

Accident Compensation in Australia

No-Fault Schemes

accident /'æksədənt/, *n.* 1. an undesirable or unfortunate happening; casualty; mishap. 2. anything that happens unexpectedly, without design, or by chance. 3. the operation of chance: *I was there by accident.*

compensation /kəmpən'seɪʃən/, *n.* 1. the act of compensating. 2. something given or received as an equivalent for services, debt, loss, suffering, etc.; indemnity.

The Macquarie Dictionary

Mark Anthony Robinson

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**ACCIDENT COMPENSATION IN
AUSTRALIA—
NO-FAULT SCHEMES**

by

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“A purer frame, a greater power rewards the sacrifice. It is the conversion of our harvest into seed. As the farmer casts into the ground the finest ears of his grain, the time will come when we, too, shall hold nothing back, but shall eagerly convert more than we now possess into means and powers, when we shall be willing to sow the sun and the moon for seeds.”

Ralph Waldo Emerson, *Man The Reformer*, 1841.

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FOREWORD

More than ten years have passed since the ill-fated attempt by the Whitlam Government, and later by Gough Whitlam himself as a private member, to introduce a national compensation scheme. In spite of the lapse of time, the philosophy of the Woodhouse Report, upon which the Whitlam legislation was based, remains as relevant today as it was when written in 1974.

This book, which takes up the story from 1974, includes an exposition of more recent proposals for reform of accident compensation law, only some of which have found their way into the statute books. The most important and far-reaching of recent proposals, namely the Transport Accident Scheme proposed for New South Wales by the New South Wales Law Reform Commission and the legislation for a no-fault Transport Accident Scheme in Victoria, are yet to be implemented.

The inappropriateness of a fault-based system financed from a compulsory third party insurance fund has been exposed repeatedly and the arguments are reproduced in the first chapter of the book. The remaining two chapters are devoted to a critical account of different benefit structures for no-fault schemes.

The publication of the book is particularly timely, given the uncertain future of proposed reforms in New South Wales, Victoria and also South Australia. Labor governments at both the State and Federal level have failed in their responsibility to elevate public debate on accident compensation reform. They have left the running to highly organised professional lobby groups which have expended large sums of money on public advertising of an undisguisedly biased and often hysterical kind. That this propaganda has not been countered by balanced and comprehensive information from Government is a grave disappointment.

The political task of introducing significant reform at State level has not been helped by the apparent lack of interest on the part of the Commonwealth Government in providing tangible support for the introduction of no-fault compensation, one consequence of which would be of significant financial benefit to the Commonwealth. Any system of periodic earnings-related compensation, typical of a no-fault scheme, will relieve the social security system and add to tax revenue. Yet, there is no evidence of the Commonwealth's support for State governments prepared to move in this direction even though progressive introduction of no-fault compensation at State level is part of current Labor Party policy.

In the face of such lack of commitment on the part of government, this book is a welcome reminder of fundamentally important principles. It also provides a most up-to-date account of what is, and what is not, happening at the legislative level. It is to be hoped that the book will reach a wide audience including not only lawyers who seek to properly inform themselves of the current state of the law and the choices available for its improvement but also every person interested in compensation reform.

Colin Phegan
University of Sydney
November 1986.

PREFACE

Australia is at present undergoing a radical reassessment of compensation for personal injury caused by accidents. We are in the midst of far-reaching legal and social reforms. This book is an overview of the present situation in this country and of possible directions that future reforms may take. Because of the changing nature of the law in this area it is not possible to consider all the proposals for compensation reform that are being canvassed in Australia. Consequently this book does not consider the recent South Australian proposals for reform of transport accidents and workers' compensation nor aspects of the proposals and debates in Queensland, Western Australia, the Northern Territory and the Australian Capital Territory. At the time of writing, the Commonwealth Department of Social Security, through the Department of Employment and Industrial Relations, launched two option papers proposing fundamental reform of Commonwealth workers' compensation arrangements. [*Possible Models For Reform*, and *Details of Some Aspects of Possible Reform*, November 1986]. The book therefore focuses on the basic principles involved in the compensation debate and the major reforms being contemplated in New South Wales and Victoria.

This work had its origin as an honours dissertation for a Bachelor of Laws degree at Macquarie University in 1985. I wish to express my sincere gratitude to Margaret Thornton, Senior Lecturer in Law, Macquarie University who was supervisor for the project. I wish to thank Beverly Caska, Librarian of the New South Wales Law Reform Commission, for her valuable assistance with references and allowing access to the Commission's formidable collection of materials. I would also like to thank Lynette Wagland for typing the manuscript and the proof readers at various stages: Lizbet Ayres, Jacqueline Elliott and David Grainger. Thanks also to Alan Clayton, of the Victorian Department of Management and Budget. I wish to record my gratitude to the publisher, Legal Books, especially Roger Hughes, and to Professor Colin Phegan for writing the foreword. The writer assumes sole responsibility for any omissions or errors that may appear in the text.

Cover illustration is by kind permission of Macquarie Library Pty. Ltd., publishers of the Macquarie Dictionary.

This book is dedicated to my parents, John and Margaret.

MARK ANTHONY ROBINSON
November 1986
Canberra, A.C.T.

INTRODUCTION

Most people do not think about accident compensation until they have to. They are not aware of the complex, inequitable, inconsistent and inefficient systems of providing compensation to victims of accidents. They do not realise that compensation for accident victims could vastly improve because they do not know that anything is wrong. Well, something is wrong. Something is very wrong in the way compensation is provided in this country.

There is a better way. A better scheme for compensation. It proposes a new deal for accident victims. It will abolish most of the unfairness of the present system. It will rid the country of outdated nineteenth century notions of liability and replace them with a realistic concept based on the responsibility of the community as a whole.

Responsibility for the compensation and care of the unfortunate victims of accidents can no longer be shirked. This responsibility includes their rehabilitation so that they may have the maximum opportunity to regain their self-worth and usefulness to the community.

Proposals for a national comprehensive compensation scheme for personal injury are not new. A national scheme was proposed in this country in 1974 and came very close to being enacted. Twelve years have now passed. The inadequacy of the present system is even more acute than it was then. The spiralling costs of workers' compensation, the near blow-outs in third party motor vehicle insurance funds, the massive delay and expense of court actions and the critical shortage of rehabilitation facilities are testament to this fact.

No-fault compensation means, simply, that you do not have to prove the fault of somebody else in order to receive compensation. This will be a fundamental feature of a new national comprehensive compensation scheme.

The fault-based system, called the common law negligence action, is the major system of accident compensation in this country. Other systems include workers' compensation, which provides limited no-fault compensation to all earners and varies from State to State, limited statutory compensation schemes, such as criminal and sporting injuries schemes and the comparatively recent emergence of no-fault motor vehicle accident compensation schemes in a few States. Apart from these schemes, the only means of support available to accident victims is the social security system, which does not pay compensation, but gives mere subsistence payments.

This book is essentially an overview of no-fault accident compensation in Australia and the fault/no-fault debate. It contains an evaluation and critique of various no-fault compensation schemes that have been proposed or are currently operating in Australia. It concentrates on motor vehicle accident schemes and relies in great measure on the 1974 Australian Woodhouse Report titled *Compensation and Rehabilitation in Australia* and the recent monumental report of the New South Wales Law Reform Commission *Report on a Transport Accidents Scheme for New South Wales*. It explores the possibility of an emerging national compensation scheme and the above works must be a starting point for any serious consideration of a new national scheme.

Chapter One *A Critique of Fault* examines what the fault principle is, and where it came from. It examines the present objections to the principle and the validity of those objections. The relevance of the principle in today's society is discussed.

Chapter Two *Compensation Schemes and Proposals* outlines and evaluates the no-fault compensation schemes that are currently operating in this country. It discusses the Woodhouse proposals and considers the comprehensive compensation scheme operating in New Zealand. The main focus of attention is on the recent New South Wales proposals for a limited no-fault transport accident scheme. The proposed scheme is designed to be capable of extension into a national scheme. The proposals also offer the most recent and extensive coverage of the relevant issues to date. The Chapter also describes and evaluates the recent changes to workers' compensation and, at the time of writing, the proposed transport accidents compensation scheme in Victoria.

Chapter Three *The Philosophy of a New Scheme* examines the general principles that should govern a new compensation scheme. Principles of community responsibility, comprehensive entitlement and administrative efficiency are canvassed. The possible goals of compensation are discussed and aligned with the goals of a "needs-based" or "income-related" scheme. Chapter Three also considers the position of people who did not earn an income at the time of their accident. How do you compensate non-earners? The Chapter concludes with an observation of the recent trend in compensation initiatives. There is developing a "care-based" attitude to accident victims. This regards the provision of long-term care and support services and the extension of rehabilitation facilities as being equal to or more important than the provision of monetary compensation. The new attitude is considered and evaluated.

Accident compensation is an issue that will not go away. Sooner

or later, and probably sooner, the legal profession, academics and the general public must become fully aware of the complex and difficult issues that are involved in the accident compensation debate. This book provides the basic material for an informed consideration of the major issues to be confronted both at present and in the future.

Chapter 1

A CRITIQUE OF FAULT

The fault principle

The concept of fault has dominated almost the entire law of torts. Even in the 1980s many people including members of the legal profession regard fault as the fabric of compensation for personal injury. Such persons have defended, and will defend, the principle in the face of the many criticisms levelled against it. This chapter will focus on what the fault principle is, how it operates in practice, and what are the criticisms.

The fault principle asserts that it is just that a person who causes loss or damage to another by his or her fault should be required to compensate that person. Similarly, a person who causes loss or damage to another without fault, should not be required to compensate the other.¹

In earlier times, the law in England applied a principle of strict liability under which a person causing injury to another was liable to compensate the injured person regardless of whether fault could be established. This principle apparently served well enough in a predominantly agricultural community. With the advent of industrialization in the nineteenth century, the modern tort of negligence based on the moral precept that there should be no liability without fault, replaced strict liability.² The conventional explanation for this development is that the new doctrine struck a balance between the conflicting demands of an expanding industrialized society. It was necessary both to encourage individual initiative and to compensate individuals who sustained injuries as the result of another person's activities. Viewed in an historical perspective, the emergence of the modern negligence action restricted the liability of defendants rather than expanded it. The action could be justified on ethical grounds, since liability depended on showing that the defendant had failed to exercise reasonable care on a matter which was within his or her own control. Liability could also be justified as a means of exacting retribution from a negligent defendant and as a device for deterring careless behavior. The principle was formulated and applied before the use of motor vehicles had become almost universal in the community. Fleming² states that the movement towards fault coincided with, and was undoubtedly influenced by, the demands of the industrial revolution. He says: "It was felt to be in the better interest of an advancing economy to subordinate the security of

individuals, who happened to become casualties of the new machine age, rather than fetter enterprise by loading it with the cost of 'inevitable' accidents. Liability for faultless causation was geared to impede progress because it gave the individual no opportunity for avoiding liability by being careful and thus confronted him with the dilemma of either giving up his projected activity or shouldering the cost of any resulting injury."³

Both the Woodhouse Committee and the New South Wales Law Reform Commission have examined the fault principle. Their conclusions are broadly similar in highlighting the deficiencies of the fault principle as applied to modern day conditions. The terms of reference of the Woodhouse Committee directed that the Committee examine the establishment of a no-fault system of personal injury compensation. This reference was later extended to include incapacity due to sickness. As a consequence of this reference, the Committee did not feel the need to justify the abolition of the fault-based negligence action. However, since it received a number of submissions advocating the retention of fault, the Committee did deal with the issues, although in a somewhat one-sided fashion.

The preliminary argument the Committee used was that the issues involved depict a social problem of growing concern.⁴ This was followed by a number of quotations, mainly from jurists, designed to illustrate the criticisms which have been directed at the fault system during the past 30 years. The Committee then examined the philosophy of the fault-based system in Australia, and the system in practice, including discussion of the risks of litigation, the enormous delays, the negative effects of the system on rehabilitation, and the costs. This powerful attack on the common law was to some extent substantiated by empirical research undertaken by the Committee.

The Woodhouse Committee faced some criticism for the unbalanced and one-sided case against the common law.⁵ The Committee said very little about the advantages of the common law. The same criticism cannot be made against the New South Wales Law Reform Commission in its treatment of the fault issues. The Commission gave detailed consideration to the arguments for and against the preservation of the common law in the *Issues Paper Accident Compensation* (1982), the *Working Paper* (1983) and the *Final Report* (1984). The reason for such a detailed examination of fault was two-fold. The terms of reference for the Commission did not indicate that the State Government had already committed itself to a no-fault scheme. By contrast, the Woodhouse Committee reference specifically stated that the Federal Government planned

to introduce a no-fault scheme. Also, the large number of submissions that were made to the Law Reform Commission demanded that a proper and complete investigation of the issues be undertaken. The Commission's stated challenge was to devise a system which effectively overcame the deficiencies of the common law, while not abandoning its more positive features.⁶

A number of people believe that the fault system fulfills community expectations. The Law Society of New South Wales has stated: "Community concepts of fairness and justice demand that if a person is injured through the fault of some other person and his life is thereby interrupted he should be compensated".⁷ The common law is thus perceived as having a "corrective justice" function. This function does not hold up well when realities of insurance, particularly compulsory insurance, are considered. Compulsory third party insurance negates a central aim of the fault principle, that the wrongdoer must pay. Instead, the loss is spread to the community. However, payments from the fund are selective, and only those who are fortunate enough to be able to establish fault will receive compensation. The Woodhouse Committee refers to the fault theory as a "frugal screening device" which continues to survive not for any moral purpose, but for hard reasons of economy.⁸ The Committee concludes: "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 on to 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."⁹

Professor Atiyah has drafted an "indictment" of the fault principle. These charges may serve as an appropriate basis for further discussion.¹⁰ *Count 1*: "The compensation payable bears no relation to the degree of fault". Atiyah notes how it is not generally material whether the fault of the defendant was gross or slight. If there is fault, the defendant is liable to pay full compensation. This can be a catastrophic liability. *Count 2*: "The compensation payable bears no relation to the means of the defendant." It is the alleged aim of the civil law to compensate, not to punish. However, fault operates regardless of capacity to pay. The fault system can only operate because of the existence of insurance. *Count 3*: "The fault principle is not a moral principle because a defendant may be negligent without being morally culpable and vice versa". Because of the objective way fault is

viewed in law, personal qualities of the person involved are ignored. Objective standards do not require that a defendant have any consciousness of moral wrong-doing, or risk, or danger of conduct. *Count 4*: "The fault principle pays insufficient attention to the conduct or needs of the plaintiff". The courts do not consider any meritorious acts of the plaintiff, but focus attention when there has been some fault. For example, a heroic person of limited means who is severely injured in a rescue attempt receives no damages unless he or she can show fault on someone's part. Conversely, someone whose conduct is selfish, and who has ample means to bear any loss sustained recovers full damages if negligence can be shown.¹¹ *Count 5*: "Justice may require payment of compensation without fault." Neither in law nor in morality is fault the *only* ground in which a person may be required to compensate another. *Count 6*: "Fault is an unsatisfactory criterion for liability because of the difficulties caused in adjudicating on it". Atiyah's final count is based on the practical problems associated with proving fault, and the difficulties involved in concentrating too much on one specific case to the exclusion of statistical and other evidence about accidents of the kind in question.

In considering the underlying basis of fault, it is useful to examine the purported aims of a fault-based system. It is important to note that the aims of the system are themselves the subject of much debate.¹² However, it is possible to categorise the aims as appeasement, justice (morality), deterrence, and compensation.¹³ The argument that appeasement is one of the aims of tort law is based on the proposition that the infliction of injury will lead to retaliation by the victim, his or her family and friends. Therefore, the victim must be "appeased" by action against the wrongdoer. The Law Council of Australia has stated: "From experience one knows that people get very angry about being knocked down by a drunk driver—more angry than if it is a mere accident. There is a sense of grievance, which to some extent is satisfied by the common law action . . .".¹⁴ There exists some considerable doubt as to whether appeasement is, or has ever been a clear aim of fault-based system. Certainly there is no unquestionable evidence to support such an aim. Commentators Glasbeek and Hasson have argued¹⁵ that there is little historical or modern day merit in the theory: "We feel that the argument that appeasement justifies the law of torts' insistence on the requirement of fault to establish liability is totally incredible".¹⁶

Justice and morality

Professor Glanville Williams views the justice objective as having two aspects. The first, which he terms "ethical retribution", is a moral argument that a wrongdoer, someone at fault, must be punished. The second aspect, "ethical compensation", proposes that the ethics of society require that a wrongdoer makes good the loss occasioned by the victim. The argument claims that: "Common sense morality suggests that a man who has been negligent ought to pay compensation to those whom he injures. Someone must bear the loss, and we think it better that this loss should rest on the person at fault than on the innocent person on whom it happens to fall. Like every other ethical proposition, this is an intuition which cannot ultimately be proved or disproved, but can only be held or rejected".¹⁷ The justice/morality argument, as a major aim of the fault principle in modern times, has been soundly criticised and rejected. The basic reason is that liability based on fault, as it operates in practice, has little to do with any principle that the wrongdoer must pay. As earlier noted, compulsory third party motor vehicle insurance, compulsory workers' compensation, and widespread liability insurance have undermined any notion that the individual must pay. Instead, the costs of liability are spread widely throughout the community in the form of motor vehicle registration fees and higher prices. Other arguments against the justice/morality concept are included in Atiyah's "indictment".

