. He highlights that in 2003, the majority of the 18 torts cases decided by the High Court favoured the defendant, continuing a trend that commenced at the end of 1999.³¹

Some commentators suggest that the only beneficiaries of the changes to personal injury law are the insurers, as premiums have yet to fall.³² However, according to the Australian Competition and Consumer Commission, the real average premium for public liability insurance fell by 15% between the end of 2003 and mid 2004 in contrast to a trend of substantial increases since 2000.³³ Similarly, the real average premium for professional indemnity insurance fell by 17% between the end of 2003 and mid 2004, reversing a pattern of increases since 2000.³⁴ Most insurers believe that the fall in the number of claims in relation to public liability insurance in this six month period resulted from greater levels of excess (the average level of excess increased significantly in 2003) and a change in portfolio mix rather than as a result of tort reform.³⁵ The Law Society of NSW has argued

²⁸ Law Society of NSW, above n 17, p 31.

²⁹ District Court of New South Wales, above n 27, p 13.

³⁰ Spigelman J, ‘Tort law reform in Australia’, Address to the Anglo-Australian Lawyers Society and the British Law Association Lincoln’s Inn, London, 16 June 2004 and presentation to the London Market at Lloyds, 6 July 2004. A copy of the speech is available from www.lawlink.nsw.gov.au/sc

³¹ Luntz H, ‘Round-up of cases in the High Court of Australia in 2003’, *Torts Law Journal*, 12(1) February 2004, p 1.

³² ‘Insurers are the real winners from negligence reforms’, *Sydney Morning Herald*, 10/2/05, p 2; ‘Tort reform needs injection of fairness’, *Australian Financial Review*, 4/2/05, p 60; Law Society of NSW, above n 17, p 6.

³³ Australian Competition and Consumer Commission, *Public liability and professional indemnity insurance: fourth monitoring report*, January 2005, p 16.

³⁴ *Ibid*, p 29.

³⁵ *Ibid*, pp 23 and 37. In contrast, the average level of excess decreased substantially across a number of insurers in relation to professional indemnity insurance between 2002 and 2004: p 30.

that ‘the community has yet to see the significant reduction in premiums or improved availability of insurance that were promised’ concluding that ‘the only thing the [*Civil Liability Act 2002*] has succeeded in reducing is injury compensation’.³⁶ The Law Society highlights that premiums are still close to twice the level they were in 1999 (public liability insurance premiums rose 44% in 2002 and 17% in 2003) despite public liability premiums falling between the end of 2003 and mid 2004.³⁷ The Law Society claims that the assumptions on which the *Civil Liability Act 2002* is based are deficient, resulting in its failure to impact on public liability premiums.

Insurers believe that an insufficient number of claims have settled under the new legislation to enable them to properly assess the impact of the changes on the cost of claims.³⁸ They are therefore unsure as to what will be the ultimate effect of the reforms. Nonetheless, insurers anticipate a flow on effect in relation to the cost of claims and premiums. Some insurers have voiced their suspicion that the ultimate impact of the reforms will depend on the attitude of the courts to the award of damages and the extent to which lawyers will seek to avoid the changes.³⁹

A number of commentators are concerned that the benefits of the tort reform process have come at the expense of the injured as some may no longer be properly compensated. Kirby J, of the High Court of Australia, has warned:

We have to beware that we do not remove entirely the role of the common law as a standard setter for carefulness and accident prevention in our society... Whilst in Australia we roll back the entitlements of those who suffer damage, in the name of ‘personal responsibility’, we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong.⁴⁰

The Law Society of NSW has also argued that:

The Government’s tendency to present the compensation needs of the injured as a discretionary financial interest, and one which is in competition with premiums, rather than as a social right (the right of restitution), has allowed it to create systems in which fair compensation has given way to financial and political concerns.⁴¹

³⁶ Law Society of NSW, above n 17, pp 6 and 27.

³⁷ Ibid, p 27.

³⁸ Australian Competition and Consumer Commission, above n 33, p 38.

³⁹ Ibid, p 40.

⁴⁰ ‘Kirby fears tort reform may go too far’, *Australian Financial Review*, 24/2/05, p 11.

⁴¹ Law Society of NSW, above n 17, p 19.

Abelson has examined court awards for major injuries in the last ten years in NSW.⁴² His calculations suggest that the amount of compensation ordered has never been excessive, as he found damages to be largely consistent with the economic valuation of the state of health, including reasonable amounts for pain and suffering. This led him to conclude that ‘political moves to reduce court awards by capping maximum amounts are inconsistent with individual valuations of health that are usually the basis of economic valuations’.⁴³

Whilst Conde supports the restriction of the duty of care to prevent frivolous claims, he argues that:

Reforms implementing general damages thresholds, on the other hand, are unsatisfactory. All too often thresholds give defendants the right to be negligent and to injure someone up to a given level before any liability is owed. The most onerous threshold, seen in NSW, allows for a scary amount of injury.⁴⁴

Vines argues that the laws introduced throughout Australia in response to the insurance crisis were premised on the idea that the crisis was ‘caused by an ever-increasing level of litigation, ever-increasing damages awards and an extremely litigious society composed of individuals who are not prepared to take responsibility for their own actions’. Therefore, she suggests that ‘the present Australian tort reform process is based largely on a simple desire to cut costs and to ensure predictability for insurers. On its own this is not enough to create principled tort law or effective reform’.⁴⁵

Spigelman CJ believes that the underlying cause of the insurance crisis was the workings of the fault based tort system.⁴⁶ These concerns have led some to revive the debate on the value of no fault compensation schemes. Spigelman CJ notes:

there has been no serious discussion in Australia of us adopting on an universal basis the no fault type insurance scheme that exists in New Zealand. It does, as I have said, exist for motor vehicle accidents in Victoria and has been advocated more widely. Nevertheless, if the changes both in judicial attitudes and the legislative regime now in place do not result in a system of compensation for accidents which is widely accepted to be economically sustainable, a no fault scheme may appear to be the only alternative.⁴⁷

⁴² Abelson P, ‘Is injury compensation excessive?’, *Economic Papers*, 23(2) June 2004, pp 129-139.

⁴³ Ibid, p 139.

⁴⁴ Conde C, ‘The foresight saga: risk, litigiousness and negligence law reforms’, *Policy*, 20(3) Spring 2004, p 33.

⁴⁵ Vines P, ‘Tort reform, insurance and responsibility’, *University of New South Wales Law Journal*, 8(2) November 2002, p 22.

⁴⁶ Spigelman, above n 30.

⁴⁷ Ibid.

Luntz, who has long advocated the introduction of no fault compensation, argues:

that the rise in premiums is due to complex factors, not all of which are yet fully known, but that lack of principle plays only a minor role among them; that the changes advocated by politicians are making the law less, not more, principled; and that these changes will do little to reduce the costs of the system of compensation. I assert that the problem with the present system of compensation is its slow, cumbersome, expensive and discriminatory operation; that many of the costs of injury are inevitable and will be incurred anyway; that the real issue is how the unavoidable costs should be allocated; and that to make the system more affordable requires the elimination of the wasteful costs of investigation into fault.⁴⁸

2.2 Other compensation schemes

A number of compensation schemes operate in NSW, primarily in relation to people injured at work or in motor accidents, as well as victims of crime. This section provides an overview of these schemes noting some of the benefits currently available.

2.2.1 Workers' compensation⁴⁹

WorkCover NSW is a statutory authority with the primary objective of working 'in partnership with the NSW community to achieve safe workplaces, effective return to work and security for injured workers'. It is responsible for ensuring compliance with workers' compensation legislation and the occupational health and safety legislation.⁵⁰ It also promotes the prevention of work-related injury and diseases. WorkCover is funded by a levy on workers' compensation premiums.

A person injured at work can pursue the no fault benefits provided in the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*. They may also be entitled to lodge a claim for modified common law damages. A 'worker' is defined in section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) as 'a person who has entered into or works under a contract of service or a training contract with an employer'. 'Injury' is also defined in section 4 to mean 'a personal injury arising out of or in the course of employment'. It includes:

a disease contracted by a worker in the course of employment, where the employment was a contributing factor to the disease, or the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment

⁴⁸ Luntz H, 'Reform of the law of negligence wrong questions – wrong answers', *University of New South Wales Law Journal*, 8(2) November 2002, p 18.

⁴⁹ For further information see: WorkCover NSW, www.workcover.nsw.gov.au

⁵⁰ Section 22 *Workplace Injury Management and Workers Compensation Act 1998*

was a contributing factor to the aggravation, acceleration, exacerbation or deterioration.

Dust diseases, such as asbestosis and silicosis, are excluded from this definition but are covered in the *Workers' Compensation (Dust Diseases) Act 1942*.

Section 9 of the *Workers Compensation Act 1987* provides that an injured worker is to receive compensation from his or her employer, whether or not the injury occurred at or away from the place of employment. However, compensation is only payable if the employment was a substantial contributing factor to the injury.⁵¹

Various benefits may be paid as compensation. They include:

- payments in the event of death;⁵²
- weekly compensation as income support⁵³ - 'If total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include a weekly payment during the incapacity';⁵⁴
- medical, hospital and rehabilitation expenses;⁵⁵
- compensation for non-economic loss, including permanent impairment benefits,⁵⁶ and
- property damage.⁵⁷

According to section 151E of the *Workers Compensation Act 1987*, modified common law damages apply where a worker is killed or injured as a result of the negligence or other tort of his or her employer. However, court proceedings must be commenced within three years of the date of the injury being received but cannot be commenced within six months of notice of the injury being given to the employer.⁵⁸ The only damages that may be awarded are for past economic loss due to loss of earnings and for future economic loss due to the

⁵¹ Section 9A *Workers Compensation Act 1987*

⁵² See sections 25 to 32 *Workers Compensation Act 1987*

⁵³ See sections 33 to 58 *Workers Compensation Act 1987*

⁵⁴ Section 33 *Workers Compensation Act 1987*

⁵⁵ Section 60 *Workers Compensation Act 1987*

⁵⁶ See sections 65 to 73 *Workers Compensation Act 1987*

⁵⁷ See sections 74 to 78 *Workers Compensation Act 1987*

⁵⁸ Sections 151C and 151D *Workers Compensation Act 1987*

deprivation or impairment of earning capacity.⁵⁹ No exemplary or punitive damages may be awarded.⁶⁰ To be eligible for common law damages, the worker must have either died or have a degree of permanent impairment that is at least 15%.⁶¹ Recovery of damages ends any entitlement to further compensation under the *Workers Compensation Act*.⁶² The benefit of pursuing a common law claim should not be overstated as:

Only a person with serious long-term injuries would be likely to be interested. However, such a person would almost certainly be unwise to give up rights to future medical treatment and the cost of care. It follows that although common law rights remain theoretically available, in practice they have been abolished.⁶³

The cost of work-related injuries is significant. 10,300 people were permanently disabled (that is, the worker was considered to be either totally or partially permanently incapacitated for any type of work) as a result of workplace injuries in 2000/01.⁶⁴ The overall cost of workplace injuries in 2000/01 was \$804 million (comprised of: \$22.3 million – non-compensation payments; \$235.8 million – compensation payments; and \$546.2 million –liability estimate). However, total payments equalled \$2,946 million (of which workplace injuries constituted 80%) consisting of weekly benefits, lump sum payments, medical expenses, legal costs and investigation expenses.