While it is relatively easy to catalogue the deficiencies of the justice/morality argument in practice, it is much more difficult to challenge the basic assumptions on which the argument is made. Is there a widely held notion of "common sense morality" in the community? If so, is it reflected in the common law? Or could it be that the public's perception of justice and morality is moulded and shaped by the existing rules and norms? Sally Lloyd-Bostock has examined the question of "common sense morality" in relation to accident compensation.¹⁹ A survey of 1,000 accident victims was conducted in England by the Centre for Socio-Legal Studies, Oxford, in 1977. The evidence of the views of these victims was analysed by Lloyd-Bostock in an attempt to test the morality theory. The survey revealed that accident victims seem to attribute fault in a way which justifies the compensation claim available. Fault is attributed most often in the kind of accidents where the possibility of compensation is likely to occur to the victim.²⁰ For example, in road accidents (where liability depends on the fault of the other driver) fault is attributed to the immediate causes,

whereas in work accidents (where the employer is compulsorily insured) it is a less proximate, background cause which predominates. Lloyd-Bostock concludes from the study that accident victims attribute fault for their accidents and responsibility for compensating them as a reflection of the existing laws.²¹ In other words, she has empirically demonstrated that the public perception of justice and morality in accident compensation is not reflected in the law, but is shaped and directed by the law. The idea, then, of a widely held common sense morality which dictates to accident victims where fault and liability should be attributed breaks down: "The victim often appears not to have his own independent, strong feelings about what should happen—he simply does not really know. In particular, he has no idea how much money he should get. It is not just a matter of not knowing his legal rights or how much he *could* receive. In a situation which is unfamiliar, he lacks specific norms of his own and does not feel competent to generate them for himself from more general principles because there is a range of possibilities. What he *feels* is, therefore, often largely the result of what his lawyer, trade union, the police, friends and others have suggested to him since his accident. Having arrived at an account (amount) he may then vigorously defend it".²²

What is now left for the moral argument in accident compensation? Andre Tunc contends²³ that because legal fault is unquestionably divorced from moral culpability in accidents (because of the "chance" of accidents and the objective standard of the reasonable person), and tort law has not lived up to its aim of ethical compensation, the moral law demands a new philosophy of accident compensation which would inspire specific laws.²⁴ In an argument similar to Atiyah's *Counts* 1, 3 5 and 6 against the fault principle, Tunc declares that the major challenge to be addressed by the tort jurist in the contemporary world is the reconciliation of the following two principles: the moral law demands that when someone has taken a deliberate decision, that person must bear the responsibility for what has been done; when an accident has occurred, the moral law demands as a matter of priority that the victim be indemnified.²⁵ In a no-fault accident compensation scheme, these two principles could be satisfactorily reconciled. The moral law which demands that the victim has access to rehabilitation and compensation would be assured as of right. The law which demands that people bear responsibility for their actions could be maintained by an extension or refinement of the criminal law and other statutory requirements. However, the questions should be asked: is it just to leave responsibility upon

the individual "wrongdoer" when accidents are caused by a myriad of contributing factors? Should not society bear a large portion of the responsibility for victims of an activity which society allows and facilitates? Sir Owen Woodhouse has argued, "Since the community as a whole readily accepts all the advantages, surely there must be a heavy responsibility upon that same community to support the burden that falls upon the random casualties?"²⁶ He argues that the lawyer would say "no". The lawyer has grown up with the concept of immediate and individual causation. He would find it difficult to understand why doctors, economists, social workers and scientists criticise the law in this area. The lawyer is unable to appreciate that what he or she has been taught to regard as a legal problem is nothing of the sort: it is a social problem with the widest implications.²⁷

In the Senate Committee Inquiry into the 1974 Woodhouse proposals, evidence from the Royal Australian College of Surgeons Injury Research Unit was given to bring out the environmental and socio-economic factors related to accident causation. The Committee continued, "Yet the fault system relies upon the 'negligence' factor to determine a right to compensation notwithstanding that accidents are caused by many different factors and that innocent victims may suffer injury without any other person being negligent".²⁸

Much of the criticism of the law in this area centres on the fact that the law concentrates on "the" cause of a loss.²⁹ While it takes account of other factors, it still places primary significance on one incident or connected series of incidents to determine cause. The concentration is not only on an individual incident, but also an individual person or body purported to be "the" cause of a loss. While the courts may use legal rules and principles for determining cause in the hope that such decisions will appear objective or even scientific, it does not disguise the reality of policy considerations and moral judgments which the courts must undertake. When a court must choose between a number of causes for an accident or between a number of potentially liable defendants, individual moral judgments of blame may result.³⁰ The same applies when the court attempts to determine whether the injury or loss is proximate to the cause. Questions of foreseeability and remoteness are ripe with policy considerations.³¹ As Terence Ison has commented, "These complex problems of causation, with their inevitable toll of mistakes and injustices, are, however, inherent in tort liability. Indeed, many of them are inherent in any system of compensation by reference to the cause of the sickness or injury".³² If a

compensation scheme were devised which eliminated the requirement of fault, the complex problems of causation (which use up an enormous amount of resources) would be resolved. There is no justification, moral or otherwise, for perpetuating a system which does not adequately respond to the multiplicity of factors that make up the causes of accidents.³³

Deterrence

As originally founded, one of the most important justifications for the fault system was its deterrent effect. It is said that fault deters careless or potentially dangerous conduct. Calabresi, in his explanation of the deterrent goal of tort liability,³⁴ states that fault tries to reduce total costs by deterring specific conduct which is felt to be dangerous. "Letting the party which causes the loss bear it", he says, attempts to decrease accident costs by either reducing the cost-causing activity (by making it more expensive) or by the introduction of safety devices or stronger materials (particularly in automobiles), so that the cost is less than paying for damage claims.³⁵

In an economic analysis of tort law, deterrence has been described as a major goal. Richard Posner has stated that, "The dominant function of the tort system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety".³⁶ The apparent attractiveness of the deterrence argument must be considered in the light of liability and compulsory insurance. If deterrence is the dominant function of tort law, why then are vast numbers of people and organizations effectively exempted from the main method of enforcing deterrence—actual payment of damages? In Professor Fleming's words, "The deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance".³⁷ In New South Wales there is compulsory third party personal injury cover for owners of motor vehicles. Enterprise liability is protected to some extent by compulsory workers' compensation cover and extensive coverage for defective product liability.³⁸ What incentive is there for individuals and groups to cut down on dangerous, or potentially dangerous, activities?

For motorists, it could be argued that considerations of personal safety, fear of licence suspension and the threat of criminal sanctions may be enough to deter dangerous conduct. These may be the only remaining considerations in New South Wales as far as personal injury on the road goes, since the Government

Insurance Office is named in the court action instead of the negligent defendant.³⁹ What of the fault principle here? It is suggested that it would be difficult to feel morally culpable after an accident you have caused when you do not have to pay any personal injury damages, you are not named as a defendant, the premium is not loaded to account for your driving habits, and you do not feel that you have breached the objective standard required by the law. In fact, you may be incapable of ever achieving the standard of the "reasonable" person. It has been suggested⁴⁰ that if deterrence were seriously regarded as a major function of tort law, and it is a priority to the compensation function, liability insurance should be removed entirely.⁴¹

The area in which the deterrence argument is strongest in support of the fault principle is product liability. As noted earlier, economic theory argues that fault tries to reduce cost (accident)-causing activity by making it more expensive. This gives manufacturers the impetus to devise further safety measures and to develop stringent quality controls. However, with the advent of liability insurance, it appears that it is the insurance companies that now provide a major incentive for manufacturers to install safety devices and provide for quality control. It was once estimated that some insurance companies in certain risk areas spent more money on accident prevention than they did on claims.⁴² It is in the insurance companies' interest to help prevent accidents. "Whenever insurance premiums rise, dissatisfaction with the insurance industry intensifies. This in time stimulates pressure for the State to nationalise the business. Since insurance people want to avert this fate, they seek to reduce accidents".⁴³ Craig Brown argues⁴⁴ that for insurance and the fault system to work together towards achieving the goal of deterrence, there must be a direct relationship between the premiums and the causes of accidents. Such a relationship may be found in Australia where a "no-claim bonus" provides incentive for motorists with third party property cover. Another relationship may be found in the recent changes to workers' compensation in New South Wales where the employers must pay the first \$500 of each claim by their employees.⁴⁵

There is another way in which the fault principle can act as a deterrent in product liability cases. The adverse publicity that may arise from some trials could have significant impact on the practice of some companies. Ralph Nader would surely testify to this.⁴⁶ Once this deterrent value of fault is conceded, the question must be asked whether fault is necessary for the adverse publicity factor to apply. Craig Brown does not think so.⁴⁷ He argues that society

has demonstrated very little faith in the deterrent effect of fault liability by the establishment of statutory standards of conduct in countless areas of human activity, backed by penalties to enforce them. Government safety programs and campaigns provide further testament to the failings of the fault principle. He concludes, "Reliance on the traditional system of tort liability does not achieve anything like the degree of deterrence needed in modern society with its ever-increasing technology".⁴⁸ Brown's argument is applicable to the Australian scene. Recent decades have seen the creation and expansion of consumer protection laws. Australia has demonstrated that the free flow of market forces is not enough to deter negligent manufacturers or distributors.⁴⁹ Government intervention is required. In a highly regulated environment, it may be that the economic arguments of cost-benefit analysis are of little relevance. What is more relevant is the way the State has been stirred to act for the protection of the consumer.

Whether the government enacts protection laws for political advantages⁵⁰ or because of an unacceptably high level of accidents, the role of the fault system as a deterrent in product liability is considerably weakened. A national comprehensive compensation scheme could be implemented to operate alongside the existing consumer protection laws and occupational health and safety legislation. The deterrence factor could still operate from a breach of statutory duty that imposes substantial penalties and enforcement provisions.

Compensation

Compensation is a well-recognised goal of the law of torts. It has been suggested that if compensation were a major goal of the tort system, there would be no real need or reason to prove that the injury was the result of the fault of another.⁵¹ Even if compensation were a minor goal of the fault principle, it can be observed that the goal is severely deficient in practice. It is deficient largely because of the requirement of fault. As the N.S.W. Law Reform Commission states, the common law negligence action is not, by definition, a remedy available to all injured people.⁵² The Commission estimated in its *Working Paper* that approximately one-third of victims (or the families of victims) of motor vehicle accidents are unable to receive any compensation through a common law negligence action.⁵³

Apart from the fault principle's failure to compensate these victims at all is its failure to achieve the aims that are within the compensation goal. The claimed advantages of individual

assessment of loss, of "full" recovery, of the virtues of the court adversary process and lump-sum damages awards, are soundly examined, criticised and rejected by the Commission.⁵⁴

In 1981, Justice Murphy attempted to explain how the principle of full restitution was being undermined by the decisions of Australian courts. Full restitution of the injured person is the stated aim of the fault-based system. However, in the High Court case of *Todorovic v. Waller*⁵⁵ Justice Murphy argued that awards for personal injury and death based on full restitution may be an unacceptable burden on the community, particularly upon vehicle owners and industrial concerns through the insurance system. One way to reduce the burden is to transfer some or all of the social costs to the injured persons and their dependants. He stated that "This has been the preferred judicial method, achieved (a) by unjustifiable discount rates (reaching even 8%) applied to earnings and expected medical expenses which the courts pretend will not increase with inflation; (b) by ignoring general increases in wages due not to inflation, but to increases in productivity; (c) by miserable awards for pain and suffering for catastrophic injuries; and perhaps the worst (d) by declining to implement the direction in compensation to relatives legislation to award damages proportioned to the injury. For many years . . . in serious personal injury cases the social function of the courts has been to depress damages . . . The principle of restitution has been theory, not practice".⁵⁶ The principle of full restitution that Justice Murphy refers to is the pivotal component of a monetary-based system of compensation. A lump-sum monetary payment is supposed to compensate the victim and put him or her in the position he or she was in before the accident occurred. Rehabilitation and care for the accident victim is not the pre-eminent concern of the courts in that the courts cannot deal with such on-going initiatives.⁵⁷

The inadequacy of the common law fault principle in practice in today's society is well-documented, most recently by the Commission.⁵⁸ The resulting message is clear. Fault is no longer a valid criterion for eligibility to accident compensation and a new scheme must be formulated.

The practical difficulties of proving fault in the courts through the adversary process are well-known. The difficulties are particularly acute in high speed traffic cases.⁵⁹ Once the victim has established eligibility to compensation (has proved fault) there are a number of ways the courts can reduce the damages. Apart from the methods Justice Murphy outlined above is the contributory negligence rule. Contributory negligence may be defined as, "A plaintiff's failure to meet the standard of care to

which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default in bringing about his injury".⁶⁰ This definition includes the concepts of causation and fault. Negligence in this sense is directed at the victim's failure to take reasonable care of his or her own interest. In a personal injury case where the victim is demonstrated to have been partly responsible for the injury, the courts will reduce the award of damages by the "deemed" percentage of contributory negligence.

In a survey conducted by the Woodhouse Committee, it was found that overall, insurance companies had saved over 39.5 per cent of assessed damages due to the application of contributory negligence. The average rate of reduction varied between 30.4 per cent in Queensland and 49.9 per cent in New South Wales.⁶¹ The utilization of the contributory negligence rule is thus the greatest factor in the reduction of damages. Compensation that the court has decided will be just sufficient to compensate and maintain the victim will be drastically reduced if contributory negligence is proved. The victim is left to his or her own resources to make up for these reductions. The process of proving this negligence is also difficult, and costly. It can lead to the anomaly that Atiyah has noted. He states that it is "remarkable" that a wholly innocent plaintiff who cannot prove fault receives no compensation, while a grossly negligent plaintiff, who may have been 80 per cent to blame for his or her own injuries, is entitled to some benefits (20 per cent of assessed damages).⁶²

The "once and for all" lump sum payment of damages has come under increasing criticism, and much of it has come from the courts.⁶³ In the House of Lords, Lord Scarman summarized the sentiments this way: "Sooner or later—and too often later rather than sooner—if the parties do not settle, a court (once liability is admitted or proved) has to make an award of damages. The award, which covers past, present, and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering—in many cases the major part of the award—will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low".⁶⁴

Other inadequacies which reflect badly on the compensation goal of the fault principle are the long delays in common law

negligence actions and the anti-rehabilitative effects that this has on accident victims.⁶⁵ These aspects are inherent parts of the litigation process. It would take either a massive reform of the negligence action itself, or a huge increase in the judicial capacity of this country to remedy this situation.⁶⁶ Even so, delaying tactics would probably survive such reforms.