WorkCover NSW is currently aiming to achieve a fully funded scheme by 2014. As at June 2004 the projected deficit for the WorkCover scheme was \$2,353 million, a decrease of \$629 million compared to the deficit as at June 2003. This reduction is thought to be due to an improvement in the performance of insurance operations, with better return to work rates and management of tail claims, as well as strong investment returns. The WorkCover scheme has been paying for itself since 2001/02.⁶⁵

2.2.2 Motor accidents compensation⁶⁶

The NSW Motor Accidents Scheme is a compulsory third party personal injury scheme for motor vehicles registered in NSW. It is regulated by the NSW Motor Accidents Authority

⁵⁹ Section 151G *Workers Compensation Act 1987*

⁶⁰ Section 151R *Workers Compensation Act 1987*

⁶¹ Section 151H *Workers Compensation Act 1987*

⁶² Section 151A *Workers Compensation Act 1987*

⁶³ *Personal Injury Law Manual NSW*, LBC Loose-leaf, p 3441.

⁶⁴ The figures in this paragraph are from WorkCover NSW, *Statistical Bulletin 2000/2001*, pp 14, 25, 45 and 46.

⁶⁵ Information in this paragraph is drawn from: WorkCover NSW, *Annual Report 2003/2004*, pp 4, 6 and 21.

⁶⁶ Information in this section is, unless otherwise stated, sourced from NSW Motor Accidents Authority www.maa.nsw.gov.au

(MAA) and 'is intended to provide a fair and equitable system for claimants ensuring that the most seriously injured receive maximum compensation'.⁶⁷

The motor accidents scheme is fault based. A person may lodge a claim under the scheme if he or she is injured in a motor vehicle accident, whether he or she was the driver, a passenger, pedestrian, cyclist or motorbike rider, so long as the driver or the owner of a vehicle was partially or completely at fault. Compensation is reduced in cases where the injured person is partly to blame for his or her own injuries. A claim cannot be made if:

- the injured person was totally at fault;
- no one was at fault; or
- the person at fault was not the owner or driver of a motor vehicle.

Claims can be made for both economic and non-economic loss. Economic loss includes:

- hospital, medical, rehabilitation and pharmaceutical expenses – the *Motor Accidents Compensation Act* allows for the early payment of treatment expenses up to \$500, prior to the claim being finalised;⁶⁸
- attendant and respite care;
- loss of income;
- loss of ability to earn an income; and
- other reasonable and necessary expenses and losses suffered.

Economic loss is restricted in a number of ways. No damages for the loss of earnings or the deprivation or impairment of earning capacity are to be awarded in relation to the first five days the loss is suffered because of the injury.⁶⁹ Net weekly earnings above \$2,500 (indexed) are to be disregarded.⁷⁰

To be eligible for non-economic loss, the degree of whole person permanent impairment must be at least 10%.⁷¹ Non-economic loss includes such things as pain and suffering and loss of the enjoyment of life. The maximum amount that may be awarded is \$284,000

⁶⁷ Motor Accidents Authority of NSW, *Annual Report 2003-2004*, p 113.

⁶⁸ Section 51.

⁶⁹ Section 124 *Motor Accidents Compensation Act 1999*

⁷⁰ Section 125 *Motor Accidents Compensation Act 1999*

⁷¹ Section 131 *Motor Accidents Compensation Act 1999*

(indexed).⁷² One of the objects of the *Motor Accidents Compensation Act 1999* is to maintain the affordability of premiums by ‘limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities’.⁷³

The MAA received almost 50,000 claims between October 1999 and the end of June 2004, spending \$1,045 million in claim payments for the same period.⁷⁴ The MAA is also concerned with the prevention of injury and rehabilitation. It invested more than \$17 million in projects in these areas in the last three years. Catastrophic injury is its current priority in relation to funding for rehabilitation.⁷⁵

The *Motor Accidents Compensation Act 1999* amended the motor accident scheme to lower the price of green slips, reduce the level of litigation by improving the process by which people obtain compensation, and to ensure the receipt of prompt medical treatment.⁷⁶ According to Premier Carr, greenslip prices fell three times in the twelve months prior to December 2004 and the average payment to a person seriously injured increased from \$369,500 to \$379,100.⁷⁷

The MAA reviewed the *Motor Accidents Compensation Act 1999* in 2002. The Insurance Council of Australia submitted to the 2002 review that:

early indications are that the scheme is meeting its objectives. Premiums are more affordable, and it appears that claimants are receiving treatment and compensation more quickly and effectively which has not been to the detriment of the full compensation of people with permanent and serious injuries.⁷⁸

However, the Australian Plaintiff Lawyers Association (now Australian Lawyers Alliance) believes that the motor accidents scheme has failed to achieve its objective of preserving ‘principles of full compensation for those with severe injuries involving ongoing impairment and disabilities’ because the 10% whole person impairment eliminates too many people, the guidelines are too rigid, and many serious psychological/psychiatric

⁷² Section 134 *Motor Accidents Compensation Act 1999*

⁷³ Section 5.

⁷⁴ Motor Accidents Authority of NSW, above 67, pp 106 and 109.

⁷⁵ Ibid, p 5.

⁷⁶ Hon J Della Bosca, *NSWPD*, 3/6/99, p 902.

⁷⁷ Hon R Carr MP, ‘Greenslip costs fall for the third time in a year’, *Media Release*, 9/12/04.

⁷⁸ Insurance Council of Australia, *Submission by the Insurance Council of Australia to the Review of the Motor Accidents Compensation Act 1999 (NSW)*, 2002, p 5. A copy of the submission is available from Motor Accidents Authority, www.maa.nsw.gov.au Accessed 21/2/05.

conditions are excluded.⁷⁹ Whilst the NSW Bar Association accepts that the scheme has a number of positive features, it believes the scheme lags significantly behind court proceedings. Accordingly, it has raised some concerns regarding the affordability and effectiveness of the scheme:

affordability involves consideration of more issues than merely the price of a green slip. Affordability also requires consideration of other costs associated with the scheme. Firstly, there are the costs to injured persons who are now denied proper compensation for injuries which they have sustained through no fault of their own. Secondly, as the scheme succeeds in deterring and minimising compensation, society incurs additional costs through public hospital and Medicare payments for treatment and Social Security payments for the permanently impaired. Finally, affordability entails consideration as to whether society can and should afford a higher premium in order to ensure proper compensation for the tortiously injured. There is no magical improvement in the state of society when premiums fall under \$330 per year. There is, however, a failure in our collective responsibility for providing a fair society when those injured in motor vehicle accidents are not properly compensated for their injuries.⁸⁰

2.2.3 *Victims' compensation*⁸¹

A criminal injuries compensation scheme has operated for almost 40 years in relation to cases where the offender may not be known or no conviction was recorded.⁸² Previously, a court based scheme enabled victims to apply to the court for compensation where there was a convicted offender and compensation was recoverable from the property of the offender. An evaluation of the regime in NSW in the 1980s led to the enactment of the *Victims Compensation Act 1987*. This has since been replaced by the *Victims Support and Rehabilitation Act 1996* (previously known as the *Victims Compensation Act 1996*) and the *Victims Rights Act 1996*.

⁷⁹ Australian Plaintiff Lawyers Association, *The Compensation Scheme under the Motor Accidents Compensation Act 1999 (NSW) – 2002 Review of the Scheme: APLA Submission*, 24 April 2002, p 3. A copy of the submission is available from Motor Accidents Authority www.maa.nsw.gov.au Accessed 21/2/05.

⁸⁰ New South Wales Bar Association, *Submission on the statutory review of the Motor Accident Compensation Scheme*, 4 April 2002, p 4.

⁸¹ Information on victims' compensation, unless otherwise stated, is sourced from Victims Services NSW: www.lawlink.nsw.gov.au/vs For further information see: Johns R, *Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services*, NSW Parliamentary Library Briefing Paper No 10/02.

⁸² The *Criminal Injuries Compensation Act 1967* extended a court based scheme that had been operating since the turn of the century: New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, Report 43, 1984, paras 2.47-2.49.

A number of people are eligible for compensation under the *Victims Support and Rehabilitation Act 1996*.⁸³ A person, who is injured as the result of an act of violence, or by witnessing an act of violence, may claim compensation. Members of the immediate family of a homicide victim, and a parent/guardian injured as a result of learning of the act of violence of which a minor was the victim, are also eligible. Individuals who are injured while trying to prevent or arrest someone committing an act of violence may be eligible for compensation as are those who are injured whilst assisting the victim of an act of violence. However, an injury must meet the \$7,500 threshold⁸⁴ and claims must be lodged within two years of the act of violence.⁸⁵

Compensation may be paid (up to \$50,000)⁸⁶ for:

- injuries sustained;
- actual medical and related expenses;
- actual loss of earnings; and
- lost, destroyed or damaged personal items that were worn or carried at the time of the act of violence.

In 2003-04, Victims Services determined 6,257 claims for compensation and \$62 million was paid as victims' compensation. \$3.8 million was collected in restitution.⁸⁷

The victims' compensation scheme has frequently sparked concern in relation to the sustainability of its cost. In 1997, the fund was paying approximately \$90 million a year, with future liabilities expected to reach \$128.7 million by 2000.⁸⁸ In 2000, the current liabilities of the Victims Compensation Tribunal were reported as more than \$150 million, of which 70% involved applications that claimed shock as the primary injury.⁸⁹ The Joint Select Committee on Victims Compensation found in 1997 and 1998 that the escalating number of claims for shock was having an impact on the long term liability of the victims' compensation scheme.

⁸³ Sections 6 to 9 *Victims Support and Rehabilitation Act 1996*

⁸⁴ Section 20 *Victims Support and Rehabilitation Act 1996*

⁸⁵ Section 26 *Victims Support and Rehabilitation Act 1996*

⁸⁶ Section 19 *Victims Support and Rehabilitation Act 1996*

⁸⁷ Attorney General's Department, *Annual Report 03-04*, p 16.

⁸⁸ NSW Parliament, Joint Select Committee on Victims Compensation, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme*, February 2000, p 11.

⁸⁹ *Ibid*, p 12.

The victims' compensation scheme has been amended a number of times in the last decade in order to exert greater control over the cost of the scheme. For example, the *Victims Compensation Act 1996* raised the threshold for claims from \$200 to \$2,400. This has subsequently been increased to \$7,500. The 1996 Act also abolished appeals to the District Court on issues of quantum. The name of the Act has been altered from the *Victims Compensation Act 1996* to the *Victims Support and Rehabilitation Act 1996* to reflect a change in the focus of the scheme from compensation to rehabilitation. 'Shock' is no longer a compensable injury, having been replaced by the category of 'psychological or psychiatric disorder'. However, to be eligible for compensation for a psychological or psychiatric disorder it must be either severely disabling, or, if it is deemed to be moderately disabling, it must be the result of an act of violence that occurred in the commission of an armed robbery, abduction or kidnapping offence.