The Law Reform Commission also points to the substantial and increasing burden on the New South Wales court system. While the amount spent in this State on courtroom facilities to decide common law negligence actions is large,⁶⁷ the addition of legal and administrative costs⁶⁸ would bring the figure to a staggering level. On these points, the Commission concludes that "The total cost of the fault system cannot be justified and this underlines the importance of finding an alternative which can distribute the funds available for transport accident victims more equitably and efficiently".⁶⁹ The final recommendations of the Commission which argue for the abolition of the negligence action (in relation to transport accidents) give further meaning to the assertion by John Fleming that, "The death knell of tort liability for accidents is indeed becoming ever more audible".⁷⁰

Further evidence that the fault principle has not lived up to the compensation goal has been recently provided by the Macquarie University School of Economic and Financial Studies.⁷¹ In an interdisciplinary study of District Court and Supreme Court personal injury cases, the School set out to examine the awards (or refusals) of compensation, and to test the factors which influence the composition of the awards. Although the survey was relatively small,⁷² two major findings emerged. The first finding was that compensation awards could be objectively explained. The School found that the model they had constructed explained 49.2 per cent of the variation in awards.⁷³ The second finding was a strong indicator that there is a significant positive correlation between age and the size of the award. One would normally expect the reverse. The authors state that one explanation is that the evidence of economic loss is more readily available in the case of an older person. They argue that: "This suggests the possibility of *under compensation* through lump sum awards of persons who cannot establish an earning pattern. This would seem a growing problem in a time of high unemployment. It seriously undermines the claim that common law damages give 'full compensation' ".⁷⁴ The authors further argue for the development of a national compensation scheme for personal injury. In a concluding section they state: "In view of the results outlined in this paper, it would

appear that a national universal compensation scheme offering administratively determined compensation for injury would be feasible and could be superior to the present system".⁷⁵

Conclusion

This concludes the examination of the fault principle and how it operates in practice. The basic aim has been to demonstrate that while the principle had some relevant usefulness in past times, it is now no longer a useful criterion to determine eligibility for compensation. A new system is needed. A new scheme must be formulated that has universal application. It must be both equitable and efficient. It must be implemented in a uniform manner on a national level so that there are no anomalies between the States. There is no question now that the days of fault liability are numbered. As Justice Michael Kirby has stated, "The question is not *whether* no-fault entitlement will come. The question is *how* it will come, *when* and from *whom*".⁷⁶

Footnotes

1. P.S. Atiyah *Accidents, Compensation and the Law* (1980) pp. 469, 470.
2. John G. Fleming *The Law of Torts* (1977) pp. 7, 8.
3. *Ibid*, p. 8.
4. As against a legal problem *Australian Woodhouse Report* National Committee of Inquiry, *Compensation and Rehabilitation in Australia* 1974 [62] hereinafter referred to as *Australian Woodhouse Report*.
5. Noted in Geoffrey Palmer *Compensation for Incapacity* (1979) p. 31.
6. New South Wales Law Reform Commission *Report: A Transport Accidents Scheme for New South Wales* (L.R.C. 43 1984) [3.3] hereinafter referred to as *Commission's Report*.
7. Submission to the Law Reform Commission No. S40, cited in the *Commission's Report* [3.5].
8. *Australian Woodhouse Report op. cit* [102].
9. *Ibid* [103].
10. Atiyah *op. cit.* pp. 472-497.
11. *Commission's Issues Paper* [3.17].
12. Geoffrey Palmer *supra* n. 5.
13. Glanville Williams *The Aims of the Law of Torts* (1951) 4 *Curr. Leg. Prob.* 137, and Williams and Hepple *Foundations of the Law of Tort* (1976).
14. In oral evidence to the Australian Woodhouse Committee, cited in The Senate Standing Committee on Constitutional and Legal Affairs: *Report on the Reference: The Clauses of the National Compensation Bill 1974* (AGPS Canberra 1975) p. 20.
15. Glasbeek and R.A. Hasson "Fault—The Great Hoax" in Lewis Klar (ed.) *Studies in Canadian Tort Law* 1977, p. 395.
16. *Ibid*, p. 400.
17. Williams and Hepple *op. cit.* p. 116.
18. Atiyah *Accidents, Compensation and the Law op. cit.* p. 475.

19. Sally Lloyd-Bostock *Common Sense Morality and Accident Compensation* [1980] *Insurance Law Journal* 331.
20. *Ibid.*, p. 339.
21. *Ibid.*, p. 344.
22. *Ibid.*, p. 343; see also the revised version of Lloyd-Bostock's paper in D. Harris *et al. Compensation and Support for Injury and Illness* [1984] Oxford Centre for Socio-Legal Studies.
23. Andre Tunc *Tort Law and the Moral Law* (1972A) *Camb. Law J.* 247.
24. *Ibid.*, p. 255.
25. *Ibid.*, p. 259.
26. Owen Woodhouse *The Philosophy of Compensation* paper delivered at the *Workers' Compensation—New Directions* conference, Adelaide, May 1984, p. 7.
27. *Ibid.*
28. Senate Standing Committee *supra* n. 14, p. 22.
29. See, for example, G. Fridman and J. Williams "The Atomic Theory of Negligence" (1971) 45 *Australian Law Journal* 117, S. Lloyd-Bostock "The Ordinary Man and the Psychology of Attributing Causes and Responsibility" (1979) 42 *Modern Law Review* 143, and, H.L.A. Hart and A.M. Honore *Causation In The Law*, 2nd ed. 1985 Oxford. Clarendon Press.
30. See Malone *Ruminations on Cause-in-Fact* (1958) 9 *Stan. L. Rev.* 60, and, E.S. Weinrib *A Step Forward in Factual Causation* (1975) 38 *M.L.R.* 535.
31. See B. Kercher and M. Noone *Remedies* (1983) p. 90 in the context of contract damages and G. Williams *Causation in the Law* [1961] *Cam. Law J.* 62.
32. Terence G. Ison *The Forensic Lottery* (1967) London p. 22.
33. See further, Commission's *Report* [3.34-3.36] on the decline of the significance of fault in relation to motor vehicle accidents.
34. Guido Calabresi *Fault, Accidents and the Wonderful World of Blum and Kalven* (1965) 75 *Yale Law Journal* 216.
35. *Ibid.*, p. 238.
36. Richard A. Posner *A Theory of Negligence* (1972) 1 *Journal of Legal Studies* 29, reproduced in Henry G. Manne *The Economics of Legal Relationships* (1975) U.S.A. (West Publishing Co.) at p. 217. For a good collection of the main economic arguments in tort law, see Manne extracts 9 to 19.
37. John Fleming *The Role of Negligence in Modern Tort Law* (1967) 52 *Virginia Law Rev.* 815, at p. 823 quoted in Craig Brown *Deterrence and Accident Compensation Schemes* (1979) 17 *Uni. Western Ontario Law Rev.* 111, at p. 115. See also Atiyah *Accidents, Compensation and the Law op. cit.* Chapter 24.
38. Especially since the insertion of Manufacturer's Liability in Division 2A of Part V of the *Trade Practices Act*. 1974.
39. By virtue of the *Motor Vehicles (Third Party Insurance) Amendment Act*, 1984 N.S.W.
40. Craig Brown *supra* n. 37, p. 116.
41. As is the situation in the Soviet Union, see Brown *ibid.*
42. Brown *ibid.*, p. 117 citing James & Thornton *The Impact of Insurance on the Law of Torts* (1950) 15 *Law & Contemp. Prob.* 431 at p. 441.
43. Brown *ibid.*, citing A. Linden *Canadian Negligence Law* (1972), at p. 478.
44. *Ibid.*, p. 118.
45. See M. Poberezny *Workers Compensation—Recent Changes in New South Wales* (1985) 10 *Legal Service Bulletin* 194.
46. Brown *supra* n. 37, p. 121.
47. *Ibid.*
48. *Ibid.*, p. 122.

49. See generally J.L. Goldring and L.W. Maher *Consumer Protection Law in Australia* 2nd ed. (1983) Butterworths.
50. As Goldring and Maher argue, *ibid*, p. 7.
51. Glasbeek and Hasson *supra* n. 15, p. 402.
52. Commission's *Report* [3.17].
53. Commission's *Working Paper* [3.10]. This estimate was backed up by similar estimates from other inquiries, see [3.10], footnote 11. In the final *Report*, the Commission claims further evidence that the number of *severely injured* people in this category may be even higher: *Report*, [3.19,20].
54. Commission's *Report* Chapter 3. See also the two Research Papers published by the Commission *Traffic Accident Case Studies* and *Case Study Booklet* [R.P. 1 & 2, 1984].
55. (1981) 150 C.L.R. 402; 56 A.L.J.R. 59; 37 A.L.R. 481.
56. *Ibid*, at p. 517.
57. Recent care and rehabilitation proposals will be discussed in Chapter 3.
58. See the Commission's *Issues Paper* [3.10—3.26], the *Working Paper* [3.1—3.41] and the *Report* [3.16—3.101] .
59. Commission's *Report* [3.29].
60. From the American Restatement of Torts cited by Fleming *The Law of Torts op. cit.* 251.
61. *Australian Woodhouse Report* Tables III & IV; see G. Palmer *op. cit.*, pp. 29, 30.
62. Atiyah *Accidents, Compensation and the Law op. cit.*, p. 483.
63. See Kercher and Noone *Remedies* (1983) pp. 321-323.
64. *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, at pp. 183, 184. Cited in Kercher and Noone *ibid*, p. 321, and the Commission's *Report* [3.44].
65. These criticisms were outlined in the Woodhouse Committee Report, and the Commission's *Report* [3.71-83].
66. See generally Michael Chesterman's Research Paper on Accident Compensation *Proposals to Modify the Common Law* (November 1983) New South Wales Law Reform Commission, C.P. 2.
67. The Commission estimates that the annual cost of providing Supreme Court and District Court courtrooms, judges and staff to decide negligence claims in N.S.W. is approximately \$8.9 million (in 1982 dollars): *Report* [3.87].
68. At present unquantifiable in N.S.W., see *ibid* [3.89-94].
69. *Ibid*, [3.104].
70. John Fleming *The Law of Torts op. cit.*, p. 13.
71. R. Braddock, S. Galitsky and K. Meldrum *Compensation for Personal Injury: A First Report* (October 1983) and *A Second Report* (November 1984).
72. 315 cases in N.S.W. were examined. The research is continuing.
73. R. Braddock *et al*, *A Second Report op. cit.*, p. 19.
74. R. Braddock, S. Galitsky, K. Meldrum, and D. Knox, *Compensation for Personal Injury: An Interdisciplinary Study* (August 1984) p. 38, paper presented at the Thirteenth Conference of Economists, Perth 1984.
75. *Ibid*, p. 43.
76. Justice M. Kirby *Reforming Compensation for Accidents* (November 1976) paper presented at the Magistrates' Conference, Canberra.

Chapter 2

COMPENSATION SCHEMES AND PROPOSALS

Introduction

Any serious debate on an accident compensation scheme must include reference to past initiatives taken in Australia. Accordingly, this Chapter will review the various compensation schemes which are in operation or have been proposed in this country. It will highlight some of the problems and difficulties which have plagued these schemes and proposals.

The main focus of this section will be on the proposals of the New South Wales Law Reform Commission. These proposals offer the most recent and extensive coverage of the relevant issues to date. They may also be extended to facilitate the introduction of a national comprehensive compensation scheme. The chapter also examines the recent Victorian proposals for a pure no-fault motor vehicle accident compensation scheme.

The basic aims of the proposals contained in the 1974 National Committee of Inquiry, the *Australian Woodhouse Report*, a brief description of the *Report*, and why its proposals were not implemented will also be discussed. The Victorian, Tasmanian, and Northern Territory no-fault transport compensation schemes and the current operation of the New Zealand comprehensive compensation scheme will also be considered.

The Australian Woodhouse proposals

When the Whitlam Labor Government took office in late 1972, it initiated what was to become the most far-reaching proposal for the reform of personal injury compensation yet offered in Australia. Only in New Zealand had such a massive legal and social reform been implemented. The Australian proposals came very close to being enacted in 1975. The history of the reform movement in both countries is chronicled by Geoffrey Palmer in his book *Compensation for Incapacity*.¹ Palmer's work outlines the difficulties faced by the reformers in New Zealand and Australia. While the New Zealand scheme was eventually enacted (in a form somewhat different from that proposed by the 1967 Woodhouse Royal Commission²) the Australian Woodhouse proposals became bogged down in a mass of opposition and delay. There was dispute on many aspects of the proposals. However, as Palmer's book demonstrates, there was also a surprising degree

of fundamental support for the scheme both within the government and the opposition parties at the time.³ The major opposition came from the well-organized interest groups of the trade unions, the legal profession and the insurers. But, the power of the political element could not be separated from the compensation proposals. Politics went hand-in-hand with policy. As Palmer states: "The development of policy is inevitably pragmatic. The Woodhouse reform did not attempt to produce the ideal proposal for the compensation of the incapacitated. The aim was to recommend the most rational policy that could be accepted by government *and* enacted. Thus the political aspect of each policy recommendation needed examination as much as its logical or social advantages".⁴ What follows is a brief account of the Australian Woodhouse proposals.

The *Australian Woodhouse Report* proposed a national compensation and rehabilitation scheme for the injured and the sick. The scope of the scheme was enormous. It was to cover everyone in the country who became sick, had congenital disabilities or suffered an injury regardless of fault. The theme of the *Report* was the need for "automatic rehabilitation and compensation—without tags and without discrimination".⁵ As noted earlier, the Committee regarded the relevant issues as a social, rather than a legal, concern. The founding principles of the new scheme were to be community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.⁶ The compensation that was to be provided was to be earnings-related. The Committee did not seriously consider any other scheme of benefits, such as a disability or needs-based scheme.⁷ The Committee argued that the principle of "real compensation" required the provision of earnings-related benefits. Earners, during periods of total incapacity, would receive a taxable payment of 85 per cent of their previous taxable earnings. A ceiling was imposed on the maximum weekly amount payable (\$500 per week in 1974). Those with permanent partial disabilities would be assessed on a set scale with the index of average weekly earnings. Non-earners would receive no benefit during the first three weeks of incapacity and after that would receive the minimum "notional" weekly payment (\$42.50 per week in 1974). The benefits were to be periodic. There was provision for the assessment of future earnings, but only within a limited range. A method was devised for assessing the future earnings of persons who were over 15 and under 26 years of age. The Bill was later revised to raise the cut-off age to 31. There were limited provisions for lump-sum payments, but the Committee

soundly rejected the payment of lump sums in general. All periodic benefits would be automatically adjusted to allow for inflation. The price to be paid for these benefits, which were to become available as of right, was manifold. The existing remedies at common law were to be abolished. The workers' compensation system was to be dismantled. The compulsory insurance system would collapse, as would much of the liability insurance industry. The scheme was to be administered by the Social Security Department of the Federal Government.

In order to support the goal of complete rehabilitation, the Committee proposed the establishment of a National Safety Office. This body would co-ordinate and plan policy based on the new statistical information which would become available.⁸

The fate of the proposals

As noted earlier, opposition to the proposed scheme in Australia was well-organized and ultimately effective. When the Bill passed into the Senate in October 1974, it was handed over for the consideration of the Senate Standing Committee on Constitutional and Legal Affairs. Its report came out in July 1975 after extensive submissions were received.⁹ The recommendations of the Senate Committee resulted in delaying the Bill's passage through Parliament. While the Senate Committee was broadly in favour of a no-fault compensation scheme,¹⁰ it concluded that the Bill should be withdrawn and reconsidered by Parliament. The two main reasons were that the provisions of the Bill had serious deficiencies and that there were serious doubts as to its constitutional validity.¹¹ 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".¹² The Committee, however, argued for the retention of common-law rights in a number of areas. The "non-exhaustive" list included actions for damages based on wilful or intentional injury to the person, actions against manufacturers and distributors of defective products, plus some areas of professional negligence and nuisance.¹³ The Senate Committee's "alternative approach" to the Bill was to recommend a system of compensation which would operate in conjunction with all the existing common-law remedies. Such a proposal would have undermined the basic plan and philosophy of the Woodhouse proposals. The alternative proposal was supported by only three of the six Senators.¹⁴ The

Senate Committee expressed concern for the "significant" effects that the Bill would have on the private and State insurance industry and the economy in general. It recommended that the government examine in detail these issues before the Bill should be passed.¹⁵ The most significant aspect of the Senate Committee *Report* was its general support for a national comprehensive no-fault scheme which would be constitutionally valid, even though its view of the constitutional issue was not optimistic. It resulted in some restructuring of the Bill to make it more politically acceptable. A major effect of the *Report* was to have the sickness part of the scheme dropped from the final Bill (which was to become Mr. Whitlam's Private Member's Bill in 1977).

As noted earlier, throughout the period in question, there was forceful opposition from the trade unions, the legal profession, and the insurers. There was also considerable opposition from the State governments. While the States generally supported a compensation scheme, they wanted it on their terms. These terms included retention of the common-law rights in certain areas of non-economic loss and retention of a role for the sometimes lucrative private and State insurance bodies. Some States believed that compensation laws were clearly within the States' rights.¹⁶ Fortunately, the Senate Committee was aware that such proposals were not acceptable if the essential elements of the Woodhouse scheme were to be implemented.

The trade union movement did not want the common law abolished. Palmer notes that at the time of the Inquiry four States had achieved 100 per cent earnings compensation for work-related injuries and the unions were against the proposal to reduce this to 85 per cent. Palmer states that the unions took a "short-sighted" view and that, "The unions were concerned with men at work and did not wish to consider the wider social implications of compensation".¹⁷ There was even an accusation at the time by Mr. Whitlam that some of the union secretaries were making alliances with lawyers and insurance companies in order to block the scheme.¹⁸

The members of the legal profession were "the most accomplished defenders of the common law in Australia".¹⁹ The profession's basic proposition was that the new scheme should operate in conjunction with existing schemes. The well-organized opposition and "wide array of political tactics" led Palmer to conclude: "... the legal profession in Australia was prepared to fight in the most cynical manner to ensure that the injury industry was organised in a way that preserved the status quo ... much of the opposition ... was motivated by financial self-interest".²⁰

The insurers were also well-organized. One hundred and forty-nine general insurers formed a National Compensation Insurance Committee which presented their proposals. Palmer summarizes their submissions: "The only practical approach was to do what the insurers wished in order to avoid disrupting the economy of Australia. State rights should be respected. Injury could not be distinguished from sickness in its social consequences. Few people understood the existing systems so it was not possible to secure informed opinion on their weaknesses. The insurance industry should remain in any scheme. There were constitutional difficulties in doing any more than supplementing existing remedies. The common law had to remain. The liquidation of insurance company assets would be necessary if the insurers had their business taken away".²¹ Palmer claims that the proposals put by the insurance industry were not credible. Further, the reform package it put before the Senate Committee was "one of the most unabashedly self-serving proposals ever advanced to a policy-making body".²² The Woodhouse Committee criticised the private insurance industry for being unco-operative in its submissions. The insurers did not seem to accept the need for adjustment and change within the industry and spent their efforts opposing the scheme. The Committee argued that the problems of the insurance industry's adaptation were, "... plainly secondary to the over-riding need to find the best administrative solution for the new scheme and it is equally clear that a wide-ranging social welfare objective is not a fit subject matter for a private enterprise operation".²³

None of the Woodhouse recommendations were implemented. However, the scheme did come remarkably close to being enacted. Although it has been some years since the *Woodhouse Report*, the basic principles and issues that were formulated are even more relevant and crucial today.

A piecemeal, jagged approach to accident compensation reform is not the answer. A consolidated effort involving the co-operation of the States and the Federal Government is required. This is perhaps a major lesson to be learned from the Woodhouse proposals in Australia. The Federal Government cannot initiate the required reforms alone. However, this does not preclude it from taking the initiative in policy formation that could act as a guide for the States. At the very least, the Federal Government could initiate continued and informed discussion and debate among the States with a view to consolidating national policy.

Of course, valuable lessons may be learned from compensation schemes already operating within this country and in New Zealand. An examination of these follows.

The New Zealand Scheme

Since 1974, New Zealand has become the centre of much attention for anyone interested in or committed to accident compensation reform. New Zealand has abolished the common-law negligence action and a statutory authority provides earnings-related compensation to all accident victims. The coverage is 24 hours a day for all New Zealanders. The scheme is only broadly similar to the proposed Australian Woodhouse scheme. Persons or groups who wish to reform the law of accident compensation, particularly those who argue for the abolition of the common law, must turn to New Zealand for an appraisal of its system. Palmer has described how the system of government in New Zealand has made reform on this scale possible.²⁴ The Parliament in New Zealand is unicameral. It has a long tradition of strong central government. As Palmer states: "Legislating in New Zealand does not present the difficulties that it does in other countries. To constitute the Government a party must have a majority in the House of Representatives. Thus any Government is sure of being able to pass its legislation—there is no upper house to block or delay. And New Zealand has no 'written' constitution in the sense of formal limitations on the exercise of legislative power. Parliament is sovereign".²⁵

What follows is a general outline of the New Zealand scheme as it is currently operating and some of the benefits that are payable.²⁶ The Accident Compensation Corporation will pay incapacitated earners 80 per cent of their earnings losses. There is a maximum of \$700 per week. There is no legislative provision for automatic indexing of benefits (the Woodhouse Royal Commission recommended indexing but this was never implemented). It has been the Corporation's practice to adjust the benefits to account for inflation at six-monthly periods since 1979.²⁷ No payments are made during the first week of incapacity and persons injured at work or while travelling to and from work are compensated for that week by their employer. Allowance may be made for earnings increases but only if the incapacitated person is under 20, or an apprentice, or improver, or employed under a contract of service requiring training. Children under 16, students and people who have completed a vocational course within six months may be considered to have earnings losses of between \$218 and \$327 per week.²⁸ No other allowances are made for potential for advancement. A maximum lump sum of \$17,000 for non-economic loss may be paid for permanent incapacities. A maximum of \$10,000 may be paid for

loss of amenities or enjoyment of life, loss from disfigurement, for pain and mental suffering and mental shock and neurosis.

Evaluation

There are many aspects of the New Zealand scheme which have been criticised. One aspect that may cause hardship is the provision of the Act (s. 59(2)) which enables the Corporation to determine the future earning capacity of an earner based on any form of work that the injured person is now considered capable of doing. This provision may be used by the Corporation even if the work is not available in the earner's area.²⁹

A report which came out late in 1983 by Donald Kirby outlines some further criticisms of the scheme.³⁰ The report was commissioned by the New South Wales Law Society. The report is a "sincere" attempt to examine the scheme from the point of view of the "consumer". Kirby talked to the claimants who had "run foul of the system" as well as a few lawyers. The report is an emotive work that must be read with caution. It contains allegations which are presented as fact. These are supported by an extremely loose and selective "empirical" study. Some of his conclusions are: "... the Accident Compensation Corporation has, by general agreement, adopted an 'insurance attitude' towards claims . . . [and] Many people . . . do very badly under the system until they appeal, and until they get legal representation, and that it is probable that many who could successfully appeal do not do so".³¹ Donald Kirby paints a bleak picture of the scheme in operation. While there is no empirical study available on the public acceptability of the scheme in New Zealand and the overall "success" of its operation, there have been other attempts. The most recent one was by Mr. J. Miller.³² Rather than undertake an empirical study, Miller analysed the many submissions that were received by the New Zealand Government in 1980 and 1982, when various amendments to the scheme were being considered.³³ The submissions that were analysed came from most of the main interest groups in New Zealand. There were submissions from employers, unions, the legal and medical professions, farmers, sporting bodies, religious organizations, social welfare groups, academics, and many more. Although the submissions were critical of the scheme in its operation in certain respects, Miller found there was strong support for a no-fault scheme. He stated that the support "came from all sectors".³⁴

The tremendous cost savings of the compensation scheme compared with the expense of administering the common-law

system was mentioned in the submissions. The New Zealand Law Society provided the following table of employers' liability insurance premiums in Victoria compared with New Zealand levies.³⁵

	Rate per #100 annual payroll	
	Victoria	New Zealand
Clerical	\$ 0.87	\$0.50
Farmers	\$10.20	\$1.70
Fitters and turners	\$ 9.49	\$1.90
Freezing workers	\$10.24	\$2.75
Truck drivers	\$11.34	\$1.90
Waterside workers	\$14.65	\$2.25

It is important to note that the Victorian levies only provided for work-related accidents, whereas the New Zealand levies also funded non-work accidents. As one group stated, "The New Zealand Accident Compensation Scheme is probably the cheapest in the world today".³⁶ The results of Miller's study give further credence to the 1984 comments of Sir Owen Woodhouse who stated: "... I am in no doubt that New Zealand lawyers and New Zealand insurers, let alone New Zealand accident victims would shudder at the thought of abandoning the comprehensive accident scheme in favour of a return to those workers' compensation and common law arrangements ... There is general acceptance and approval of the scheme in New Zealand. It is regarded as fair, as efficient, as economically viable and far less expensive than any alternative could possibly be".³⁷

The Victorian Scheme

Victoria introduced a transport accidents scheme in 1973 after recommendations contained in two reports.³⁸ The scheme is administered by a separate statutory authority called the Motor Accidents Board. The scheme preserves all common-law rights in Victoria. The following benefits are payable on a no-fault basis: (1) Payments for loss of earning capacity based on pre-accident net (after tax) earnings to a maximum of \$20,800; (2) 80 per cent of hospital, medical and paramedical expenses for a maximum period of five years; (3) where, for one month prior to the accident, the injured person was engaged mainly in unpaid housekeeping or child care, 80 per cent of costs incurred for household help or child care for a period of two years (within five years of the accident), to a maximum of \$2,000; and (4) a lump sum payment to the dependants of a deceased person calculated by reference

to the amount payable to the victim if he or she had lived, subject to a maximum of \$20,800.³⁹ The Act does not require the compensation payments to be periodic. In 1979 the Act was amended to alter the earnings-related assessment of income to an assessment of lost earning capacity. This was done so that the benefits would not be subject to federal taxation. The amendment also had the benefit of allowing some previously excluded non-earners to claim for lost earning capacity.⁴⁰ The Victorian Act was further amended in 1981 to impose rehabilitative duties on the Board. Mr. A.K. Clarke, General Manager of the Board stated: "A scheme that only provides financial assistance is less than half a scheme and ignores the greatest need of the disabled. Every effort should be made to restore them to their best possible capacity to participate in family, social and employment activities".⁴¹ The establishment of a Rehabilitation Account in Victoria was the result of a Board of Inquiry headed by Sir John Minogue. The *Minogue Report*, released in 1978, recommended substantial changes to the scheme as well as the common law. The *Report* recommended the removal of the monetary ceiling on benefits and an extension to retirement age, indexation of benefits, increased provision for household help and rehabilitation and extensive changes to common-law rights.⁴² Most of these proposals were not implemented.

Evaluation

Although Victoria has established a scheme which recognizes that fault is irrelevant for the provision of compensation to accident victims, the scheme is deficient in a number of respects. The main inadequacy of the scheme is the perpetuation of the common-law action. While fault is not relevant in the actual entitlement to compensation, it is extremely relevant to the extent of compensation available. There is no justification for perpetuating a system which discriminates between two classes of accident victims—those who can prove fault, and those who cannot.

A further inadequacy of the Victorian scheme is that it preserves all of the aspects of the common-law system that have been criticised and questioned in Chapter 1. These include the long delays in hearing a common-law claim, the possibility of an inadequate assessment of damages, the retention of once-and-for-all lump-sum payments, and the anti-rehabilitative effects of common-law actions. The maintenance of the common-law system preserves the heavy administrative and associated costs that are

involved in the litigation process.⁴³ Apart from the retention of the common-law action, the Victorian no-fault scheme is severely limited in the amount of compensation that is payable. With an absolute maximum of only \$20,800 for earners, and \$2,000 for non-earners, the scheme provides only the most basic levels of protection. Finally, a most fundamental defect of the system is that it is only available for transport accidents. As observed earlier, there is no reason to differentiate between motor vehicle accident victims and victims of other kinds of accidents. However, the removal of the requirement of fault in one further category of accident victims (transport accident victims) is an improvement.

Workers' compensation in Victoria

Recent changes to workers' compensation in Victoria have radically altered the importance of the common-law negligence action by employees against employers. A new workers' compensation scheme called "WorkCare" was implemented by the Cain Government in July 1985.⁴⁴

The *Accident Compensation Act* 1985 (Vic.) establishes the Accidents Compensation Commission. This body will administer the new form of levies on the wages paid by employers. It will also act as the central policy-maker. Benefits paid to victims of accidents at work will be periodic. There is a maximum of \$400 per week payable. The entitlements to lump-sum compensation have been narrowed.⁴⁵ A Victorian Accident Rehabilitation Council will be established to develop a consolidated State-wide network of rehabilitation facilities. These facilities will be provided as of right to injured workers. The most significant aspect of the Act is that it abolishes the common-law action for economic loss for work accidents. A common-law action still exists for non-pecuniary loss such as pain and suffering and loss of enjoyment of life. Full common-law rights have been retained for death claims and for accidents on the way to and from work.⁴⁶

Victoria has implemented these changes despite a "barrage of criticism" from the insurers, the unions and the legal profession.⁴⁷ Although the common-law action is only partially abolished, it may be that the Victorian legislators will soon see significant positive results from the scheme. The government estimates that the benefits to workers will increase by over \$100 million per year and that the premiums paid by employers will be reduced by 50 per cent.⁴⁸ Once these positive results are realized, the way will hopefully be paved for further extension and refinement to the Victorian statutory no-fault scheme which

will eventually replace the common law, and operate not only for workers and transport accident victims, but for any person who suffers personal injury.

The Tasmanian Scheme

The Tasmanian scheme is limited to transport accidents and is similar to that operating in Victoria. It retains the common-law negligence action and supplements it with no-fault benefits. The scheme began operating in 1973⁴³ and followed a Law Reform Committee investigation.⁵⁰ The Committee recommended that the common law action be abolished or at least rendered ineffective.⁵¹ This was not implemented.

The scheme is administered by the Tasmanian Motor Accidents Insurance Board. This is a statutory authority which also runs the compulsory third-party motor vehicle insurance system. The benefits provided by the scheme include: (1) Periodic payments to people wholly disabled in vehicle accidents. The disability allowance is 80 per cent of an earner's average net weekly pre-accident earnings. For the first two years it is payable where an employed or self-employed person is wholly disabled from engaging in his or her usual occupation or business. Thereafter the allowance is payable while the injured person is wholly disabled from engaging in any employment or occupation for which he or she would, but for the disability, be reasonably suited. (2) A housekeeping allowance of 80 per cent of replacement cost may be paid for two years where the injured person was engaged in specified housekeeping activities at the time of the accident. Unlike the Victorian scheme, in Tasmania compensation is not payable to a child or student for the deprivation or reduction of earning capacity. (3) Benefits in the event of the death of a family member include a lump sum up to \$10,000 for a surviving head of household plus a further \$2,000 for each dependant. In addition, periodic allowances may be paid for up to two years. (4) Allowances are not indexed for inflation . . . (5) All medical expenses reasonably incurred up to a limit of \$25,000 and contributions to funeral expenses.⁵²

Evaluation

Like the Victorian scheme, the Tasmanian scheme is limited to transport accidents and retains the common-law action. The comments made earlier about the Victorian scheme also apply here. It may be observed that the benefits under the Tasmanian

scheme are more generous in respect of lost earnings than in Victoria. There are no statutory maximums to the amount payable. However, the benefits are not indexed for inflation. This could pose a serious problem in the future in times of high inflation. One of the lessons learned from the New Zealand scheme is to index the benefits to inflation. This would avoid the criticisms that have arisen in that country about the reducing value of compensation. Further, there is no provision for an automatic entitlement to rehabilitation facilities. There is an urgent need in Tasmania for an integrated, State-wide rehabilitation service that operates within the transport accident scheme.

The Northern Territory Scheme

The Northern Territory has a transport accident scheme which has replaced the common-law remedies. The 1979 *Bradley Report*⁵³ resulted in the establishment of a scheme⁵⁴ which retained the common-law negligence action for pain and suffering and loss of enjoyment of life and limited damages under that head to \$100,000. However in 1984 the common-law rights were abolished and "replaced" with a scheduled lump sum of up to \$50,000 for permanent disabilities.⁵⁵ In addition to this lump sum, transport accident victims in the Northern Territory may receive the following benefits: (1) Compensation to people in employment at the time of their accident for reduced capacity to earn income at a level which is equivalent to the difference (after tax) between 85 per cent of the equivalent Territory male or female average weekly earnings and the amount the accident victim is capable of earning in employment whilst incapacitated. Such benefits commence seven days after the accident and continue during incapacity until age 65. Periodic payments in respect of incapacity are indexed on an annual basis. (2) Payment for the medical treatment of accident victims to a limit of \$50,000 for any one accident. Standard hospital charges for those people who are not Commonwealth assisted patients and are not otherwise indemnified may also be paid. (3) Benefits for home and vehicle modifications and also the supply of aids and appliances to a ceiling of \$20,000.⁵⁶ The scheme also pays an income-related benefit to a dependent spouse upon the death of the head of household, and a modest lump sum on the death of a dependent spouse.

Evaluation

The Northern Territory is the first Australian jurisdiction to completely remove the requirement of fault from entitlement to,

and levels of, benefits. The abolition of common-law rights is the most progressive aspect of the scheme and makes the transition to a "pure" no-fault system of accident compensation in other States significantly easier to envisage. There is also a recent proposal that the common law action be abolished for work-related injuries.⁵⁷ This scheme, however, has limited provisions for rehabilitation. As with the Tasmanian scheme, the Northern Territory needs an integrated, effective rehabilitation program.⁵⁸

The New South Wales proposals

Introduction

In August 1984, the then federal Attorney-General, Senator Gareth Evans, addressed an accident compensation seminar in Canberra.⁵⁹ In his speech, Senator Evans reiterated the Australian Labor Party policy on national accident compensation. He stated that, "Labor will develop, in co-operation with the States, a national compensation scheme on a no-fault basis with universal coverage for all injury and work-related injury and disease".⁶⁰ The Hawke Government was elected to power in 1983 with this policy as part of the election platform. The government does not favour the unilateral approach of federal action which was recommended by the Woodhouse Committee. Rather, it aims to achieve accident compensation reform on a State-by-State basis, in conjunction with national action.