3 NO FAULT COMPENSATION IN AUSTRALIA

3.1 History of no fault in Australia

3.1.1 *Committee of Inquiry into a National Rehabilitation and Compensation Scheme for Personal Injury in Australia*

A number of jurisdictions in Australia have considered the possibility of introducing no fault compensation in one form or another. In 1973, the newly elected Whitlam Government established a Committee of Inquiry into a National Rehabilitation and Compensation Scheme for Personal Injury in Australia. The Committee was chaired by Justice Owen Woodhouse, who had previously chaired the Royal Commission into compensation for personal injury in New Zealand. The report produced by the New Zealand Royal Commission in 1967 advocated the establishment of a no fault compensation scheme for accidental injury (the New Zealand Woodhouse report). See section 4.1.1 for an overview of the history of no fault compensation in New Zealand.

The terms of reference for the Australian inquiry acknowledged that the Government had decided ‘in principle to set up a comprehensive and universal system of social insurance to cover incapacities arising from injury in terms both of rehabilitation and compensation’.⁹⁰ On 1 February 1974 the terms of reference were expanded to include sickness.⁹¹ The National Committee of Inquiry tabled its report in July 1974 (the Australian Woodhouse report).⁹²

The Australian Woodhouse Report strongly criticised legal systems based on the ability to prove fault. It argued:

the fault system fails to accept the philosophy that is said to support it. It does nothing at all for the innocent victims of no-fault accidents. By compulsory insurance it removes all personal responsibility from those who are supposed to bear the cost of fault accidents. It operates by shifting onto the broad shoulders of the general community the losses of carefully selected plaintiffs. And paradoxically, without the obligation of insurance, its attraction for both plaintiffs and defendants would disappear.⁹³

The Committee also highlighted the risks and delay associated with litigation and the subsequent impact on the speed with which the injured are rehabilitated. It argued that the concept of negligence ‘is used not to assist the injured but to avoid payments to large

⁹⁰ National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (Chairperson: O Woodhouse), July 1974, p 245 (the Australian Woodhouse report).

⁹¹ Luntz H, ‘Looking back at accident compensation: an Australian perspective’, *Victoria University of Wellington Law Review*, 34(2) June 2003, p 283.

⁹² National Committee of Inquiry, above n 90.

⁹³ *Ibid*, p 40.

numbers of them on grounds of economy'.⁹⁴ The Committee stressed the difficulty of accurately assessing future needs, as people are generally either under or over-compensated depending upon their age at time of death.

The Australian Woodhouse report proposed that a 24 hour no fault compensation scheme be established in Australia, with compensation to be primarily concerned with the maintenance of living standards as opposed to merely preventing poverty. Like the New Zealand Woodhouse report, the recommendations were based on the five principles of: community responsibility; comprehensive entitlement; complete rehabilitation; real compensation; and administrative efficiency. Compensation would be prompt, automatic and related to earnings. It would not matter whether it arose from sickness or injury, or if the injury or illness occurred in Australia or overseas. The scheme included the self-employed, housewives and children. It was argued that the new scheme would be extremely beneficial as:

The administrative waste and extravagance of the existing fragmented methods of alleviating the plight of sick and injured persons would be replaced by a uniform and efficient system operated under the direction of the Australian Government as a social service for all.⁹⁵

The Committee suggested that the scheme be funded by a combination of:⁹⁶

- a uniform national compensation levy of 2% on salaries and wages;
- an excise tax on petrol;
- consolidated revenue to the amount of existing social security benefits; and
- the balance to be sourced from consolidated revenue.

However, all Australian states rejected the Committee's recommendation that common law actions be abolished.⁹⁷

3.1.2 National Compensation Bill 1974

The National Compensation Bill 1974, based on the proposals in the Australian Woodhouse Report, was introduced to the Australian Parliament in October 1974. The Bill passed the House of Representatives but the Senate referred it to the Constitutional and

⁹⁴ Ibid, p 43.

⁹⁵ Ibid, p 138.

⁹⁶ Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Clauses of the National Compensation Bill 1974*, Parliamentary Paper 142, 1975, p 44.

⁹⁷ NSW Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, Report 43, 1984, p 103.

Legal Affairs Committee where it subsequently was delayed for a number of months. Whilst the Committee accepted the worth of a number of concepts in the Bill, it found the Bill to have some significant deficiencies and doubts in regard to its constitutional validity, in particular, the constitutional power of the Australian Parliament to abolish common law rights. Justice Kirby of the High Court of Australia has stressed that the implementation of such a compensation scheme is still complicated as:

At least in the case of persons who presently enjoy a common law right to compensation, it is now questionable whether the Federal Parliament could abolish such a right without affording those affected 'just terms' as required by the constitutional provision limiting acquisition of property under federal law.⁹⁸

No fault compensation schemes were introduced in Tasmania and Victoria in the early 1970s in relation to motor accidents (a no fault motor accident compensation scheme was subsequently established in the Northern Territory in 1979). The Constitutional and Legal Affairs Committee, when reviewing the National Compensation Bill, viewed the changes in these states as too limited. Nonetheless,

The Committee formed the view that if a comprehensive and fair system of compensation having constitutional validity became available either through this or some other scheme, then the removal of common law liability for negligence with respect to work and road injuries would be justified.⁹⁹

However, the Committee argued for the retention of an action for breach of statutory duty and certain other causes of action.

The National Compensation Bill was subsequently withdrawn from the Federal Parliament and redrafted. However, the Whitlam Government was dismissed in November 1975, when the Bill was ready to be reintroduced.¹⁰⁰ Gough Whitlam introduced it as a private member's bill in February 1977, whilst Leader of the Opposition, but it was not successful as it lacked the support of the Government.

3.1.3 1983 Federal Election

A Labor Government was elected to the Australian Parliament in 1983. One of its election platforms was a proposal for a national compensation scheme ensuring speedy compensation at reasonable levels for all persons injured in any kind of accident.¹⁰¹ The

⁹⁸ Kirby M, 'Tort system reforms: causes, options, outcomes', *Journal of Law and Medicine*, 8(4) May 2001, p 386.

⁹⁹ Senate Standing Committee on Constitutional and Legal Affairs, above n 96, p 24.

¹⁰⁰ Luntz, above n 91, pp 288-289.

¹⁰¹ *Ibid*, p 290.

ALP Law and Justice Policy suggested four steps by which the common law fault principle could be eliminated:¹⁰²

1. no-fault motor accident compensation scheme to be introduced, accompanied by abolition of common law claims arising from such accidents;
2. increase workers' compensation benefits under existing statutory system to match benchmarks set by motor accident scheme;
3. extend workers' compensation to 24 hours a day cover for earners, with abolition of common law claims;
4. 24 hours a day cover for non-earner non-road accident victims.

This proposal has not been fully realised. No fault motor accident compensation schemes have only been implemented in Tasmania, Victoria and the Northern Territory. In 1984, the NSW Law Reform Commission published its report detailing a possible no fault scheme for NSW in relation to motor accidents. However, the scheme was not implemented.

3.1.4 New South Wales Law Reform Commission

Following discussions of possible no fault compensation schemes for NSW, GIO submitted a further proposal for a no fault motor vehicle accident scheme to the NSW Minister for Transport in 1979.¹⁰³ An Interdepartmental Committee was subsequently formed and a Cabinet Minute prepared which proposed that legislation be introduced for a no fault compensation scheme to cover death or injury caused by a motor vehicle. However, the scheme was to be limited to those who could not obtain a remedy already available under the law. Cabinet considered the Minute on 26 February 1980 and it was deferred before being withdrawn a year later. However, a four person committee was formed in August 1981 with the approval of the Premier and the Treasurer to consider, amongst other things, a compensation scheme for personal injury as an alternative to an action under the common law. The Committee rejected the concept of a no fault scheme as it deemed it to be too expensive.

On 12 November 1981, the NSW Law Reform Commission (NSWLRC) received the following terms of reference:

To inquire into, report on and make recommendations concerning the extent to which compensation should be payable in respect of death or personal injury and in particular, without affecting the generality of the foregoing, to consider

- (a) whether 'no-fault compensation' should be payable in respect of death or personal injury suffered by any person through the use of a motor vehicle or other means of transport;

¹⁰² Quoted in NSW Law Reform Commission, above n 97, p 101.

¹⁰³ Information in this paragraph is sourced from: NSW Law Reform Commission, above n 97, pp 101-105.

- (b) whether ‘no-fault compensation’ should be payable in respect of death or injury suffered by any person in circumstances other than the use of a motor vehicle or other means of transport;
- (c) whether a ‘no-fault compensation’ scheme or schemes should be introduced in New South Wales and, if so, to consider further the nature and scope of any such scheme including
 - the benefits to be provided;
 - the basis on which claims should be determined;
 - the means of financing the scheme;
 - the manner in which the scheme is to be administered;
 - the relationship between the benefits under the scheme and other forms of assistance or entitlements, whether provided under legislation or otherwise;
- (d) whether any ‘no-fault compensation’ scheme should be in substitution for all or any rights to compensation under existing law;
- (e) whether the principles and practices relating to compensation for death or personal injury under
 - workers’ compensation legislation;
 - other legislation;
 - the tort or common law system;should be modified and, if so, in what way;
- (f) any matter incidental to the above including transitional arrangements for the implementation of recommendations.

The NSWLRC released its report on accident compensation and a transport accidents scheme for NSW in 1984.¹⁰⁴ Four options for reform were identified:

1. The common law could be modified.
2. A no fault scheme could be introduced as a supplement to the common law.
3. A no fault scheme could be introduced to replace the common law.
4. A comprehensive scheme could be implemented, such as proposed by the Australian and New Zealand Woodhouse reports, so all accident victims are compensated irrespective of the cause of their injuries.

The Report acknowledged a number of arguments both for and against retaining an action for negligence under the common law. However, the NSWLRC found ‘no reliable evidence to support the assertions concerning the connection between fault, community justice and deterrence’ and noted further that ‘inherent in the concept of fault is the failure to

¹⁰⁴

New South Wales Law Reform Commission, above n 97.

compensate a substantial proportion of accident victims at all and a further proportion at less than the full extent of the injury on grounds of contributory negligence'.¹⁰⁵ The NSWLRC was critical of the cost of the fault system and argued that:

No modification of the common law negligence action can overcome its most serious deficiency, namely, its failure to compensate a substantial number of transport accident victims. This can only be remedied by supplementing the common law action, or replacing it altogether, with a no-fault system of compensation.¹⁰⁶

The NSWLRC subsequently proposed that a transport accident scheme be implemented in NSW. It indicated its preference for a pure no fault scheme rather than a dual scheme, as in Victoria and Tasmania, as it was believed that this would ensure that costs could be more easily controlled.

3.1.5 Changes to the workers' compensation and motor accidents schemes in the late 1980s

The workers' compensation and motor accidents compensation schemes in NSW faced a number of problems by the mid 1980s, particularly in relation to the cost of the systems.¹⁰⁷ Consequently, the NSW Labor Government made a number of significant changes to the schemes. Common law rights in relation to workers' compensation were abolished by the *Workers Compensation Act 1987* as part of an attempt to reduce the cost and other problems of the workers' compensation scheme. Similarly, the *Transport Accidents Compensation Act 1987* implemented some of the recommendations of the NSWLRC to restructure the benefits of the motor accidents scheme in favour of the seriously injured. The common law negligence action was abolished and a statutory scheme was established in its place. However, the fault principle was retained.