The ultimate aim of a national comprehensive compensation scheme is now the government's "long term objective".⁶¹ The plan involves four stages of implementation. They are: first, introduction of a no-fault motor accident compensation scheme, accompanied by abolition of common-law claims arising from such accidents; secondly, expansion of workers' compensation benefits under existing statutory systems to match the benchmark set by the motor accident scheme; thirdly, extension of workers' compensation to 24 hour a day cover for earners, with abolition of common-law claims; and fourthly, 24 hour a day cover for non-earner non-road accident victims.⁶² Senator Evans' speech referred to the Northern Territory scheme and the New South Wales Law Reform Commission's proposals. He said the scheme and the proposals had the potential to become a model for adoption in other States. Once uniformity had been achieved at the State level, the Commonwealth would address the interaction of consolidating laws. He said the work of the New South Wales

Commission was "vital" in helping to achieve the "ultimate goal".⁶³

The scope of the inquiry

In November 1981, the New South Wales Law Reform Commission received its accident compensation reference from the State Attorney-General. The terms of that reference were very wide. The Commission was to inquire into, report on and make recommendations concerning various possible no-fault compensation schemes. It was also to inquire into the nature and scope of the proposed schemes, the benefits to be provided, the basis of claims, financing, administration, and the relationship of the schemes to the common law, and other compensation systems or schemes. The concept of "personal injury" in the reference included pre-natal injury, illness resulting from injury, and occupational disease. Unlike the Woodhouse Committee, the commission was not asked to inquire into a scheme for illness. Further, the Commission was not asked specifically to inquire into accident prevention and rehabilitation measures. However, the Commission eventually did make significant and extensive recommendations for rehabilitation.⁶⁴

After the initiation of broad public debate with the 1982 *Issues Paper*, the Commission eventually decided to restrict itself to consideration of a limited transport accidents scheme. The 1983 *Working Paper* presented tentative recommendations for the scheme and invited submissions from the public. The terms of reference asked the Commission to report on a no-fault scheme for transport accidents causing death or personal injury. The Commission reasoned that there were sound policy reasons for examining transport accidents. It stated that motor vehicle accident compensation was in "urgent need of review", and the formulation of a scheme involved issues that were relevant when considering the extension of compensation arrangements to other areas. Also, the Commission argued that a transport accidents scheme was financially viable in New South Wales due to the ready availability of registration contributions.⁶⁵

The Commission's proposals

The Commission's *Report on a Transport Accidents Scheme for New South Wales* was published in October 1984. What follows is a brief description of some major elements of the proposals.

The proposed scheme applies only to death or bodily injury

caused by or arising out of an accident involving a motor vehicle or a form of public transport. The scheme is to be funded by motor vehicle owners (in lieu of compulsory third party premiums) and a levy on drivers' licences. It will operate only in New South Wales. It is a "pure" no-fault scheme. This means that the common-law negligence action for transport accident injuries would be abolished. The workers' compensation system would remain intact. It is the abolition of the common-law negligence action which is perhaps the most controversial aspect of the proposals.

The Commission has proposed compensation for loss of earning capacity. The benefits would be periodic. There are a few provisions for lump-sum payments, the main one being a payment for permanent disability. This payment is over and above the other benefits under the scheme. The Commission recommended that those who suffered permanent disability of a degree over 4 per cent would be entitled to lump-sum compensation to a maximum of 208 times the value of average weekly earnings at the date of the payment. In June 1984, that lump sum would have been \$87,360.

The level of benefits to be paid for loss of earning capacity is calculated at 80 per cent of the difference between pre-accident and post-accident earning capacity. The maximum loss that is payable is 150 per cent of average weekly earnings (at June 1984, 80 per cent of this was \$504 per week). Benefits would be paid five working days after the accident.

There is a broad definition of an "earner" in the scheme, which takes into account part-time and intermittent employment and periods of unemployment. Because the scheme is earnings-related, there is to be no compensation paid to non-earners for the first two years of incapacity. Thereafter, non-earners would be deemed to have "notional earning capacity". This notional earning capacity is set at 50 per cent of average weekly earnings (\$210 at June 1984) and is scaled down for persons under 21 years of age. A non-earner accident victim who suffers long-term incapacity will be entitled to 80 per cent of his or her notional earning capacity, i.e. 80 per cent of \$210 or \$158 per week. Both earners as well as non-earners will be eligible for this level of benefits after two years. The difference is that for earners, the level is a minimum benefit, and for non-earners, it will be a maximum benefit. In general, the benefits would continue until the recipient is aged 65.

While non-earners are not entitled to earnings-related compensation, they are eligible for a number of rehabilitation measures detailed in the *Report*. The Commission views rehabilitation as an essential objective of the scheme. The statutory

body which is proposed to administer the scheme, the Accident Compensation Corporation, may arrange to modify the victim's workplace, actively seek employment for the victim and provide financial incentives to prospective employers. The Corporation would be empowered to provide loans for special purposes.

There is a wide variety of support services proposed. The Corporation would be empowered to provide household services for up to four weeks and thereafter means-tested on family income, attendant care, accommodation or modifications to existing homes, and, after six months, a weekly mobility allowance or modification of motor vehicles.

In cases of long-term incapacity, there is an interesting provision which allows for consideration of potential for advancement. If a person's earnings could have been expected to increase in the 10-year period following the accident, the victim may apply for this assessment (after a waiting period of two years). This provision would apply to non-earners as well as earners. The Commission also considered the possibility of "top-up" insurance which would probably be provided by the Corporation. This would give very high income earners the extra coverage that they may desire.

The Commission's goal of compensation

One of the most fundamental policy questions which must be answered in a compensation system relates to the provision of the compensation itself. Basic questions which must be answered include: What form will the compensation take? What exactly is being compensated? If there are losses, how may they be quantified, or should they be quantified? Should the level of benefits reflect the needs of the victim based on the extent of the disability, or provide for financial restitution based on a loss of earning capacity? Can a compensation system provide for both financial needs and needs arising from disability?

The Commission saw three major models for the assessment of compensation: the welfare model, the disability model and the restitution model. The policy choices have been made from each of these models. A brief survey of these models is required in order to understand the rationale of the Commission and how it views the goal of compensation.

The welfare model

The assessment of compensation in a welfare model would be needs-based and similar to the Australian social security system. The victim would probably be means tested to establish eligibility

for compensation.⁶⁶ The welfare model has a number of advantages. It can be integrated easily into the social security system. The model would not be regressive and the lower benefits may provide an incentive for the injured person to return to the workforce.⁶⁷ The disadvantages of the welfare model, as stated by the Commission, are that high income earners will not be compensated according to their financial needs and that it should not be the role of a compensation scheme to redress inequalities in income. On this argument, "... inequalities should be addressed primarily through the taxation and general welfare systems and not through compensation systems, particularly those covering only specific kinds of accidental injury".⁶⁸

The disability model

Under this model, compensation is assessed not according to earning capacity, but on the degree of disability suffered by the victim. Thus, similar disabilities would receive similar benefits. The Commission noted two arguments in favour of the disability model. Since the benefits would disregard the effect on the person's earning capacity, there would be a strong rehabilitative incentive. Secondly, assessing the degree of physical disability is administratively simpler than assessing lost earning capacity.⁶⁹

However, inequitable results may follow from a flat-rate or disability model. The Compensation Reform Action Group has claimed that the model "fails to deal with the one-legged judge problem, i.e. both the judge and the trapeze artist would receive the same flat-rate compensation for the loss of a leg, but while the judge could still work, the trapeze artist would be unable to work and be dependent on the flat-rate benefit".⁷⁰ The Commission argues that another disadvantage of the model is that an accurate assessment of the injury cannot be made immediately after the accident and some method of assessment must be devised to cover the interim "acute" period.⁷¹ The Commission therefore recommends that the disability model be used only for assessing permanent disability on an equal basis for both earners and non-earners as a supplement to other benefits.

The restitution model

Compensation under this model is designed to restore the injured person to the position he or she was in before the accident. This is the stated goal of common-law damages for personal injury. The restitution principle operates as an earnings-related system when a loss of earnings is suffered by the victim. The main

argument in favour of the restitution model is that it attempts to replace, as far as money can, the losses actually sustained by the victim: "Any other model means that the fortuitous occurrence of an injury may leave the injured person substantially worse off than he or she would have been but for the accident."⁷² The Commission noted that the restitution model is "strenuously" supported by many groups who are "no doubt influenced by the common law".⁷³

There are a number of objections to the restitution model. One view questions why earnings-related benefits should be paid to a person who is no longer working. This seemingly distasteful argument claims that differences in incomes are justified only by the differences in the value of productive labour; therefore, if a person is prevented from working, there is no reason why compensation should be paid as if he or she were working.⁷⁴ Professor Harold Luntz believes that the common-law principle of full restitution is misconceived and should not be implemented in a statutory scheme: "I am of the opinion that the common law went wrong when it attempted to replace in full the gains which would have been made from the exploitation of an earning capacity without making any allowance for the saving in effort that would have been involved in the realization of those gains".⁷⁵ Another objection to the restitution model is that it is regressive. This argument applies to the Commission's scheme, since the funds for compensation would be collected at a standard rate for motor vehicle drivers. Because it is proposed that compensation payments be earnings-related, existing inequalities in income will be preserved, even exacerbated. This is the situation at present concerning motor vehicle accident compensation. Funds are paid equally by all registered drivers, but compensation is paid at a higher rate to high income accident victims than to middle income victims, and higher to middle income victims than to low or nil income accident victims. The common law pays damage awards that vary with the size of the victim's pre-accident income, even though the contribution made by the victim to the relevant pool premiums bears no relation to that income. Michael Chesterman argues that: "So long as the number of unemployed people in the community remains large (and all sorts of factors, including advances in technology and an ageing population are likely to contribute to this), the feeling that those with jobs are a privileged group even when afflicted by accidents will not be dispelled".⁷⁶ The Commission has at least recognized that the proposed scheme will preserve the regressive aspect of the present common-law actions for transport accidents.⁷⁷ It further

recognizes that the restitution model is "not easy" to apply to non-earners.⁷⁸

The policy choices of the Commission

The Commission fundamentally bases its *Report* on the restitution model and utilizes some aspects of the welfare and disability models. The restitution model is given effect by continuing payments for loss of earning capacity, payment of medical and out-of-pocket expenses and provision for the loss of unpaid household services. The three major qualifications to the principle of restitution are: a ceiling is imposed on the compensation payable; loss of earning capacity is reduced by 20 per cent to 80 per cent; and non-earners are deemed to have some earning capacity after two years. The disability model is utilised only to compensate permanent disabilities according to a set scale. The permanent disabilities will receive the same lump sum regardless of the victim's pre-accident earnings. The payment is, in effect, a substitute for the common-law damage claims of loss of enjoyment of life, and pain and suffering. The disability payment is in addition to any other benefits under the scheme. The welfare model is used in the provision of death benefits to the surviving spouse or children and in the provision of household services. For the provision of these services, needs-based criteria operate after four weeks from the date of the incapacity or death.⁷⁹

When assessing the applicability of the scheme to a national comprehensive compensation scheme, the Commission's proposals are unfortunate in two major respects. Apart from the fact that the scheme is limited to transport accidents, it is designed to be regressive. The Commission recognizes this and argues that compensation in a national scheme may not be regressive, since contributions would be made from the taxation system. However, the fact remains that this particular scheme is regressive. The only possible justification for an earnings-related scheme in the context of transport accidents is if the scheme will, as opposed to may be extended to cover all cases of personal injury and eventually illness. As discussed earlier, this is the stated policy of the Federal Government. However, the policy must be implemented expediently so that the regressive effects of the limited schemes will be short-lived. The other unfortunate aspect of the Commission's proposals relates to the treatment of non-earners who are excluded from periodic payment of compensation (for two years) simply because of their status in the workforce at, or around, the time of the accident. While there are further

considerations on this issue, the immediate point is that non-earners are discriminated against in an earnings-related scheme.

It must be remembered that the Commission was set a very difficult task. It had to sift through many different options which fundamentally conflict with each other. The notion of earnings-related compensation is deeply entrenched in our society. It will be a major legacy left by the common law. It is also an integral part of the workers' compensation system. The Commission's choice of an earnings-related scheme is unfortunate, but only in the short-term. It should also be recognized that in the face of the popularity of the restitution principle, the Commission had also to present a proposal which would be politically acceptable. This is a major constraint where reform of the law is concerned, particularly major reform. The issues concerning earnings-related compensation and how to compensate non-earners is discussed further in the third chapter of this book. The next section discusses the new scheme for transport accidents that was proposed by the Victorian Government in May 1986.

A new transport accident scheme for Victoria

Introduction

On 7th May 1986, the Victorian Cain Government unveiled a new transport accident compensation reform package. At the time of writing, legislation required to implement this package has been introduced in the Victorian Parliament.⁸⁰ In the second reading of the Transport Accident Bill and in a 198-page "Government Statement" released at the same time, it was revealed that the main motivation behind the scheme was that the existing dual system, described earlier, was financially "out of control".⁸¹ With an unfunded liability of \$1,600 million at June 1986 and the prospect of having to increase motor vehicle registrations by 176 per cent to \$500 per car per year,⁸² it is perhaps understandable why the government sought a cheaper, more efficient means of compensating accident victims. The Victorian Government had little choice.

The most significant aspects of the scheme are the complete abolition of the common law action for negligence in relation to transport accidents and the ambitious, consolidated approach to rehabilitation and accident prevention. The reasoning of the Victorian Government for these reforms is well worth quoting in full:

The Victorian transport accident compensation scheme is

beset with economic and social inadequacies. Financially it is out of control, and socially it fails to deliver benefits efficiently and equitably to Victorian accident victims. It is clear that the historic application of common law notions of negligence, fault, and blame in immediate post-industrial revolution Britain retain little relevance to a modern Australian society in which the number of vehicles exceeds the number of drivers, and where accidents to which no fault or blame attaches occur regularly. As well, the development of community-wide compulsory liability insurance has further eroded the relevance of negligence actions by abrogating the traditional responsibility for those at fault to personally satisfy a demand for retribution. In recent history, the State of Victoria has led, rather than followed, the enlightened tendency towards accident compensation schemes that emphasize a no-fault concept of equitable care, attention, and compensation for the victims of accidents in a modern mechanised society. It was the first Australian jurisdiction to bring into operation a no-fault motor accident scheme while the recent Workcare reforms represent a new Australian benchmark. The Government believes it is essential that evolutionary development continues. For, 13 years on, it is apparent that the mix of tandem no-fault and fault systems has failed to meet its objectives, measured against concerns of cost and care. In its present form, the scheme emphasizes and promotes inequity, delays, inefficiency, and hostility to the exclusion of the common good. It is under-financed through a regressive, standardised levy that takes no account of risk exposure, or the responsibility of road users for their individual safety performance. Yet it delivers benefits in uncertain once-and-for-all lump sums of money against progressive earnings criteria, together with a notion of fault or blame, across swings that range from extravagance to parsimony. Co-operation, efficiency, accident prevention and rehabilitation and adequate maintenance for the long-term severely injured are largely ignored or neglected. The existing care system has little to commend it. There is a clear requirement for major reform.⁸³

Outline of the Victorian scheme:

i) Rehabilitation and care provisions

In a clear demonstration of the present trend towards

emphasizing a rehabilitation and care-based system, as opposed to a money-based compensation system,⁸⁴ the Victorian Government states that, "The reform package sets the preventative value of road safety, and the restorative or curative value of rehabilitation as primary objectives. This represents a philosophical shift from the existing emphasis on compensation as a palliative".⁸⁵ The prevention, rehabilitation and support care package is not spelt out in great detail in the Government Statement. In summary, it proposes,

- * Doubled expenditure on road accident prevention.
- * A phased transfer of policy co-ordination for accident prevention to the new Transport Accident Commission.
- * Heightened emphasis on targeted objectives to reduce the behavioural causes of road accidents.
- * A significant upgrading of road trauma services at specified major hospitals.
- * The provision of generously financed post-graduate research fellowships in road trauma studies at selected city and regional hospitals.
- * Boosted expenditure, financed by the Transport Accident Commission, on rehabilitation and support services to at least double existing levels.
- * Commitment to a long-term objective to merge vocational rehabilitation services, where feasible, with the Victorian Accident Rehabilitation Council.
- * A significant extension of support services, such as home help and child care.⁸⁶

Although the above list of objectives is impressive, it is unfortunate that the government did not indicate exactly *how* it is going to implement these goals. There are little or no criteria provided so as to determine the eligibility or entitlement of accident victims to rehabilitation facilities and support services and care. The impression is left that these "details" will be filled in at a later stage by the government or the proposed Transport Accident Commission. Because the plans are drawn in such a general fashion, it may raise doubts about the extent of the Victorian Government's commitment to these particular goals, particularly as they are described as "primary objectives".

ii) Benefits and policy choices

The Victorian Government has proposed four main types of benefits to accident victims. It must be remembered that these benefits are the "trade off" the public must accept for the total abolition of damages based on the common law negligence action.