The abolition of common law rights in respect of motor accidents and workers' compensation was controversial. Following the election of the Coalition Government in 1988, a number of amendments to the schemes were implemented. The *Workers Compensation (Compensation Court Amendment) Act 1989* reinstated access to common law damages in particular situations and the *Motor Accidents Act 1988* restored modified common law rights.

¹⁰⁵ Ibid, p 72.

¹⁰⁶ Ibid, p 104.

¹⁰⁷ Information in this section is drawn from *Workers Compensation and Motor Accidents Compensation in NSW* by Marie Swain, NSW Parliamentary Library Briefing Paper No 39/95. This paper provides a detailed overview of the development of workers' compensation and motor accidents compensation in NSW.

3.1.6 *Legislative Council Standing Committee on Law and Justice*

In the mid 1990s, the NSW Legislative Council Standing Committee on Law and Justice inquired into the motor accidents scheme and examined various aspects of the long term care of victims of motor accidents. In its interim report, the Committee noted that most people who were severely injured in the past would simply not have survived. Accordingly, it argued:

It was a decision of society to improve medical retrieval and survival techniques to a level where victims are now kept alive even with ventilated assistance for life. It seems a reasonable argument that society has the responsibility of providing these survivors with a life which is of reasonable quality, independence and dignity.¹⁰⁸

The Committee received a number of submissions advocating the introduction of no fault long term care. Some of the proposals included:

- John Walsh, a partner with Coopers and Lybrand Actuarial Services, suggested that a funded no fault long term care scheme be developed. He proposed that it be funded by a dedicated levy on motorists and collected with third party premiums. The scheme could be administered either by an independent authority or by the Motor Accidents Authority.¹⁰⁹
- The key recommendation of the NSW Ageing and Disability Department was that long term care be provided on a no fault basis to people who have brain and/or spinal cord injuries as a result of a motor accident. The Department also suggested that lump sum awards should be replaced by structured settlements paid directly to the service providers.¹¹⁰
- The Brain Injury Association, Australian Quadriplegic Association, and Paraplegic and Quadriplegic Association of NSW recommended that a no fault system of compensation at least be introduced for the long term care of catastrophically injured motor vehicle accident victims.¹¹¹

However, the Insurance Council of Australia and Law Society of NSW were opposed to the introduction of a no fault scheme.¹¹² They argued that social security was already available and claimed that a no fault scheme would foster a dependency mentality and thus inhibit rehabilitation.

¹⁰⁸ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, above n 13, p 125.

¹⁰⁹ Ibid, p 129.

¹¹⁰ Ibid, p 130.

¹¹¹ Ibid.

¹¹² Ibid, pp 131 and 133.

The Standing Committee described an emerging proposal for a no fault scheme in NSW based on the future care program that operates in Tasmania.¹¹³ The proposal described a no fault long term care scheme fully funded by a dedicated levy on motorists as part of the premium for compulsory third party insurance. The levy would go into a pooled fund prior to being invested and administered by an independent statutory authority with significant consumer representation. A tribunal or independent assessors would determine eligibility for the benefits. The scheme would adopt a case management approach and involve community support.

The Standing Committee found that approximately 250 to 300 people in NSW were catastrophically injured each year in motor accidents and subsequently required lifetime long term care. They calculated the cost of long term care under the fault based scheme to be \$100 million, which only applied to about 50% of those requiring long term care. The cost of providing the same care to those who are unable to receive any compensation was estimated to be an additional \$100 million each year, or \$30 per compulsory third party premium.¹¹⁴

The Committee subsequently recommended that a no fault long term care scheme be developed for NSW.¹¹⁵ Nevertheless, the Hon J Della Bosca indicated in his second reading speech for the Motor Accidents Compensation Bill that, whilst the introduction of a no fault long term care scheme was seen as achievable sometime in the future, more discussion with interest groups was required.¹¹⁶

3.1.7 *Torbay motion*

The issue of a no fault compensation scheme for NSW has continued to attract attention at various times. For example, on 5 September 2002, Richard Torbay MP argued that a detailed debate on the advantages and disadvantages of no fault compensation was needed. He accordingly moved in the Legislative Assembly:

That this House calls on the Government and the Opposition to consider the implementation of a comprehensive no-fault scheme of compensation for personal injuries in New South Wales.¹¹⁷

The motion was unsuccessful.

¹¹³ Ibid, pp 138-139.

¹¹⁴ Ibid, p 139.

¹¹⁵ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Second Interim Report*, December 1997, recommendation 3.

¹¹⁶ Hon J Della Bosca, *NSWPD*, 22/6/99, p 1042.

¹¹⁷ R Torbay MP, *NSWPD*, 5/9/02, p 4709.

3.2 Victoria ¹¹⁸

The first no fault motor accident scheme to operate in Australia was introduced in Victoria in 1974 when the Motor Accident Board was established. The scheme provided for the payment of medical expenses and weekly income payments until the common law claim was settled. In 1980, the scheme was amended so that victims of an accident received income payments on a weekly basis until their common law claims were finalised, with lifetime no fault benefits available for those with no entitlement at common law.

The Transport Accident Commission was established by the *Transport Accident Act 1986* which combined the common law and no fault benefits so that every person was covered irrespective of fault. However, those who can prove fault may pursue further compensation through the courts.

The objects of the Victorian scheme are to:¹¹⁹

- reduce the cost to the Victorian community of compensation for transport accidents;
- provide, in the most socially and economically appropriate manner, suitable and just compensation in respect of persons injured or who die as a result of transport accidents;
- determine claims for compensation speedily and efficiently;
- reduce the incidence of transport accidents;
- provide suitable systems for the effective rehabilitation of persons injured as a result of transport accidents.

People injured in transport accidents are entitled to compensation if: the accident occurred in Victoria; or the accident occurred in another state or territory and involved a registered motor vehicle¹²⁰ and the person was a resident of Victoria or they were the driver of, or a passenger in, the registered motor vehicle.¹²¹ The dependants of a person who died in a transport accident may receive compensation if the person who died would have been entitled to it. 'Injury' comprises 'physical or mental injury and includes nervous shock suffered by a person who was directly involved in the transport accident or who witnessed the transport accident or the immediate aftermath of the transport accident'.¹²²

¹¹⁸ Information in this section, unless otherwise stated, is sourced from the Transport Accident Commission website www.tac.vic.gov.au

¹¹⁹ Section 8 *Transport Accident Act 1986* (Vic)

¹²⁰ 'Registered motor vehicle' is defined in section 3 of the *Transport Accident Act 1986* (Vic).

¹²¹ Section 35 *Transport Accident Act 1986* (Vic)

¹²² Section 3 *Transport Accident Act 1986* (Vic)

The Transport Accident Commission may provide the cost of reasonable treatment that contributes to the victim's recovery and rehabilitation, for example, ambulance, hospital, medical, pharmacy, therapy, dental and nursing expenses. Other benefits that may be available include: income support; disability and rehabilitation services; travel costs; a visitation allowance for family; support with household tasks; childcare; equipment or aids; lump sum and weekly payments in cases of permanent impairment.

The transport accident scheme is funded by a payment made when a person registers his or her motor vehicle in Victoria. An average of \$83,000 is paid for each road death and \$69,000 for each serious injury. In 2003/04, the Transport Accident Commission paid more than \$617 million in support services for over 42,000 clients (the amount in 2002/03 was a little over \$536 million). The breakdown of this expenditure is shown in the following table.

Service	Cost (\$ million)
Treatment	167.2
Loss of income	60.8
Impairment	18.3
Death benefits	46.5
Long term care	46.1
Other no fault	23.9
Common law – serious injury	171.0
Common law – interstate and other	52.1
Run-off/VWA section 137	31.5
Total	617.4

Source: Transport Accident Commission, *Annual Report 2004*, p 17.

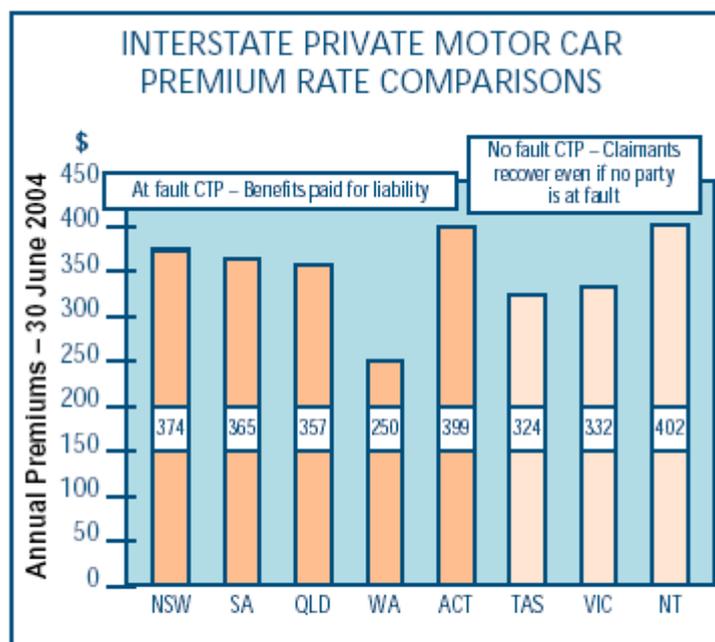
Common law actions are still permitted in limited circumstances. Section 93 of the *Transport Accident Act 1986* requires the degree of impairment to have been determined by the Transport Accident Commission. The injury must be a serious injury, that is, the degree of impairment must be 30% or more. Proceedings may be brought when the degree of impairment is less than 30% if the Court grants leave or the Commission agrees that the injury is serious and consents to the bringing of proceedings. The maximum damages that may be awarded for economic loss and pain and suffering are \$880,880 and \$391,490 respectively.¹²³ The dependants of a person killed in an accident may recover up to \$641,240 for their economic loss.

Luntz compared the motor accident schemes in NSW and Victoria and identified that people in Sydney have consistently paid higher premiums than if they lived in Melbourne. The following graph compares the premiums paid for compulsory third party insurance in

¹²³

Transport Accident Commission, *Annual Report 2004*, p 5.

each state and territory in 2004, and highlights the relatively low premiums in Victoria and Tasmania despite the existence of no fault schemes in those states.



* NSW - Average premium for March 2004

** QLD - Maximum premium

*** All premiums are inclusive of GST

Source: Motor Accidents Insurance Board, *Annual Report 2003-2004*, p 10.

As well as highlighting that victims of motor accidents in Victoria receive compensation much quicker, Luntz stresses:

The Victorian levies have been sufficient to assure every person injured in a motor accident in Victoria (and some outside) of some compensation and to pay hefty dividends on occasion to the Government. The NSW premiums pay only about 50 per cent of injured victims some compensation and large parts of the fund are squandered on the costs of determining who they are to be.¹²⁴

3.3 Tasmania¹²⁵

The Motor Accidents Insurance Board (MAIB) commenced operation on 1 December 1974. It is governed by the *Motor Accidents (Liabilities and Compensation) Act 1973* and

¹²⁴ Luntz, above n 48, p 20.