The benefits proposed are:

- (i) Provision of medical and hospital benefits and of generous rehabilitation and care and attention benefits.
- (ii) An income and adjustment benefit which is payable for the first 18 months after the injury. This would be related to income loss related to the position at the time of the accident, and would be intended to provide the individual with the means to adjust to the consequences of the accident.
- (iii) An impairment benefit which is assessed after 18 months or when the injury is stabilised. This benefit would be related to the degree of impairment and to the age of the injured person. As such it would cover costs associated with the injury, including pain and suffering, quality of life changes, lifestyle costs, and the loss of the ability to provide services to others. Its variation with age would reflect the fact that the magnitude of these costs is greater for a person of younger age. Part of this impairment benefit would be payable as a lump sum, with the remainder being payable as an annuity.
- (iv) A long-term loss of earnings capacity benefit which would supplement the annuity component of the impairment benefit to provide compensation for loss of earnings capacity.⁸⁷

For victims who were earners at the time of their accident, the Victorian scheme proposes a limited earnings-related compensation system. The "income adjustment benefit" thus in effect replaces common law damages for loss of earning capacity. They are, however, six major differences:

- * The "income adjustment benefits" will be periodic.
- * Benefits are not payable for injuries resulting in less than 10 per cent incapacity.
- * The benefits will last only *18 months*.
- * The first five days' loss of income will not be compensable.
- * The benefits would be subject to federal taxation.
- * For a person who has a full income loss, only *80 per cent* of earnings are payable, subject to a floor of \$211 per week and a maximum of \$430 per week, with allowances for dependants. For a partial loss of income, the payment will be 85 per cent of the difference between actual and pre-accident injuries.⁸⁸

This benefit is only available to "earners", as defined in the scheme. The Victorian Government has utilised the New South Wales Law Reform Commission's formulation of "earner" so the

definition is wide.⁸⁹ However, no matter how wide the net is cast, this benefit is not available to non-earners. This means that a victim who has not worked for a period of 26 weeks in the two years preceding the accident, and who did not have a firm commitment of employment at the time of the accident, will not receive anything by way of monetary compensation for the first 18 months of incapacity.

An accident victim who is incapacitated in the long-term would receive an "impairment benefit". The victim would not be eligible for this benefit until *after* 18 months from the date of the accident and following an incapacity assessment by the proposed Transport Accident Commission. The "impairment benefit" will be in two parts. The first part will be a *lump sum* payment to a maximum of \$38,500.⁹⁰ This payment will compensate for the common law damages claim of pain and suffering. The lump sum will not be paid to injured minors. The government states this lump sum, "will be payable to all persons other than minors, independently of age, and reflects compensation for the type of loss involved in the injury, whatever the age at which the injury occurs".⁹¹ The lump sum benefit being considered here is not related to a person's pre-accident earnings and is therefore payable to both earners and non-earners. It is essentially a lump sum for pain and suffering. If the accident victim desires, the benefit may be paid periodically instead of as a single sum.

The second part of the "impairment benefit" will equally apply to earners and non-earners. It is clear that pre-accident income will not be a consideration in the determination of this benefit. The government states, "The periodical impairment payment involves, *inter alia*, compensation for loss of the ability to provide services to the family and broader community commitments, but for income earners it will involve some part of the ability to provide income-generating services to employers. Thus, for income earners, this benefit is seen as involving partial compensation for loss of earnings capacity".⁹⁴ The only criteria upon which this determination is made are the victim's age and the degree of impairment.

The fourth major type of benefit proposed under the scheme is called the "loss of earnings capacity benefit".⁹⁵ This also is a long-term benefit and will take the form of a periodic payment which is assessed after 18 months from the accident. It is a benefit essentially directed towards earners who can demonstrate a long-term loss of earning capacity. The benefit, however, is not a separate benefit. It is a *supplement* to the second part of the "impairment benefit". The scheme would pay 80 per cent of the

assessed loss of earnings capacity for a victim who has suffered a total loss of earnings, and 85 per cent for a partial loss of earnings capacity. The benefit would not be taxed.

Long-term periodic benefits may be calculated by adding the assessed periodic "impairment benefit" to the assessed "loss of earnings capacity benefit". The *total* periodic benefit is then subject to a *maximum annual payment* of \$18,200 [\$350 per week] and a *minimum* of \$9,776 [\$188 per week]. The minimum annual payment may be supplemented by dependants' allowances of \$2,600 *per annum* for the first dependant and \$832 *per annum* for each subsequent dependant.⁹⁶ It should be noted that, "The periodical impairment benefit plus loss of earnings capacity benefit will be subject to a ceiling so that the total *cannot be greater than* assessed uninjured earning capacity".⁹⁷

Pre-accident earning capacity is defined in the Transport Accident Bill to be the weekly amount the earner had the capacity to earn before the accident in employment reasonably available to the earner in view of the earner's training, skills and experience (less tax).⁹⁸ Because the loss of earning capacity benefits are stated to apply to earners as well as non-earners, non-earners are "deemed" to have a pre-accident earnings capacity loss of 60 per cent of Average Weekly Earnings.⁹⁹

Notable aspects of the death benefits in the scheme are a large lump sum payable to the surviving spouse [up to \$67,630], and earnings-related periodic payments for the next five years.¹⁰⁰ This will assist the spouse at a time when it is needed most, in the crucial adjustment period soon after the accident. The death benefits are similar to those proposed by the New South Wales Law Reform Commission.¹⁰¹

iii) Administration and funding

The Victorian scheme is to be administered by an all-encompassing statutory body called the Transport Accident Commission. The body will take on the functions of the present Motor Accidents Board, the State Insurance Office and the Road Traffic Authority. The body will bear ultimate responsibility for all aspects of the scheme. The functions and objectives of the Transport Accident Commission will be: (a) To reduce the cost to the Victorian community of transport accidents. (b) To provide suitable and just compensation in respect of persons injured or who die as a result of transport accidents. (c) To speedily and efficiently determine claims for compensation. (d) To reduce the incidence of transport accidents. (e) To provide suitable systems for the effective rehabilitation of persons injured as a result of

transport accidents.¹⁰² Appeals from the decisions of the Commission will go to the Administrative Appeals Tribunal and from there to the Supreme Court of Victoria.

The government has opted for a fully-funded scheme and has re-structured the compulsory third-party motor vehicle insurance premium to more accurately reflect risk areas. As well as the former city/country zoning system, there is proposed an "intermediate" zone comprising the outer suburbs of Melbourne. The makes and types of vehicles have also been re-assessed. On 1st July, 1985, the government increased premiums by 16 per cent. Further, the government proposes a 50 per cent increase in fines for traffic offences. This will take effect from 1st January, 1987. The extra revenue from these fines will be used for the Commission's road safety activities.

Evaluation

Victoria was the first State in Australia to introduce a no-fault transport accident compensation scheme that has worked in conjunction with the common law. The problems with that arrangement were: the benefits were limited to a low \$20,800; there was no automatic right for victims to receive long-term rehabilitation and on-going care and support facilities; and it became too expensive. More fundamentally, the partly no-fault arrangement still discriminated between those who could prove fault and those who could not. Those who demonstrated fault to the satisfaction of the courts were entitled to virtually unlimited damages whereas those who could not show fault, regardless of the extent of their injuries, were stuck with the above maximum figure.

The Victorian scheme is commendable in that it abolishes these artificial distinctions between the injured victims of accidents. At the time of introducing the scheme, the Victorian Premier stated that the basic elements of the scheme were not negotiable and only "fine tuning" would be considered as the legislation passed through Parliament.¹⁰³

The scheme as initially presented however, has a number of matters that need closer attention. As already observed, the scheme does not detail the rehabilitation facilities and care and support services that are to be available. Nor does it clearly spell out eligibility for these facilities and services. It is to be assumed that they will be worked out in future regulations or in the policy to be formulated and adopted by the Transport Accident Commission. Study of the New South Wales Law Reform

Commission's proposals on these issues reveals that it would be much more satisfactory for these matters to be included in the original legislation or at the very least, to be clearly formulated in advance.

Criticism may be made of the decision to adopt a 10 per cent threshold for compensating long-term accident injuries. The threshold is unreasonably high and there is no provision for flexibility. The Commission recommended 4 per cent and the Woodhouse Committee recommended 10 per cent, but with a provision for "unusual and special cases" and where it would avoid injustice.¹⁰⁴ The Victorian Government rationalizes that, "The effect of this is to confine publicly financed compensation to persons with major loss of personal assets, and to require those with more limited loss to handle the situation within their own resources".¹⁰⁵ It is submitted that the decision is arbitrary and cannot be supported. How is a non-earner with a "more limited loss" of, say 9 per cent, permanent injury going to "handle the situation" within his or her own resources?

On the question of benefits generally, it does not take much comparing to see that the benefits are less than those proposed by the New South Wales Law Reform Commission. Added to this is the fact that the costings were about two years apart. Another general observation of the Victorian scheme is that the calculations of the benefit entitlements are extremely confusing. Many complex formulae have been created which cannot be accurately tested at this stage.

A further, more fundamental shortcoming of the scheme is in the treatment of non-earners. Non-earners are to receive nothing by way of monetary compensation during the first 18 months of incapacity. This is despite the Victorian Government's statement, "Thus there is much in common between the loss incurred by a mother who can no longer provide care and attention to her family and an income earner who can no longer earn an income".¹⁰⁶ Does the claim that earners have a "special place" in our society¹⁰⁷ justify the exclusion of benefits to non-earners in the short-term crucial period when compensation is needed most? These issues are canvassed in the final chapter of this book.

In July 1986, the Law Institute of Victoria released a response to the Transport Accident Bill.¹⁰⁸ Apart from the obvious condemnation of the abolition of fault, the Institute was very critical of the benefits provisions. Among some of the comments were the following, "The scheme proposed by the Government provides a maximum weekly payment of \$400, subject to tax for the first 18 months only. This is less than Average Weekly Earnings

and thereafter it reduces to \$325.” “The lump-sum payments and ongoing weekly pensions in the main are very small and depend on a Guide to Impairment which classifies a colostomy as being too insignificant to be compensable! Benefits are significantly less than those provided by Workcare [workers’ compensation], yet there can be no valid reason for treating transport accident victims differently to industrial accident victims”¹⁰⁹.

The Victorian Government proposed that those who are not satisfied with the level of benefits can purchase “top-up” insurance. As to whether this is a desirable development, it is difficult to state. If such insurance becomes widespread and leads to differential treatment of accident victims who have the same injuries with regard to medical and rehabilitation treatment, this writer would argue against further insurance. A better alternative would be to improve the benefits and rationalise the rehabilitation and care facilities so that the incentive for other insurance is diminished. Otherwise, a class of “those who have top-up insurance” and “those who do not” will emerge with perhaps unfortunate results for the latter group.

On the whole, the Victorian Transport Accident Scheme has the appearance of not being as well-thought-out or planned as the Commission’s proposals. Obviously, much use has been made of the Commission’s Report in the scheme, but unfortunately, there is little and sometimes dubious justification for many of the decisions that have been made, especially in the areas where the scheme departs from the Commission’s proposals. A more visionary proposal is called for—one that could be capable of being moulded into a national comprehensive compensation scheme. As noted above, the abolition of the distinctions between those who can prove fault and those who cannot is a welcome development. It will be an important feature of a national scheme. Further policy issues to be considered in a national scheme will be discussed in Chapter three.

Postscript

At the time this book was going to print, the Victorian Labor Government backed down on fundamental components of its transport accident reform package. Due to the majority of the Liberal and National Parties in the Legislative Council, and after extensive negotiations with the government, it was decided to completely restructure the benefits and to retain the common law negligence action. The new package, not yet implemented at the time of writing, involves: No-fault benefits for all people for up

to three years or \$65,000—whichever comes first; no-fault benefits past this point only for those who are 50 per cent or more impaired and who have not been successful at common law; after 18 months, the long-term lump sum and annuity benefits will remain substantially unchanged; common law rights will be retained only where a victim has a "serious injury", deemed by the new Bill to be 30 per cent impairment or greater; and, a common law threshold of \$20,000 with a maximum of \$450,000 for pecuniary (earnings) loss and a \$20,000 threshold with a maximum of \$200,000 for pain and suffering.

This new package of the Victorian Government is a grave disappointment to those interested in the future of accident compensation reform in this country. The result of the changes above will be that a victim who is seriously incapacitated to a degree of, say 45 per cent, and who is not able to establish the fault of another in the courts will only be eligible to a pool of \$65,000 over a three-year period, and possibly the longer term benefits. However, if that victim could establish negligence, he or she will be entitled to claim from a pool of up to \$650,000. This is in spite of the fact that both victims may have paid equal contributions to the insurance fund through vehicle registration payments. There is no social, rational or ethical justification for this situation. It is to be hoped that future accident compensation reforms in other Australian States do not follow this path.

Reaction to no-fault proposals

New South Wales

The most significant aspect of the public reaction to the Commission's Report is that there has been very little. It has been two years at the time of writing since the publication of the Report, and only a smattering of comment has surfaced from the public and academics. This is a far cry from those heady days in 1983 and 1984 when there was vigorous debate in newspapers and academic journals. The lack of response from the public-at-large could be explained largely by lack of knowledge and understanding of how the present compensation systems work.¹¹⁰

What reaction there was to the Commission's work on accident compensation reform came after the publication of the *Working Paper* in May 1983. The main source of opposition seemed to come from the legal profession. The organization which spearheaded the campaign against the Commission's proposals was the Law Society of New South Wales.

The Society attempted to discredit the proposals by placing full-page advertisements in major New South Wales newspapers and spending large sums of money on brochures and public relations exercises. In fact, the Society allocated itself a fund of up to \$500,000 for its compensation fighting campaign.¹¹¹ Similarly, the Law Council of Australia and New South Wales Bar Association were active in opposing the abolition of the negligence action. The Law Council established a committee and pooled substantial funds to oppose the Federal Government's plans on no-fault.¹¹² In what was probably the most radical gesture of opposition, 100 lawyers from Sydney's western suburbs marched in protest to the proposed scheme just one month before the final Report was released by the Commission.¹¹³ One need not speculate as to the reason why these lawyers took such desperate measures to voice their opinions. This is a profession which prides itself on rational action and advice, on taking matters through the proper channels, and in caring for the best interests of their clients—members of the public. Drastic action such as street marches only serve to discredit the profession and make people question the self-interest element of their opposition.

In September 1983, the Law Society released a 35-page reply to the Commission's *Working Paper*.¹¹⁴ The reply was a strongly-worded exercise in destructive criticism. By the selective use of extreme hypothetical examples, the Society attacked various aspects of the proposed scheme, as well as the scheme's fundamental premises. Predictably, the Society's main objection was the proposed abolition of the common law negligence action. Its "progressive" attitude to legal and social reform is evidenced by the second paragraph of its reply: "The Law Society is unequivocally opposed to these radical changes in the law. While the Law Society agrees that there is a need for reform of the existing law, the Society believes that the necessary changes should be made cautiously, and based upon proven models".¹¹⁵ The reply was widely circulated in New South Wales, especially to the media.¹¹⁶

Rather than contribute constructively to the accident compensation debate in New South Wales, the Society decided to lobby direct to the State Government. It proposed its own transport injury compensation scheme called "Wage Care".¹¹⁷ It proposed a similar system to the dual fault/no-fault scheme that operated in Victoria. From the details that were available, it was clear that the no-faults benefits proposed were minimal. It was proposed to give accident victims who could not prove fault 85 per cent of pre-accident earnings. However, this would be subject to an

absolute maximum of \$45,000 (at July 1985). The source of funding would be the same as that proposed by the Commission, although the Society expected that the Commonwealth would provide grants to make up the necessary funds. Of course, the existing common law claims would come out of that same fund. The proposed scheme would be administered by a statutory body or a branch of the Government Insurance Office of New South Wales.