¹²⁵ Information in this section, unless otherwise stated, is sourced from the Motor Accidents Insurance Board website www.maib.tas.gov.au

the *Motor Accidents (Liabilities and Compensation) Regulations 2000*. The MAIB manages a dual common law/no fault motor accident scheme. Tasmanian residents injured as a direct result of a motor accident in Tasmania are eligible for compensation under the scheme.¹²⁶ They are also eligible if the accident occurred outside Tasmania but involved a vehicle registered in Tasmania. People who do not reside in Tasmania may be eligible if the accident occurred there or involved a Tasmanian registered vehicle. Claims must be lodged within 12 months of the accident.

Benefits provided on a no fault basis under the Tasmanian scheme include:¹²⁷ reasonable medical costs; ambulance transport and hospital treatment; allowances for loss of income and inability to perform housekeeping duties; funeral expenses; death benefits; and reasonable travel costs to attend medical treatment if more than 20 kilometres away. The scheme includes a long term care program for people who are seriously injured. Accommodation and care are provided both on a respite and longer term basis.

No fault compensation is payable in the period between the accident and the finalisation of the common law claim. Common law damages are available in situations where the injury resulted from the negligence of another motorist.

The MAIB reported an after tax profit of \$51.1 million in the 2003/04 financial year compared to an average \$3.2 million profit for the previous five years. The claims expense for 2003/04 was \$96.9 million. There has been a 20% reduction in the frequency of claims over the last eight years. The liability for the provision of outstanding claims is \$556.6 million, with the MAIB achieving a solvency level of 20.6% in 2003/04.¹²⁸

3.4 Northern Territory¹²⁹

A no fault scheme has operated in the Northern Territory since 1979. The Motor Accidents Compensation Scheme, which is funded through contributions made at the time of motor vehicle registration, provides compensation to any residents of the Northern Territory (generally need to have lived in the Northern Territory for at least three months prior to the accident) who are injured or killed in a motor accident in Australia whilst driving or travelling in a vehicle registered in the Northern Territory. The scheme is administered by the Territory Insurance Office.

A number of benefits are provided under the scheme including:

- weekly payments for loss of earning capacity;

¹²⁶ Section 23 *Motor Accidents (Liabilities and Compensation) Act 1973*

¹²⁷ See schedule 1 *Motor Accidents (Liabilities and Compensation) Regulations 2000*

¹²⁸ Information on the financial status of the MAIB is drawn from: Motor Accidents Insurance Board, *Annual Report 2003-2004*, pp 6 and 28.

¹²⁹ Information in this section, unless otherwise stated, is sourced from the Territory Insurance Office website www.tiofi.com.au

- a top up scheme where the level of cover for loss of earning capacity can be increased to the top up benefit for two years;
- persons with injuries resulting in a permanent impairment of at least 5% may receive a lump sum benefit;
- medical, hospital and rehabilitation costs;
- attendant care for those who are unable to care for themselves;
- house and motor modifications;
- a surviving spouse may receive a lump sum payment where a person dies as the result of a motor vehicle accident;
- the surviving spouse or caregiver of dependant children may receive 10% of the average weekly earnings per week per child – benefits are also available in certain circumstances for orphaned children and dependant parents; and
- funeral expenses.

There were 378 no fault and 59 common law claims reported in 2003/04, 10% less than the overall claim numbers for 2002/03.¹³⁰ Net claims payments totalled \$25 million, with 22% of all payments being for loss of earning capacity. Fatal claims also represented a large proportion of payments, with 44 claims constituting 17% of total claims payments. The motor accidents compensation scheme reported an operating profit of \$13.8 million in 2003/04, a significant improvement on the \$21.9 million loss experienced in 2002/03.

¹³⁰Territory Insurance Office, *Annual Report 2004*, p 19.

4 INTERNATIONAL NO FAULT COMPENSATION SCHEMES

A number of no fault compensation schemes operate in various countries around the world. This section particularly examines the accident compensation scheme in New Zealand, but also considers a couple of systems in the United States of America, before briefly noting other international examples.

4.1 New Zealand¹³¹

A comprehensive no fault compensation scheme, administered by the Accident Compensation Corporation (ACC), a Crown entity, operates in New Zealand. The essence of the scheme is the provision of 24 hour no fault coverage against injury. Its purpose is:

to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community.¹³²

The ACC operates under the *Injury Prevention, Rehabilitation, and Compensation Act 2001* which came into effect on 1 April 2002. It is responsible for:

- preventing injury;
- collecting personal injury cover levies;
- determining whether claims for injury are covered by the scheme and providing entitlements to those eligible;
- paying compensation;
- buying health and disability support services to treat, care for and rehabilitate injured people; and
- advising the government.

New Zealand citizens and residents are covered by the scheme. Temporary visitors to New Zealand may also have the benefit of cover. A person is covered for a personal injury suffered in New Zealand if it was caused by: an accident; medical misadventure; or a gradual process, disease, or infection that is work-related, caused by medical misadventure or the result of a personal injury or its treatment.¹³³ Victims of crimes of a sexual nature,

¹³¹ Information in section 5.1, unless otherwise stated, is sourced from the Accident Compensation Corporation website www.acc.co.nz

¹³² Section 3 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹³³ Section 20 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

female genital mutilation, or the wilful infection with disease, are covered for a resultant mental injury.¹³⁴ An individual may be covered for a personal injury inflicted outside New Zealand if he or she ordinarily resided in New Zealand at the time of the injury and the injury is one for which he or she would have been covered had it occurred in New Zealand.¹³⁵ Compensation is not provided in situations where the personal injury was wilfully self-inflicted or in cases of suicide.¹³⁶

Some of the benefits under the scheme include:¹³⁷

- Rehabilitation – treatment, social rehabilitation and vocational rehabilitation.
- First week compensation – According to sections 97 and 98 of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ), an employee is entitled to 80% of his or her earnings lost during the first week of incapacity if the incapacity is the result of a work-related injury and the person was an employee immediately before the incapacity. The employer has a duty to pay this compensation.
- Weekly compensation – up to 80% of pre-injury weekly earnings.
- Lump sum compensation for permanent impairment – The ACC may be liable for lump sum compensation for permanent impairment if the claimant: survived the personal injury for at least 28 days; is alive at the time of assessment; and the personal injury resulted in at least 10% whole person impairment.¹³⁸ The minimum amount of lump sum compensation that may be paid is \$2,500 (indexed) to a person whose degree of whole person impairment is 10%. The maximum amount that may be paid is \$100,000 (indexed) to a person with 80% or more whole person impairment.¹³⁹
- Funeral grants.
- Survivors' grants.
- Weekly compensation for the spouse, children and other dependants of a deceased claimant.
- Childcare payments.

¹³⁴ Section 21 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹³⁵ Section 22 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹³⁶ Section 119 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹³⁷ Section 69 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹³⁸ Clause 54, Schedule 1, *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹³⁹ Clause 56, Schedule 1, *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

Benefits are provided on a no fault basis. In return for no fault cover, individuals forego the right to sue for personal injury.¹⁴⁰ However, whilst injured persons in New Zealand are precluded from suing for personal injury, they retain the right to sue for exemplary damages.¹⁴¹ Exemplary damages are not awarded as compensation. They are usually ordered as a form of punishment where the court believes the defendant acted in complete disregard for the rights of the plaintiff, or if the court feels a need to impose them to deter others from such conduct.

The following table details the means by which the ACC scheme is funded. Sources include the government and premiums paid by employers and employees, amongst others.

Where the funding comes from	Account name	What the account pays for
Premiums paid by all employers.	Employers' Account	Work-related personal injuries (except for work injuries for self-employed or work injuries suffered before 1 July 1999. These are funded by the residual claims accounts).
Premiums paid by everyone in the paid workforce, through their PAYE.	Earners' Account	Non-work injuries suffered by people in paid employment (except motor vehicle accidents).
Premiums from self-employed people and private domestic workers.	Self-employed Work Account	Work-related injuries to self-employed people and private domestic workers.
Direct payment from government.	Non-earners' Account	Injuries to people who are not in the paid workforce, such as students, beneficiaries, retired people and children.
A tariff on the price of petrol and from a component of the motor vehicle licensing fee.	Motor Vehicle Account	Injuries involving motor accidents on public roads.
The Earners' and Non-earners' Accounts.	Medical	Injuries that result from error by medical practitioners or from rare and severe outcomes of medical or surgical procedures.
Premiums paid by employers and self-employed persons.	Residual Claims Account	Work injuries suffered before 1 July 1999 and non-work injury suffered by earners prior to 1 July 1992.

Source: Accident Compensation Corporation, 'How ACC is funded', www.acc.co.nz/about-acc/acc-funding/ Accessed 14/2/05.

4.1.1 History

A no fault compensation scheme has existed in New Zealand for more than 30 years. Prior to its commencement, injured persons could pursue damages under the common law, and, depending on the situation, they may have been entitled to benefits under the *Workers Compensation Act 1956*, the *Social Security Act 1964* or the *Criminal Injuries*

¹⁴⁰ Section 317 of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) prohibits a person bringing proceedings independently of the Act for damages arising directly or indirectly out of personal injury either covered by the current Act or by any of the former Acts.

¹⁴¹ Section 319 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

Compensation Act 1963.¹⁴² A Royal Commission was established in 1966 to inquire into and report on the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment, and the medical care, retraining and rehabilitation of persons so incapacitated. The Commission produced its report (the Woodhouse Report) in December 1967.¹⁴³ However, the contents of the report were much broader than workers' compensation, as it recommended a no fault approach to personal injury compensation in general.

The Woodhouse Report stressed that the economy suffers if the wellbeing of the workforce (or 'the housewives who sustain them') is neglected, irrespective of who is at fault in relation to an injury. The Royal Commission believed the remedies provided by the common law were inadequate in a number of ways, including: the failure to compensate numerous people; its expense and delay; and its failure to sufficiently encourage rehabilitation. The Royal Commission described the negligence action as a form of lottery due to its inconsistency of solution.¹⁴⁴ It noted how 'reprehensible conduct can be followed by feather blows while a moment's inadvertence could call down the heavens'. Consequently, the Royal Commission proposed that a 24 hour no fault compensation scheme be adopted.

The proposed scheme was based on five principles:

1. Community responsibility
2. Comprehensive entitlement
3. Complete rehabilitation
4. Real compensation
5. Administrative efficiency

The Royal Commission argued that, 'Injury arising from accident demands an attack on three fronts. The most important is obviously prevention. Next in importance is the obligation to rehabilitate the injured. Thirdly, there is the duty to compensate them for their losses'.¹⁴⁵ The Royal Commission stressed, 'If the scheme can be said to have a single purpose it is 24-hour insurance for every member of the workforce, and for the housewives who sustain them'.¹⁴⁶

¹⁴² McKenzie P, 'The compensation scheme no one asked for: the origins of ACC in New Zealand', *Victoria University of Wellington Law Review*, 34(2) June 2003, p 195.

¹⁴³ Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand*, December 1967 (the Woodhouse report)

¹⁴⁴ *Ibid*, p 19.