Apart from minimal benefits, there were three fundamental defects of the Law Society proposals. Firstly, the forensic lottery of the common law would be perpetuated. The maintenance of the common law would preserve the distinction between victims who could prove fault, and those who could not. Secondly, being an exclusively earnings-related scheme, there were no provisions for non-earners.¹¹⁸ Finally, there was no mention of rehabilitation facilities or care and support services for the injured.

At the time of writing, the Commission's Report has not been implemented. It has been two years since the Report was submitted to the State Labor Government. There has been no official comment on the Report. The Hawke Labor Government in Canberra has also been silent on the Report. The lack of response has been disappointing considering the stated election policy of the Hawke Government that it would establish a national comprehensive scheme in stages. The silence has led Colin Phegan, a Commissioner of the New South Wales Law Reform Commission, to state, "The Report of the New South Wales Law Reform Commission appears to have had no influence. More to the point, the Transport Accident Scheme recommended in the Report, which provided the Government of New South Wales with the opportunity to move to the forefront of accident compensation reform, has so far elicited no public response, positive or negative, from the Government. This ominous silence is matched in Canberra".¹¹⁹ The former Chairman of the Commission and chief architect of the scheme, Ronald Sackville, stated, "The establishment of schemes providing *periodic* compensation to accident victims, irrespective of fault, would result in substantial benefits to Commonwealth finances, both in the form of increased taxation revenue and reduced social security and health expenditure. Moreover, even without fundamental reform of accident compensation arrangements, there is an obvious need to integrate the national health and compensation systems in order to minimise the waste, abuses and anomalies that characterise existing arrangements. Despite the opportunity to encourage joint Commonwealth-State initiatives designed to work towards a more

rational system, in recent times there have been few public signs of interest by the Australian Government".¹²⁰

Although the accident compensation debate was relatively quiet in New South Wales in 1985, 1986 saw much action and discussion. In March 1986, the New South Wales Law Society became convinced that the then Wran Government was going to introduce legislation very soon that would abolish lump sums for transport accident victims and, possibly the common law action.¹²¹ The legal profession reacted swiftly by calling for common law accident claims to be filed immediately and placed large advertisements in the newspapers.¹²² It then appeared that the government was merely considering the reforms and was by no means near to introducing legislation. It was clear that the State Government's reconsideration of reform was prompted by the massive falls in the Government Insurance Office reserves. In March 1986, outstanding third-party claims exceeded reserves by at least \$1.3 billion.¹²³ At the time of writing, it appears that the State's workers' compensation system is also at a crisis stage. The major insurance companies who handle workers' compensation in New South Wales banded together and threatened to boycott the compensation system unless the State Government agreed to demands of premium rises for employers of up to 70 per cent.¹²⁴ The New South Wales Government subsequently released two Green Papers in September 1986. Both titled *Options For Reform*, one dealt with the N.S.W. workers' compensation scheme and the other with a transport accident compensation scheme. The papers included a number of fundamental reform options, many of which have been canvassed in this book. At the time of writing, the Unsworth Government was still considering these options.

Victoria

It was anticipated by the Law Institute of Victoria early in 1986 that the Victorian Government would soon reform the transport accident compensation system.¹²⁵ In a similar manner to their New South Wales counterparts, the profession advertised for all common law claims to be registered immediately.¹²⁶ The Law Institute made very detailed proposals to the Victorian Government for the upgrading of the dual fault/no-fault scheme.

In December 1985, the Institute released its plan for a Motor Vehicle Compensation Scheme for Victoria.¹²⁷ This was closely followed in January 1986 by a proposal for a "threshold" or a limit on common law damages claims.¹²⁸ Read together, these proposals argue for the retention of the common law action with

an increase in the maximum benefits payable under the no-fault scheme from \$20,800 to \$33,176. Common law damages would be limited by a threshold on non-economic losses such as pain and suffering which would eliminate small claims. The proposals would also cut back compensation to the more seriously injured by decreasing all compensation payouts. Like the New South Wales Law Society proposals, there was no provision for non-earners in the statutory scheme, and no mention of rehabilitation or longer-term care and support for accident victims. Again, the proposals fundamentally distinguished between those who can prove fault and those who cannot. The Institute's claimed justification for perpetuating the common law action was the unsupported statement that, "The fundamental flaw of total no-fault schemes is that they take benefits away from the innocent victims of motor vehicle accidents in order to provide benefits to those persons who cause accidents".¹²⁹

Conclusion

It is important to recognise the manner in which the submissions and campaigns of the legal profession have been conducted. In order to gain public and political sympathy, the lawyers have cloaked their arguments in seemingly rational, self-evident and conclusive language. To many members of the public, pleas about "fundamental principles of justice", "fundamental rights" and the negligence action as being a "cornerstone of our legal system for over one hundred years" do appear convincing. However, they disguise the real issues and prevent the public from perceiving the broader issues. If the profession as a whole could step back for a while and attempt to understand the broader social issues, it could present its arguments to the public in a truly rational and constructive manner. The Victorian Government has argued that there are many opportunities for the involvement of the legal profession in the expanding Victorian economy: "It is to be hoped that the legal profession, rather than seeking to preserve an area of activity which has been assessed as no longer being of value to the community, can grasp these opportunities and contribute to the further expansion of the Victorian economy".¹³⁰

It should be easily apparent why many solicitors and barristers are opposed to no-fault proposals. They have a vested interest in the fault system. The system provides them with a large percentage of their income. So too, the fault system throughout Australia provides income and profits to the medical profession and the insurers. It would seem that the way many perceive the issue is

that the perpetuation of the present fault system means the perpetuation of their income. The cosmetic proposals to introduce no-fault compensation alongside common law rights in transport schemes is considered as ideal. The common law is maintained and everyone will receive at least some compensation through the no-fault component. It is seen as a compromise, one that does not pose as much of a threat to the abovementioned interest.

As already argued, no-fault schemes that operate with the existing common law do not solve the many fundamental inequities, inconsistencies and inequalities that are inherent in the fault system. Lawyers, like the insurance industry, will quickly find new work to do.

Of course, not all lawyers reject the abolition of the common law negligence action. The New South Wales Society of Labor Lawyers has given strong support in favour of a pure no-fault scheme.¹³¹ The President of the Society summed up the situation by stating, "The question is how far self-interest should prevail over the common good. The government must enact new legislation, and if a few toes get trodden on it will be a small price to pay".¹³² Many other lawyers oppose the profession's campaign against no-fault. In a letter to the *Law Society Journal* in 1984, one solicitor pointed out his problems with the Society's proposals on a dual transport accident scheme. He argued,

- * It is unacceptable for innocent people who can't prove negligence to be worse off than those who can.
- * A "guilty" person who has suffered severe injuries should not be further punished by being denied compensation.
- * Frequently, the "negligence" is so small as to be largely a legal fiction. The problem is really a social one for which negligence is an outmoded concept.
- * The present system resembles a lottery and the delays and costs are unacceptable.¹³³

Another New South Wales solicitor pleaded that, "We must look to the future for our income, not to the past. Innovative, practical, supportive and beneficial work must be generated. The investment of money preserving a bad idea will not make it a good one".¹³⁴

If any scheme of compensation is to work effectively, it should have the understanding and support of the legal profession. This is not necessarily a prerequisite for wide-reaching reform, but it is, at the very least, a desirable one. In a recent speech to law students, the Chief Justice of Australia, Sir Harry Gibbs, stated, "The nature of legal practice is changing. The members of the profession are naturally worried when a field of practice in which they were accustomed to graze with ease and profit now becomes

closed to them. For example, during my lifetime large numbers of the profession came to depend for their living on actions for damages for negligence causing personal injuries, and there is at the present time particular concern lest actions of this kind be abolished by legislation. The profession must learn to adapt to changes of this kind. It has always been the case that the nature of legal work changes in accordance with social needs However, as one form of legal activity withers away another takes its place".¹³⁵ The death of fault liability will not bring disaster to the legal profession. In a rapidly expanding and complex interdependent society new and developing avenues of legal work will emerge.

Footnotes

1. (1979) Oxford University Press.
2. Report of the Royal Commission of Inquiry: *Compensation for Personal Injury in New Zealand* (December 1967).
3. Geoffrey Palmer notes this in Chapters X and XI, *Compensation for Incapacity* (1979).
4. *Ibid.*, p. 204.
5. *Australian Woodhouse Report op. cit.* [1].
6. These five principles will be discussed in Chapter 3.
7. Where payment of compensation is related to the degree of physical disability. See, further Chapter 3.
8. Particularly the information on non-work accidents, for example, accidents in the home, for which there is no consolidated data.
9. The Senate Standing Committee on Constitutional and Legal Affairs: Report on the Reference: *The Clauses of the National Compensation Bill 1974* (AGPS Canberra, 1975).
10. *Ibid*, p. 6.
11. *Ibid*, pp. 30-33. The scheme was to be enacted under two heads of power in the Constitution s. 51 (xxxiiiA), which grants the Federal Government the capacity to legislate with regard to the "provision of . . . widows' pensions . . . sickness and hospital benefits . . . and family allowances" and (xxiii) "invalid . . . pensions".
12. *Ibid*, p. 24.
13. *Ibid*, p. 25.
14. *Ibid*, p. 26.
15. *Ibid*, pp. 50-55.
16. G. Palmer *supra* n. 3
17. *Ibid*, p. 182.
18. *Ibid*, p. 183.
19. *Ibid*, p. 184.
20. *Ibid*. The reaction of the legal profession to the N.S.W. and Victorian proposals will be discussed later in this Chapter.
21. *Ibid*, p. 194.
22. *Ibid*, p. 195.
23. *Australian Woodhouse Report op. cit.* [281].
24. G. Palmer, *supra* n. 3.

25. *Ibid*, p. 63.
26. Source, J. R. Crumpston *Accident Compensation in New Zealand* (September 1984). Crumpston is a partner in the firm E. S. Knight & Co, consulting actuaries. The firm did the costing for the N.S.W. Law Reform Commission.
27. *Ibid*, p. 2.
28. *Ibid*.
29. *Ibid*; see also the Commission's *Report* [7.57].
30. Donald Kirby *The New Zealand Accident Compensation Scheme as a Model for Change in N.S.W.* (1983).
31. *Ibid*, p. 53.
32. J. Miller *Accident Compensation in New Zealand* (August 1985). Paper presented at the 40th Annual Conference of the Australasian Universities Law Schools Association, at the University of Adelaide.
33. The two main areas of contention were proposed changes to the first week of compensation, and changes to the lump sums. There was considerable concern that the benefits may be eroded because they were not indexed to inflation. *Ibid*.
34. *Ibid*, p. 6.
35. *Ibid*, p. 9.
36. Submission by the National Union of Railwaymen *ibid*, p. 10.
37. Owen Woodhouse *The Philosophy of Compensation* paper delivered at the *Workers' Compensation—New Directions* conference, Adelaide, 31st May, 1984. See also, his opening address at a seminar titled, *Personal Compensation for Injury*, August 1984, published by the Attorney-General's Department, Canberra 1985, pp. 1 to 7. Also, Mrs V. M. Duncan, "The New Zealand Experience and Possibilities for the Future", *ibid*, p. 44.
38. *Report to the Chief Secretary on Delays in the Settlement of Third Party Insurance Claims* (1969) the Delays Committee, and *Report of Committee to Investigate Compensation of Road Accident Victims Irrespective of Fault* (1972) the Arnold Report. Scheme was established by the *Motor Accidents Act 1973* (Vic.).
39. Provisions of *Motor Accidents Act 1973* (Vic.), in N.S.W. Law Reform Commission's *Report* [4.28].
40. *Ibid*, [4.29, 30].
41. A. K. Clarke *No Fault, Past Present and Future* [1981] *Australian Insurance Institute Jnl* 33.
42. N.S.W. Law Reform Commission's *Report* [4.36, 37].
43. See further, N.S.W. Commission's *Report* Chapter 6.
44. Gordon L. Hughes "The Industrial Accident Compensation System in Victoria" (June 1986) 15 *Melbourne University Law Review* 438, Harry Curtis and Gordon Hughes *Accident Compensation Handbook*, 1986 Law Book Company, and, Lynn Buchanan *Accident Compensation in Victoria* (August 1985) 10 *Legal Service Bulletin* 195. See also Gordon Hughes "Changes to the Industrial Accident Compensation System in Victoria" (Nov. 1986) 60 *Australian Law Journal* 626.
45. Lyn Buchanan *Ibid*, p. 196.
46. *Ibid*.
47. *Ibid*, p. 197.
48. *Ibid*, p. 196.
49. *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas.).
50. Report of the Law Reform Committee of Tasmania *Recommendations for the Establishment of a No-Fault System of Compensation for Motor Accident Victims* (1972).
51. *Ibid*, [109].

52. N.S.W. Commission's *Report* [4.40].
53. Third Party Insurance Committee *Northern Territory Inquiry into Motor Accident Compensation* Report to the Chief Minister and Attorney-General of the Northern Territory (1979).
54. *Motor Accidents Compensation Act* 1979 (N.T.).
55. *Motor Accidents (Compensation) Rates of Benefits Regulations* 1984 (N.T.).
56. N.S.W. Commission's *Report* [4.46].
57. *Report of the Board of Inquiry into the System of Workers' Compensation in the Northern Territory* (November 1984).
58. The *Bradley Report* did acknowledge the need for rehabilitation facilities, but made no detailed proposals. See Colin Phegan *From Compensation to Care—A Change of Direction for Accident Victims?* (December 1985) 10 *Adelaide Law Review* 74.
59. The seminar was held at the Australian National University. [1984] *Commonwealth Record* 1499.
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. *Ibid.*, pp. 1501, 1502.
64. The Commission relied on the "incidental" provision in the terms of reference. See Commission's *Issues Paper* [1.12, 1.13].
65. Commission's *Working Paper* [1.10-1.12].
66. Commission's *Report* [5.25].
67. *Ibid.*, [5.26-28].
68. *Ibid.*, [5.30].
69. *Ibid.*, [5.34-35].
70. Submission to the Commission No. S62, (December 1982) p. 2.
71. Commission's *Report* [5.37].
72. *Ibid.*, [5.41].
73. *Ibid.*, [5.44].
74. Harold Luntz *The Benefits to be Paid Under a Statutory Accident Compensation Scheme* [1983] *Oracle* 37, at p. 39. Noted by the Commission, *ibid.*, [5.45].
75. Luntz *ibid.*, p. 39.
76. Michael Chesterman *Accident Compensation—Proposals to Modify the Common Law* (November 1983), p. 23, Research Paper for the N.S.W. Commission (C.P.2).
77. Commission's *Report* [5.46].
78. *Ibid.*, [5.47]. The issue of non-earners will be discussed at length in Chapter 3.
79. *Ibid.*, [5.62].
80. Victorian Hansard *Parliamentary Debates*, Legislative Assembly, 7th May 1986, p. 1813, and 8th May 1986, p. 2021. See also, Media reports: Paul Austin, "Car Insurance Plan Wipes \$1600m in Third-Party Claims" *Australian* 9/5/86; Terrence Maher and Phillipa Tyndale, "Vic. Third-Party Scheme Axes Common Law Claims" *Financial Review* 9/5/86; Simon Clarke, "Pensions Will Replace Road Compo Payouts" *The Age* 9/5/86.
81. Government Statement, *Victoria: Transport Accident Compensation Reform* May 1986 (Government Printer, Melbourne), pp. 27 and 49. On 21st October 1986, the *Transport Accident Bill* was withdrawn from the Victorian Legislative Assembly and replaced with a new substantively unchanged Bill, the *Transport Accident Bill* (No. 2). See Hansard, 21st October 1986, pp. 1307-1310, and 28th October 1986, pp. 1551-1570. The following figures refer to the second Bill.
82. *Ibid.*, pp. 3 and 32.