¹⁴⁵ *Ibid*, p 53.

¹⁴⁶ *Ibid*, p 26.

The *Accident Compensation Act 1972* (NZ) was subsequently passed, with the scheme coming into effect on 1 April 1974. However, the Woodhouse report was not fully enacted.¹⁴⁷ A number of amendments have also been made to the scheme since 1974. One of the major changes was the removal of lump sum payments from the scheme by the *Accident Rehabilitation and Compensation Insurance Act 1992* (before being returned by the *Injury Prevention, Rehabilitation, and Compensation Act 2001*). Another change was made by the *Accident Insurance Act 1998* which placed the administration of the scheme in the hands of private insurers. However, this was reversed by the *Accident Insurance (Transitional Provisions) Act 2000*. There has been much discussion in recent years in relation to whether the ACC scheme should be administered by the state or by private insurers.

4.1.2 Evaluation

There are various opinions regarding the extent to which the no fault compensation scheme in New Zealand has been a success. The key goals of the accident compensation scheme are:

- Injury prevention;
- Complete and timely rehabilitation;
- Fair compensation; and
- A code of ACC claimants' rights.

Injury prevention

One of the primary functions of the ACC is to promote measures that reduce the incidence and severity of personal injury.¹⁴⁸ Howell et al argue that:

The New Zealand experience with ACC highlights that the introduction of any no-fault scheme that waives the right to sue cannot ignore the need to increase overt monitoring and enforcement concomitant with the waiver of legal rights, if the optimal level of loss occurrence is to be achieved.¹⁴⁹

The ACC has developed the New Zealand Injury Prevention Strategy in addition to a number of other safety programmes to try and reduce the number of deaths and injuries in

¹⁴⁷ Palmer G, ' "The Nineteen-Seventies": summary for presentation to the Accident Compensation Symposium', *Victoria University of Wellington Law Review*, 34(2) June 2003, p 242.

¹⁴⁸ Section 3.

¹⁴⁹ Howell B, Kavanagh J and Marriott L, 'No-fault public liability insurance: evidence from New Zealand', *Agenda*, 9(2) 2002, p 147.

New Zealand each year. It has established 23 'ThinkSafe communities' in New Zealand that are to work towards reducing injuries in local high risk areas by up to 5%. For example, communities might work toward the prevention of injuries on the roads, in sport and at work.

Rehabilitation

The ACC scheme is designed to facilitate the social and vocational rehabilitation of injured persons to enable them to recover their independence and the ability to work. The number of long-term claimants (persons who have received weekly compensation for more than 12 months) has significantly decreased in recent years to less than 14,000 compared to 30,000 in July 1997.¹⁵⁰ The following table compares the rehabilitation rates of claimants at three, six and 12 months from the date of injury. It demonstrates that no more than 11% of claims become long-term.

Rehabilitation Rates	2003-2004
Three Month	
Employers' Account	71%
Self-Employed Work Account	59%
Motor Vehicle Account	60%
Earners' Account	70%
Six Month	
Employer's Account	86%
Self-Employed Work Account	80%
Motor Vehicle Account	80%
Earners' Account	87%
12 Month	
Employers' Account	92%
Self-Employed Work Account	90%
Motor Vehicle Account	89%
Earners' Account	94%

Source: Accident Compensation Corporation, *Annual Report 2004*, p 76.

Fair compensation

One of the ways the ACC scheme seeks to certify its fairness and sustainability is by 'ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump

¹⁵⁰

Accident Compensation Corporation, *Annual Report 2004*, pp 7 and 9.

sums for permanent impairment'.¹⁵¹ People are generally covered in relation to accidental personal injury regardless of who is at fault.

Code of ACC claimants' rights

Part 3 of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* provides for a code of claimants' rights. The Code of ACC Claimants' Rights entered into force on 1 February 2003. It confers rights on claimants and imposes obligations on ACC in relation to how they should deal with claimants. The eight rights of claimants are:

1. The right to be treated with dignity and respect.
2. The right to be treated fairly, and to have one's views considered.
3. The right to have one's culture, values and beliefs respected.
4. The right to a support person or persons.
5. The right to effective communication.
6. The right to be fully informed.
7. The right to have one's privacy respected.
8. The right to complain.

Litigation

One of the reasons the accident compensation scheme was established in New Zealand was to avoid the expense and delay associated with the court system. However, alterations to the scheme have at times hindered progress in this area. The *Accident Rehabilitation and Compensation Insurance Act 1992* removed lump sum payments from the scheme, leading to a substantial rise in the number of common law claims brought by injured persons.¹⁵² Miller has noted how the removal of lump sum payments had a particular impact on both non-earners and injured persons who only had a short time to live.¹⁵³ Non-earners were not entitled to weekly compensation, which was based on earnings immediately prior to the injury. This fuelled litigation as injured persons sought alternative means of compensation. Miller concluded:

There is no doubt that the 'meaner and leaner' 1992 Act caused a substantial increase in damages claims by (1) creating dissatisfaction with the removal of lump

¹⁵¹ Section 3 *Injury Prevention, Rehabilitation, and Compensation Act 2001*

¹⁵² Miller J, 'Trends in personal injury litigation: the 1990s', *Victoria University of Wellington Law Review*, 34(2) June 2003, p 407.

¹⁵³ *Ibid*, p 408.

sums and (2) providing the opportunities to sue by removing or limiting ACC cover for nervous shock, workplace stress personal injury, accident and medical misadventure to name but a few. This caused aggrieved claimants to seek adequate compensation elsewhere.¹⁵⁴

Lump sum payments were reintroduced by the *Injury Prevention, Rehabilitation, and Compensation Act 2001*. However, there is no entitlement to lump sum compensation for a personal injury suffered before 1 April 2002, the date the Act came into effect.

The continued right to sue for exemplary damages has also influenced levels of litigation. According to Duffy, the number of claims for exemplary damages has increased.¹⁵⁵ Duffy suggests this is because it is a potential avenue for people who receive little financial benefit under the compensation scheme and are unable to sue for compensatory damages.

Cost

Another driving factor in the change to a no fault compensation scheme was the belief that it was a better alternative for the same amount already being spent via the court system. The ACC spends approximately \$1.4 billion a year on rehabilitation, treatment and weekly compensation. Recent calculations have found that it costs about seven cents for the ACC to deliver \$1 in benefits.¹⁵⁶ According to Todd, the scheme is substantially a success as 'the cost compares very well with any system where liability needs to be proved, the coverage is far greater and the benefits are affordable. And public administration is not necessarily inefficient'.¹⁵⁷

More than 1.5 million new claims were registered in 2003-04, predominantly in relation to the non-earners' account as revealed in the following table.

¹⁵⁴ Ibid, p 419.

¹⁵⁵ Duffy A, 'The common-law response to the accident compensation scheme', *Victoria University of Wellington Law Review*, 34(2) June 2003, p 379.

¹⁵⁶ Palmer, above n 147, p 240.

¹⁵⁷ Todd S, 'Negligence liability for personal injury: a perspective from New Zealand', *University of New South Wales Law Journal Forum*, 8(2) November 2002, p 58.

New claims registered	2003-2004
ACC Total	1,504,732
Employers' Account	168,266
Self-Employed Work Account	45,129
Residual Claims Account	1,671
Motor Vehicle Account	39,583
Non-Earners' Account	718,758
Earners' Account	530,075
Medical Misadventure Account	1,250

Source: Accident Compensation Corporation, *Annual Report 2004*, p 67.

There were 60,828 new weekly compensation claims in the past year, an increase of 5.5%. Entitlement claims have also been increasing, about 7% each year for the last three years. The total net levy income for 2004 was \$2,654.4 million with claim costs totalling \$1,798 million. The total claims liability was \$9,347.0 million.¹⁵⁸

Exclusion of illness from the scheme

A continued controversy is the sustained exclusion of sickness from the no fault compensation scheme. Currently, the only illness compensated is that connected to medical misadventure or work. Ferguson objects to the division between sickness and injury, claiming that it 'does not sit well with the rationales on which the scheme was based and has, as a consequence, undermined its objectives'.¹⁵⁹ She highlights the disparity between the benefits for accidental injury as opposed to illness, noting:

the inclusion within the Accident Compensation Scheme of all – major and minor – no-fault accidental injury, including injuries sustained in self-chosen, high risk leisure and sporting activities, while excluding those suffering major debilitating conditions through no fault of their own.¹⁶⁰

The Woodhouse report discussed the rationale behind the exclusion of sickness and disease. Whilst it accepted that in many ways the divide is not logical, it stressed that:¹⁶¹

1. It is unwise to attempt one massive leap when two considered steps can be taken.

¹⁵⁸ Information on the financial aspects of the ACC scheme is drawn from: Accident Compensation Corporation, above n 150, pp 4, 41, 68 and 82.

¹⁵⁹ Ferguson J, 'The line between sickness and accidental injury in New Zealand's Accident Compensation Scheme', *Torts Law Journal*, 12(1) February 2004, p 63.

¹⁶⁰ *Ibid*, p 74.

¹⁶¹ Royal Commission of Inquiry, above n 143, p 26.

2. There is an urgent need to co-ordinate the unrelated systems presently working in the field of injury.
3. There is a virtual absence of the statistical signposting which alone can demonstrate the feasibility of the further move.
4. The proposals put forward for injury leave the way open for sickness to follow whenever the relevant decision is taken.

There have been thoughts at times to extend the scheme to include illness, such as in 1989 when the New Zealand Government proposed the extension of the accident compensation scheme to include those incapacitated by sickness and disease.

Concluding thoughts

According to Clayton, recent attempts to grapple with tort law in Australia have highlighted:

the failure of the common law system to compensate large numbers of accident victims, the waste of its transaction costs (legal and administrative expenses), the long delays in the delivery of benefits to those who do secure a remedy, any theoretical deterrent effect being effectively blunted by the presence of liability insurance and its impediment to real injury prevention.¹⁶²

Therefore he concludes:

Recent Australian events have amply demonstrated the wisdom of New Zealand's move in 1974 to a comprehensive no-fault scheme compared to the chaotic, inconsistent, limited and expensive mishmash of measures for dealing with personal injury in Australia.¹⁶³

However, Howell et al are unable to fully endorse the New Zealand scheme. They note:

The New Zealand experience with no-fault accident compensation, in the absence of tort action to modify moral hazard behaviour, is almost unique. While ensuring certainty of payment, it is far from clear that the scheme has succeeded in balancing the transaction costs and benefits of overt monitoring and enforcement against the costs and benefits of incentive management available from tort action.¹⁶⁴

¹⁶² Clayton A, 'Some reflections on the Woodhouse and ACC legacy', *Victoria University of Wellington Law Review*, 34(2) June 2003, p 461.

¹⁶³ *Ibid*, pp 461-462.

¹⁶⁴ Howell et al, above n 149, p 147.

4.2 United States of America

No fault compensation schemes for babies with birth-related neurological injuries were introduced in the US states of Virginia and Florida in the late 1980s in response to the increasing cost of compensation for such cases and growing insurance premiums for obstetricians.¹⁶⁵

4.2.1 Florida¹⁶⁶

The Birth-Related Neurological Injury Compensation Association is a statutory organisation created in 1988. It manages the compensation plan in Florida, which is provided under the *Florida Birth-Related Neurological Injury Compensation Act* for birth-related neurological injuries irrespective of the negligence of the health care provider. It is thought that, by removing the need for litigation, the plan ensures that injured infants receive the required care as well as reducing the financial burden on parents and the health industry. Accordingly, malpractice insurance should be more readily available, and physicians may be more likely to practice obstetrics.

‘Birth-related neurological injury’ is defined in section 766.302 of the *Florida Statutes* as:

injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

It applies to live births only and does not include death or disability caused by genetic or congenital abnormality.

The following benefits may be provided under the plan:

- Actual expenses for necessary and reasonable care, services, drugs, equipment, facilities and travel, excluding expenses that can be compensated by state or federal governments or by private insurers.
- A one-time cash award (not to exceed \$100,000) to the infant’s parents or guardians.
- A \$10,000 death benefit for the infant.
- Reasonable expenses for filing the claim including attorney’s fees.

¹⁶⁵ United Kingdom, Chief Medical Officer, *Making Amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*, June 2003, p 101.

¹⁶⁶ Information on the Florida scheme is sourced from the website for the Florida Birth-Related Neurological Injury Compensation Association www.nica.com

The benefit is available to people in Florida whose doctor participates in the plan by purchasing the benefit. The rights and remedies available under the plan exclude all other rights and remedies.

4.2.2 *Virginia*

Virginia was the first state in the US to develop a separate birth injury compensation plan. The *Virginia Birth-Related Neurological Injury Compensation Act* was passed by the General Assembly in 1987 in response to medical malpractice insurance availability problems.¹⁶⁷ It was created as a no fault alternative to the traditional tort system.

The Virginia Birth-Related Neurological Injury Compensation Program¹⁶⁸ provides lifetime care for babies who are born with serious birth-related neurological injuries, where a participating physician delivered obstetrical services at the birth or the birth occurred in a participating hospital. ‘Birth-related neurological injury’ is defined as:

injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation necessitated by a deprivation of oxygen or mechanical injury that occurred in the course of labor or delivery, in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled... such disability shall cause the infant to be permanently in need of assistance in all activities of daily living... [The program] shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease or maternal substance abuse.¹⁶⁹

Compensation is provided for the following:¹⁷⁰

- Actual medically necessary and reasonable expenses – medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel.
- Loss of earnings is to be paid in regular instalments from the time the infant reaches the age of 18 until he or she is 65 years old. The amount paid is calculated as 50%

¹⁶⁷ Joint Legislative Audit and Review Commission of the Virginia General Assembly, *Review of the Virginia Birth-Related Neurological Injury Compensation Program*, (Chair: Senator Kevin Miller), January 2003, p 1.

¹⁶⁸ Unless otherwise stated, information on the program is sourced from the website for the Virginia Birth-Related Neurological Injury Compensation Program www.vabirthinjury.com

¹⁶⁹ Section 38.2-5001 *Code of Virginia*

¹⁷⁰ Section 38.2-5009 *Code of Virginia*

of the average weekly wage of workers in the private, nonfarm sector of Virginia. In 2000, this was approximately US\$17,600 per annum.¹⁷¹

- Reasonable expenses incurred in connection with the filing of a claim, including reasonable attorneys' fees.

Expenses are to be paid as they are incurred. However, the program does not provide compensation for expenses covered by: other government programs; prepaid health plans or health maintenance organisations; or private insurance. The family of an infant who sustains a birth-related neurological injury and dies within 180 days of birth may receive up to \$100,000.¹⁷²

The Virginia Workers' Compensation Commission determines admission into the Program, which operates as an exclusive remedy. If the program accepts a claim, other rights and remedies potentially available to the infant are subsequently excluded.¹⁷³

More than 80 claimants have been admitted into the program since it began. The program is funded by: participating physician fees; participating hospital fees; non-participating physician assessments; and liability insurer assessments. Between the start of the program and June 2002, almost \$25.3 million was spent on nursing, housing, vans, hospital/physician expenses, physical therapy and medical equipment, amongst other things.¹⁷⁴ Total claimant expenses have averaged about \$4.3 million each year.¹⁷⁵ However, nothing has been spent to date on loss of earnings, as no child under the scheme has turned the requisite age of 18. The fund was valued at more than \$83 million in June 2002. However, whilst that should be sufficient to meet claimant expenses for the next 25 years, the unfunded liability was estimated to be \$88 million at the end of 2002.¹⁷⁶

The program is thought to compare favourably with the tort system as it serves more children and the benefits under the scheme exceed the \$1.65 million cap on medical malpractice awards. It is also thought to benefit physicians, hospitals and malpractice insurers as a result of lower rates for malpractice insurance.¹⁷⁷

¹⁷¹ Joint Legislative Audit and Review Commission of the Virginia General Assembly, above n 167, p 12.

¹⁷² Section 38.2-5009.1 *Code of Virginia*

¹⁷³ Section 38.2-5002 *Code of Virginia*

¹⁷⁴ Joint Legislative Audit and Review Commission of the Virginia General Assembly, above n 167, p 14.

¹⁷⁵ *Ibid*, p 11.

¹⁷⁶ *Ibid*, p 49.

¹⁷⁷ *Ibid*, pp 25-32.

4.3 Other international examples

Many other countries have no fault compensation schemes in one form or another, particularly in relation to workers' compensation or motor accidents. In Canada, more personal injuries are covered by no fault schemes as opposed to claims of negligence, with various no fault schemes operating in Quebec, Ontario, Saskatchewan and Manitoba.¹⁷⁸ No fault compensation schemes for medical injury are common in Scandinavia, with systems existing in Sweden, Denmark, Norway and Finland.¹⁷⁹ The National Office of Medical Accident Compensation was established in France in October 2002 to pay compensation in relation to: medical accidents; problems resulting from an intervention by a medical practitioner; and infection occurring during the course of treatment.¹⁸⁰

¹⁷⁸ Feldthusen B, 'Posturing, tinkering and reforming the law of negligence – a Canadian perspective', *University of New South Wales Law Journal Forum*, 8(2) November 2002, p 30.

¹⁷⁹ For an overview of these schemes see: United Kingdom, Chief Medical Officer, above n 165; and Scottish Parliament, The Information Centre, *The Macfarlane Trust and No-Fault Compensation*, Research Note for the Health and Community Care Committee, 01/80, 3 September 2001.

¹⁸⁰ United Kingdom, Chief Medical Officer, above n 165, p 101.

5 CONTROVERSIAL ASPECTS OF NO FAULT COMPENSATION

The Australian and New Zealand Woodhouse reports proposed that a no fault compensation system be introduced that enshrined the principles of: community responsibility; comprehensive entitlement; complete rehabilitation; real compensation; and administrative efficiency.

Luntz strongly supports the introduction of a no fault compensation system in Australia. He argues that:

The real solution is to abandon the fault system for compensating personal injuries, as recommended by the National Committee of Inquiry into Compensation and Rehabilitation in Australia, 1974 (the Woodhouse Committee). Such a system has been operating successfully, and sustainably, in New Zealand for over 28 years. Scare tactics put out by some representatives of lawyers in Australia, claiming that the New Zealand scheme has huge ‘unfunded liabilities’, are mostly false. It remains much less costly than the incomplete, partial compensation schemes functioning in Australia, and it represents the embodiment of community responsibility for the inevitable accidents of modern society.¹⁸¹

However, other commentators are quick to identify some of the weaknesses of a no fault compensation scheme. This section therefore examines some of the purported advantages and disadvantages of no fault compensation. These considerations generally apply to a pure no fault scheme and may need to be adapted to be relevant to situations where no fault compensation operates in addition to the common law.

5.1 The role of fault and the prevention of accidents

The principle of fault emerged in a world that differed greatly to the present. Liability for damages was linked to moral blameworthiness in relation to the accident. However, technological developments have in some ways increased the risks inherent in society. For example, the advent of the motor vehicle has resulted in the exponential growth of the number of road injuries. The speed at which road accidents frequently occur can make it difficult for witnesses to accurately recall the details of the incident. Fleming accordingly saw the fault system as:

content to leave the compensation of casualties to the fortuitous outcome of litigation based on outdated and unrealistic notions of fault. What is required is to assure accident victims of compensation and to distribute the losses involved over society as a whole or large portion of it.¹⁸²

Therefore, some argue a no fault system is more relevant to the needs of today’s society.

¹⁸¹ Luntz, above n 48, p 21.

¹⁸² Fleming quoted in Royal Commission of Inquiry, above n 143, p 53.

Tort law arguably serves a deterrent function. The threat of litigation may encourage people to behave in a safer manner with the number of accidents subsequently minimised. Some fear that the removal of fault from claims may diminish the deterrence function of tort law. Howell et al argue that:

The principal weakness of no-fault schemes is the difficulty of ensuring that the socially optimal amount of care is taken by potential loss-causers, as the links between their potential to cause loss and the costs of their actions are severed.¹⁸³

There may be less accountability in a no fault system. Proponents of this theory argue that accountability and learning from adverse events are not encouraged when fault is removed, as it does not matter if one is to blame for the incident.¹⁸⁴ Explanations and apologies may subsequently be less frequent.

However, any value tort law has in terms of deterrence may be limited by the rise of costly and unnecessary defensive practices. For example, doctors may develop a habit of requiring patients to undergo various medical tests, the value of which is questionable, as an attempt to minimise the risk of being found guilty of negligence.

The deterrent role of tort law may in some cases already be met by sanctions available under the criminal law and occupational health and safety legislation. Occupational health and safety laws have been designed in such a way as to encourage the existence of a safe workplace and to ensure the welfare of the worker.

Future adverse events may be more easily prevented under a no fault compensation scheme. As litigation is less likely, a person responsible for an injury may be more willing to apologise and to report an incident when it occurs. For example, a doctor may be more likely to report an error when there is little chance of being sued for medical negligence. This can facilitate the implementation of structures to prevent a similar incident occurring in the future. The removal of the threat of litigation may also reduce potential tension between the parties involved.

Many people have insurance to protect themselves financially should they be the cause of an adverse incident. The availability of insurance can deaden the deterrent role of tort law. Luntz and Hambly highlight that legal claims are rarely brought in situations where the defendant is not insured, stressing that:

The argument that the law of torts can play an important role in accident prevention through its deterrent function loses much of its significance when we apply it to the real world since liability insurance became widespread and even compulsory.¹⁸⁵

¹⁸³ Howell et al, above n 149, p 137.

¹⁸⁴ See, for example, United Kingdom, Chief Medical Officer, above n 165, p 15.

¹⁸⁵ Luntz and Hambly, above n 15, p 42.

The New Zealand Royal Commission of Inquiry also viewed the deterrent effect of tort law as limited due to the impact of compulsory insurance.¹⁸⁶

Cane concludes that:

while it seems reasonable to think that the imposition and possibility of tort liability has some impact on people's conduct, the precise nature and magnitude of that impact is largely speculative and there is good reason to think that tort law is, at best, a blunt regulatory instrument.¹⁸⁷

5.2 Fairness

The fault principle has been criticised for being erratic and capricious in operation, 'If fault is not proved, then no matter how innocent the plaintiff, the common law will leave him to bear the whole burden of his losses, even though they might have been catastrophic'.¹⁸⁸ In contrast to the common law negligence action, no fault compensation may provide for more than a small proportion of the injured. Those who are injured in an accident but unable to establish fault are not excluded, and those who contributed to the incident that caused their injury do not have their compensation reduced as a result.

The negligence action arguably measures liability by the results of the defendant's conduct as opposed to its worth. A defendant who lost concentration for a moment and seriously injured another, will be liable for more damages than a defendant who acted recklessly and wantonly for a much longer period of time but caused little damage. This situation is avoided in a no fault compensation scheme.

Some people suffering poor health may have similar needs to those injured in an accident. However, as their disability is caused by illness, they are not eligible for anything in a system that relies on the establishment of fault.¹⁸⁹ It is possible that such inequities may be overcome in a no fault compensation scheme, depending on the breadth of the system.

Some nonetheless question the fairness of no fault compensation. Mullany does not support the general principle of a no fault system, as he believes 'the common law of tort provides the best and fairest remedy for those injured through the avoidable carelessness of others and the best incentive for proper risk management'. Even so, he is 'of the cautious opinion that the proposal for the introduction of a general, but partial, no-fault scheme governing compensation for the cost of long-term future medical care is worthy of further consideration'.¹⁹⁰

¹⁸⁶ Royal Commission of Inquiry, above n 143, p 51.

¹⁸⁷ Cane, above n 1, p 674.

¹⁸⁸ Royal Commission of Inquiry, above n 143, p 49.

¹⁸⁹ Atiyah P, *The Damages Lottery*, Hart Publishing, Oxford, 1997, p 144.

¹⁹⁰ Mullany N, 'Tort reform and the damages dilemma', *University of New South Wales Law Journal*, 8(2) November 2002, p 49.

5.3 Certainty

Atiyah argues that, as a means of compensation for personal injuries, the legal system is about as fair as a lottery:

In fact it is not too much to say that it is a lottery, a lottery by law. It is almost a matter of chance whether you can obtain damages for disabilities and injuries; it is almost a matter of chance who will pay for them; it is almost a matter of chance how much you will get.¹⁹¹

Pursuing the course of litigation can be risky for a claimant. A finding of contributory negligence may reduce his or her damages, it may be difficult to prove the fault of another, and the competency of counsel can vary. In a no fault scheme, the circumstances in which compensation is paid should be clearer and thus ensure a more consistent approach to claimants.

However, no fault compensation schemes do not resolve all of the complexities associated with tort law. They may still involve disputes about causation. In some cases, it will not be easy to distinguish injury from the natural progression of disease. There may also be disputes about the amount of damages. No fault schemes that are limited to the provision of long term care for the catastrophically injured will still experience difficulties. Mullany warns of the complexity of drawing a line between victims who are severely disabled and those who are not.¹⁹²

5.4 Efficiency

No fault compensation schemes may be more efficient in terms of time and money. An injured person may receive compensation at a faster rate than if the claim had been pursued under the common law, as time is not consumed by the issue of fault. Unlike tort law claims, the injured do not have to wait until their claim has been finalised before receiving assistance. However, other issues may remain such as the cause of the injury, which can result in the process being as expensive and difficult as the tort system.

The tort system has been described as ‘cumbersome and inefficient’ and extravagant in terms of the cost involved.¹⁹³ Proposals for no fault compensation schemes often stress their value for money with substantial savings in terms of administration and legal fees. However, some view no fault schemes as extremely expensive, with the New Zealand accident compensation scheme frequently cited as an example. In 1996, the NSW Legislative Council Standing Committee on Law and Justice reported the unfunded liability of the ACC as more than NZ\$8 billion.¹⁹⁴ However, the Committee explained that this

¹⁹¹ Atiyah, above n 189, p 143.

¹⁹² Mullany, above n 190, p 49.

¹⁹³ Royal Commission of Inquiry, above n 143, p 178.

¹⁹⁴ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, above n 13,

liability was not due to the existence of no fault benefits but the decision to fund the scheme on a pay as you go basis as opposed to it being fully funded. Premiums were thus unrealistically low for a number of years. Proposals for no fault schemes in the past have frequently been rejected on the grounds of cost, as illustrated in section 3.1. Stakeholders have often voiced fears that the cost of a no fault system may only be affordable for a few years before the cost increases exponentially.

Not all people who are injured in an accident commence a claim and even fewer receive damages, leaving family and friends, and, in some cases, the government, to provide support. Therefore it could be said that the cost of caring for the injured is already borne by the community. The overall cost of a no fault compensation scheme may subsequently be higher than the present tort system as the scope of beneficiaries is wider. The relationship between a no fault scheme and the social security system is identified by Cane as one of the problems associated with a move to a no fault system, as a no fault compensation scheme may be seen as superfluous.¹⁹⁵

The possibility of a no fault scheme that provides for the long term care of those who are catastrophically injured in motor accidents was touted in NSW in the late 1990s. The former Attorney General, the Hon John Hannaford MLC argued against its introduction, claiming that such a scheme would be:

a social welfare scheme which would give to the catastrophically injured a system of welfare assistance which is already available to them under the Commonwealth welfare system, albeit in a less advantageous scheme than would apply under the motor accident scheme.¹⁹⁶

Mr Hannaford also feared that the introduction of a partial no fault scheme would in time lead to the implementation of a no fault scheme across the board. If there was a need in this area, he argued that the Government should meet it through the health and community services portfolios.

There are a number of competing factors to be considered. Cane concludes:

the critical question that must be imposed is whether the huge cost of delivering tort compensation (consistently estimated, in aggregate, as high as 40 per cent or more of the total cost of the tort system, and relatively much higher than the cost of delivering no-fault compensation) is worth the ‘benefits’ that would be lost in the move to a no-fault system, namely the attribution of responsibility with whatever its associated incentive effects may be.¹⁹⁷

p 138.

¹⁹⁵ Cane, above n 1, p 675.

¹⁹⁶ Hon J Hannaford, *NSWPD*, 22/6/99, p 1001.

¹⁹⁷ Cane, above n 1, p 674.

5.5 Accuracy of payments

It is difficult to ensure the accuracy of lump sum payments under the common law, as the assessment of damages involves the prediction of such future events as how long the injured person will live. As a result, the payment of damages will generally either under compensate or over compensate the injured person. Damages may also be reduced by the contributory negligence of the injured or because the claim was settled prior to trial.¹⁹⁸ In some situations, the injured person may find themselves with insufficient funds because finances were badly managed. A no fault system may avoid the problem of inaccurate lump sum payments as it can allow for periodic and adjustable payments.

The United Kingdom recently considered the option of a comprehensive no fault compensation system in relation to clinical negligence.¹⁹⁹ One of the reasons the proposal was rejected was the potential increase in the number of claims as well as a belief that the overall cost of a no fault scheme would be much greater than the current tort system. For a no fault scheme to be affordable, it was believed that compensation would need to be set at a much lower level than the amount awarded at common law. Therefore, the needs of an injured person may not be adequately met in a no fault compensation scheme, which questions the relative fairness of such a system.

5.6 Rehabilitation

Rehabilitation may progress at a faster rate in a no fault system as the claimant does not have to deal with the uncertainty and delay of litigation. Injured persons may postpone their rehabilitation if pursuing a claim under the common law so as not to risk the size of their damages.²⁰⁰ According to the New Zealand Royal Commission of Inquiry:

Injured people ought not to be left in the belief that if they attempt to assist themselves the final award of damages is likely to be whittled away. Moreover, it is very much in the public interest to provide incentives to every man to get well and back to productive work. The common law form of action undoubtedly prevents it; and for so long as the element of contest remains we do not think the problem can be overcome. In our view the fact presents a strong argument against retention of the common law process.²⁰¹

However, some fear that a no fault system may open the floodgates to compensation payments and fuel a compensation culture, as fault no longer needs to be proved. There is a

¹⁹⁸ NSW Law Reform Commission, above n 97, p 49.

¹⁹⁹ United Kingdom, Chief Medical Officer, above n 165.

²⁰⁰ The NSW Law Reform Commission identifies some of the ways a common law claim can hinder rehabilitation in its report *Accident Compensation: A Transport Accident Scheme for New South Wales*, Report 43, 1984, pp 61-64.

²⁰¹ National Committee of Inquiry, above n 90, p 57.

concern that there will be little incentive for the injured to return to work as soon as possible as compensation payments act as a regular source of income. In contrast, the award of a lump sum at common law may facilitate the independence of the injured and encourage rehabilitation as the injured person has an incentive to maximise the available funds for as long as possible.²⁰²

²⁰² NSW Law Reform Commission, above n 97, p 44.

6 CONCLUSION

The recent reform of tort law in NSW emphasised the need for personal responsibility in relation to personal injury. In contrast, both the Australian and the New Zealand Woodhouse reports stressed the need for the community to take responsibility and bear the cost of personal injury. There has accordingly been a shift in emphasis from community responsibility to personal responsibility.

A large number of people who are injured in an accident do not receive any compensation or are only entitled to a limited amount of compensation for a range of reasons. In some cases, no one was at fault. In other situations it may have been too difficult to establish fault, thus resulting in an unsuccessful claim or an early settlement. Others may have been unable to satisfy the various threshold requirements that have emerged in recent years or their award of damages may have been reduced because of contributory negligence. The burden of caring for such individuals often falls on family and friends, as well as the social security system.

A particular issue that has emerged is the long term care of the severely injured. The Australian Health Ministers Advisory Council concluded in 2002 that:

the current arrangements for meeting the long term care needs of people who are severely disabled through a negligently caused adverse event are not satisfactory to anyone. They cause problems for injured people and their families, are costly and ineffective. They may mean that the community is required to pick up the long-term costs of a person who has already been compensated under the common law system. Costs are often shifted between parts of the community in a non-transparent and administratively expensive manner eg from insurers to taxpayers. If a person with severe disabilities dies prematurely, then his or her estate benefits. If they live longer than expected, the damages will be inadequate to meet their needs.²⁰³

There a number of options for reform, including: further modification of the common law; replacement of the common law; supplementation of the common law; or the implementation of a comprehensive no fault scheme. A number of commentators have voiced their support of a move to a no fault compensation scheme, as exists in New Zealand, viewing such schemes as fairer and more efficient than the tort system. However, others have been quick to draw attention to some of the dangers of such a move, highlighting the potential costs and possible creation of a dependency mentality. Howell et al therefore suggested that the best outcome would be to operate a dual scheme:

The lessons from the New Zealand ‘experiment’ appear to indicate that there are very real dangers in removing the right to sue along with no-fault insurance. Indeed, the two regimes together may provide the best of both worlds – certainty of compensation and a cost-effective way of managing moral hazard behaviour.²⁰⁴

²⁰³ Australian Health Ministers Advisory Council, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package*, 2002, p 83.

²⁰⁴ Howell et al, above n 149, p 147.

However, others have warned of the cost of a dual scheme and emphasised the merits of pure no fault compensation systems.

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