83. *Ibid*, p. 27.
84. See, "From Compensation to Care" at the end of this book.
85. Government Statement, *op. cit.*, p. 71.
86. *Ibid*.
87. *Ibid*, p. 89.
88. *Ibid*, pp. 89-90, and *Transport Accident Bill* clauses 44 and 45.
89. Bill, clause 3(2), N.S.W. Commission' Report, [7.5 to 7.15.]
90. Bill, clause 47.
91. Government Statement, *supra*, n.81.
92. *Ibid*, and Bill, clause 48.
93. *Ibid*, and Bill, clause 54.
94. *Ibid*.
95. Bill, clauses 49 and 50.
96. Bill, clause 49(2)(c).
97. Government Statement, p. 93 (emphasis added) *supra* n.81.
98. Bill, clause 49(5).
99. Bill, clauses 49(5) and 51.
100. Bill, clauses 57 and 58.
101. N.S.W. Commission's *Report*, Chapter 12, "Compensation on Death".
102. Government Statement, pp. 139-146, and Bill, clauses 11 and 12.
103. See media reports, footnote 80.
104. Australian Woodhouse Report, [401(b)].
105. Government Statement, p. 91 *supra* n.81.
106. *Ibid*, p. 17.
107. *Ibid*.
108. Law Institute of Victoria, *The Transport Accident Bill 1986: A Response by the Law Institute of Victoria*, July 1986.
109. *Ibid.*, p. iv.
110. See report of a study by the Law Society, *Sydney Morning Herald* 7/7/86 and (September 1986) 21 *Australian Law News* 20. On the academic debate, see, for example, Harold Luntz, "The Case For No-Fault Accident Compensation" (June 1985) *Queensland Law Society Journal* 167; and G. A. Murphy, "The Case AGAINST No-Fault Accident Compensation" (October 1985) *Queensland Law Society Journal* 317, and the debate in (December 1985) 10 *Adelaide Law Review* pp. 73 to 101.
111. (1984) 22 *Law Society Journal*, pp. 622 and 691.
112. See "Law Council of Australia Accident Compensation Campaign", December 1984 *Brief*, p. 5.
113. Bob Beale, "Lawyers Wage War", *Newcastle Herald* 26/9/84.
114. Law Society of New South Wales, *Reply by the Law Society of New South Wales to the Proposed Transport Accidents Scheme*, September 1983.
115. *Ibid*, p. 1.
116. See, for example, "No-Fault Law Doesn't Work", *Sunday Telegraph* 23/9/84.
117. Law Society of New South Wales, *Transport Injury Compensation Scheme* short title "Wage Care", October 1985. See also, "The Society's No-Fault Transport Injury Compensation Proposals", May 1984, 22 *Law Society Journal*, p. 208.
118. How could there be provision for non-earners in a scheme entitled "Wage Care"? There was one suggestion in the August 1985 Draft "Wage Care" Scheme that unemployed persons would receive individual assessment of future earning capacity. However, this provision was dropped in the October 1985 proposals.
119. Colin Phegan. "From Compensation to Care—A Change of Direction for Accident Victims?" (December 1985) 10 *Adelaide Law Review* 74, at p. 82.

120. Ronald Sackville, "Accident Compensation: Changes and Choices", Paper delivered at the Australian Society of Labor Lawyers, 7th National Conference, Melbourne, August 1985, pp. 7 and 8. Cited by Phegan, *ibid*.
121. Dennis Shanahan and Paul Bailey, "Limits on Compensation for Accidents Proposed" *Sydney Morning Herald* 11/3/86. See also, Editorial, "Victims Lost in the Rush" *Sydney Morning Herald*, 12/3/86.
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127. Law Institute of Victoria, *A Motor Vehicle Compensation Scheme for Victoria*, December 1985.
128. Law Institute of Victoria, *A Motor Vehicle Accident Compensation Scheme for Victoria: The Threshold*, January 1986.
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131. Stephen Rice, "Labor Lawyers Back Compo", *Sydney Morning Herald*, 28/10/83.
132. *Ibid*.
133. (1984) 22 *Law Society Journal*, p. 620.
134. *Ibid*, p. 623. See "Present Accident Scheme is Unfair and Wasteful" letter from a solicitor to the *Age* 15/9/86. See also the comments of Keith Mason, Q.C., and Chairman of the New South Wales Law Reform Commission, in (April 1986) *Reform* pp. 81 to 83. Support has also come from the media, see Editorial, "Lesson for Lawyers" *Sydney's The Sun*, 8/5/86, and, "Lawyers in Deep Trouble Over No-Fault Schemes" *Australian Financial Review* 13/11/86."
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Chapter 3

THE PHILOSOPHY OF A NEW SCHEME

The basic principles

If a national comprehensive compensation scheme is to be implemented, basic goals, priorities and principles must be formulated which are generally acceptable to the community and not utopian in their realization. The basic principles, whether achieved on a national basis by all-encompassing federal reform, or by State-by-State/federal reform, must be clear, co-ordinated and paramount.

The Woodhouse Committee proposed five principles upon which the national scheme would operate, namely: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency. While these principles may seem reasonable at first glance, further inspection will reveal that there may well be fundamental inconsistencies between them and even within them. The major source of potential conflict lies between the goals of rehabilitation and compensation. The understanding of that conflict is a central theme of this Chapter.

Community responsibility

The Woodhouse Committee advanced three main reasons why the community should accept responsibility for the compensation and rehabilitation of accident victims and the sick.¹ First, the Committee referred to the "civilised reasons of humanity". It did not explain or elaborate on this assertion. Perhaps this was just as well. If the Committee had attempted to explain what "civilised reasons of humanity" meant, it could have left itself open to criticism or question. As it stands, nobody would be prepared to argue against the notion. Who is *not* in favour of the "civilised reasons of humanity"? Harold Luntz has commented that one does hope that compassion and concern for one's fellow human beings would be widespread, but, "there are still many people who, despite the sobering statistics of injury, adopt the attitude that 'it couldn't happen to me' rather than 'there but for the grace of God go I' . . . they will not see that the suffering of individuals is due to the way society is organised, not individual fault".²

The second reason put forward by the Committee as to why the community should accept responsibility was based on the "economic reasons of self-interest". On this point, the Committee

stated, "If the well-being of the workforce is neglected the economy will soon suffer injury and society itself thus has much to lose".³ Added to this should be the contribution of non-earners to society. It is not only the well-being of the workforce which must be protected, but also that of homemakers, students, children and others who have left the workforce. Their contribution to an increasingly inter-active and interdependent economy must be recognized.

The final reason offered by the Committee was that "rights universally enjoyed must be accompanied by obligations universally accepted." This assertion is related to the argument discussed in Chapter 1, that accidents are caused not solely by individual fault, but result from a multiplicity of factors that stem from the way this society is organized. If the rights and benefits of our activities are to be shared, so too must the cost of those activities be shared by all.

There may well be evidence of community responsibility in this country. The workers' compensation systems indicate that the public no longer tolerates uncompensated workers who cannot prove fault. There may be evidence in the implementation and public acceptance of the Victorian, Tasmanian and Northern Territory motor vehicle accident compensation schemes outlined earlier. If society is willing to accept responsibility for injured workers and transport accident victims, it is very likely that it will be prepared to accept an extension of no-fault coverage to include everyone injured, by whatever cause.

Comprehensive entitlement

As stated by the Woodhouse Committee, the principle of comprehensive entitlement requires that, "all should be eligible to share in a scheme supported by funds to which all have contributed. It rightly calls for equal treatment of equal claims".⁴ The implementation of this principle in a national scheme requires the abandonment of the selective common-law system which leaves substantial numbers of accident victims uncompensated. In a national scheme, the principle would operate at its widest and all Australians would be subject to the same criteria when incapacitated through injury or illness. However, a limited State scheme, such as the one proposed by the New South Wales Law Reform Commission, must utilise the principle strictly for a certain class of victims such as transport accident victims. Therefore, the Commission's policy on this point is that: "transport accident victims suffering similar losses (however assessed) should receive

similar compensation, regardless of whether the victim can prove that somebody else was at fault, or whether he or she was at fault for the accident".⁵ The only problem with this policy is with the definition of "losses". In an earnings-related compensation scheme, the main component of this loss is the economic loss—the loss of future earnings or capacity to earn. A person who does not earn an income, or who is temporarily out of the workforce will not be eligible for such compensation. Therefore, it must be remembered that an assertion of equality of treatment does not at all mean equality of result.

The Commission did not separately canvass the principle of community responsibility, but instead incorporated it into the comprehensive entitlement principle. The Commission recognized that the ultimate objective of comprehensive entitlement could not be attained within a limited State scheme, but that the scheme could stand on its own and hasten the advent of a national compensation scheme.⁶ The Commission was influenced by three major considerations in the adoption of the principle. The first was the "civilised reasons of humanity" argument of the Woodhouse Committee. Secondly, the Commission stated that the use of motor vehicles or public transport services creates a risk of death or serious injury which is an "unavoidable part of everyday life".⁷ Because the risks are shared by virtually every member of the community and the activities are an essential element of modern society, the fault criterion is no longer a satisfactory basis for allocating compensation.⁸ Finally, the Commission argued that compulsory third party motor vehicle insurance can be seen as a broadly-based tax, the cost of which is met "directly or indirectly by virtually all members of the community".⁹ The Commission argued that community responsibility flows from comprehensive entitlement. If society in general is identified as responsible for the "cause" of accident-producing activities, then responsibility for compensating accident victims should fall on the community as a whole.¹⁰ While this argument is clearly valid and crucial to the establishment of a no-fault scheme, the assertion by the Commission that third party motor vehicle premiums constitute a "broadly-based tax" warrants closer attention. The Commission has proposed that the transport scheme be funded by contributions from motor vehicle owners, contributions from public transport authorities and a possible levy on drivers' licences.¹¹ This means that a direct contribution would be paid by all motor vehicle owners and by drivers. The indirect contribution to the scheme would come from all users of the public transport system through the payment of fares. Motor

vehicles are owned and driven by both earners and non-earners. Public transport is also utilised by earners and non-earners. If contributions to the scheme are paid equally by all members of the community, should not their entitlements be the same? The Commission stated that, "the funds provided by the community at large should be used for the benefit of all members of the community injured in transport accidents . . .".¹² The Commission was, of course, aware that the principle of comprehensive entitlement could not be perfectly realized in a limited State scheme. However, if both earners and non-earners contribute equally to a compensation fund, they should receive equally the same, or at least similar, levels of benefits.

Complete rehabilitation

The third basic principle of a new national scheme must be complete rehabilitation. The Woodhouse Committee described this goal as the primary objective.¹³ The policy will be to: "encourage every incapacitated person to recover the maximum degree of bodily health and vocational utility and social well-being at the earliest possible time . . . every incentive must be built into the system as a whole—for the promotion of personal effort, individual reliance and finally self-respect".¹⁴ The Woodhouse Committee defined rehabilitation as "the restoration of the handicapped to the fullest physical, mental, social, vocational and economic usefulness of which they are capable".¹⁵ The Committee presented a comprehensive plan for rehabilitating all handicapped persons in the community.¹⁶ The Australian Government would direct and co-ordinate increased training opportunities and facilities, the financing of State rehabilitation units within hospitals, the development of 42 comprehensive rehabilitation centres around Australia, the establishment of an artificial aids and appliances service, the generation of publicity, information and research, and the organization of a placement service for the disabled.¹⁷

The need for rehabilitation as an essential goal of a new scheme is reflected in the failure of the common law to influence the rehabilitation of accident victims. Indeed, it has been well-known that the operation of the common law discourages rehabilitation.¹⁸ Both the Woodhouse Committee and the New South Wales Law Reform Commission received many submissions arguing and demonstrating this fact. The Woodhouse Committee stated that this presents a strong argument against the retention of the common-law process and that supporters of the common

law had paid little attention to the issue in their submission.¹⁹ The New South Wales Law Reform Commission's information is much more up-to-date, and examines in detail the effects of the common law on rehabilitation. The Commission discusses the medically-diagnosed condition called "accident compensation neurosis" which is closely linked to the victim's anticipation of a pending claim.²⁰ The Commission also argues on a more fundamental level that the goals of rehabilitation and the assessment of damages are in conflict under the common law: "The common law emphasizes what was lost, be it quality of life, loss of earning capacity or loss of function. The greater these losses, the larger the damages awarded. Rehabilitation will seek to minimise or eliminate these losses, and concentrate on remaining abilities, and so efforts to rehabilitate may result in reduction in damage awards".²¹ The Commission's proposals to promote rehabilitation are the speedy payment of compensation and provision of substitute services, the final assessment of long-term partial incapacity, and the returning of all "compensable" accident victims to the Commonwealth medical, hospital and ancillary services arrangements.²²

By placing transport accident victims in the hands of the Commonwealth health system and Medicare, the Commission proposes to avoid State responsibility for the costs of rehabilitation. This is the first hint of a real attempt to involve the Commonwealth in the proposed State scheme and it will serve as a basis for further State/federal co-operation when the scheme is extended to other areas and enacted by each State. The Federal Government is best equipped to deal with the provision of uniform health and rehabilitation services on a national level. The Federal Government should not object to spending more money on these services because it will make substantial savings on the social welfare system due to the proposed periodic payment of compensation.²³

Rehabilitation must be a primary goal of a national compensation scheme. As A. K. Clarke commented in relation to the Victorian scheme,²⁴ any scheme which provides only monetary assistance is less than half a scheme and ignores the greatest needs of the disabled. Coupled with the rehabilitation goal is the "care" goal of a national scheme. Harold Luntz has commented: "Where we have failed, it is our duty to attempt to remedy the failure by rehabilitation. Again, in so far as we succeed in rehabilitating the injured and the sick, the need for compensation is diminished and productivity is increased. But there will always remain a core of injuries which cannot be eradicated; there will be deaths and

severe disabilities where rehabilitation is impossible. In such instances the community as a whole must bear the burden of compensation".²⁵ Professor Luntz's comments are quite apt. However, the community must not only bear the burden of compensation but may also be required to bear the burden of the longer term care and assistance of accident victims. It may have to do the latter at the expense of diminution of monetary compensation.²⁶ The dual goals of rehabilitation and care feature prominently in the work of the Commission. Possible conflict between these goals and the goal of "real compensation" will be examined further at the end of this Chapter.

Real compensation

The fourth basic principle in the establishment of a new compensation scheme is a realistic level of benefits. The Woodhouse Committee stated that, "the primary purpose of the compensation scheme is aimed at providing money payments that will enable the sick and injured to maintain substantially their living standards".²⁷ Thus, the Woodhouse Committee designed a system of earnings-related benefits for incapacity. The Committee did not seriously consider any other scheme of benefits, such as a system using needs or disability-based criteria for the provision of compensation. The argument used to support the policy choice was that higher earnings are usually matched by heavier commitments, and if income ceases to flow, great financial strains may soon arise. The Committee argued that in times of adversity, everybody should have the chance to receive back part of the contribution they had made earlier to the economy in general and to the social welfare fund.²⁸ The policy adopted, as stated in the New Zealand Woodhouse Report, was: "The losses of individuals vary greatly and so do their continuing commitments. A fair part of their different losses and a fair part of their sudden problems will not be relieved by a system which ignores lost earnings in favour of a general average of assistance. The only way in which a comprehensive system of compensation can operate equitably is by linking benefits to earning capacity and by taking into account permanent disability".²⁹ Terence Ison, in his 1967 plan for reform,³⁰ placed income maintenance as the primary goal of compensation: "The primary goal should be income security, i.e., to maintain the real income of anyone disabled from earnings through sickness or injury at a level not greatly below that which he had reached on a steady basis prior to the disability".³¹ There is no denying that the Woodhouse assertion that a person's

commitments are related to his or her earnings is to some degree correct. There would be hardship if that income were to stop suddenly because of injury. But whether this justifies the provision of income-related benefits in the long-term is open to question.

In a limited State scheme such as the one proposed by the New South Wales Commission, it has already been argued that the provision of earnings-related benefits to transport accident victims when the contributions to the fund are not related to earnings is regressive. The Commission itself has stated that in formulating the proposals, it was influenced by the fact that there was a ready and adequate source of funds available for compensating transport accident victims.³² This enabled the Commission to recommend earnings-related payments in the short and long terms of incapacity. It was influenced also by the fact that the restitution principle is "entrenched" in the provision of common-law damages to this class of accident victim.³³ The Commission further recognized that once the scheme is extended to other areas where funds are limited or non-existent, some "modification" of the scheme will be necessary.³⁴

In a truly comprehensive national scheme, the provision of "real compensation" will be influenced by a number of factors. These factors include how far the scheme has been extended (will it cover illness as well as personal injury?), and what funds are available for monetary compensation. If the payment of a levy on income tax is required in a national scheme, as proposed by the Woodhouse Committee, the provision of earnings-related compensation would not be entirely regressive. However, if the scheme is to eventually merge into the social security framework earnings-related compensation in the long-term would have to be re-assessed. The Commission recognizes that the merger of a national scheme into social security is possible in the future: "Ultimately it may also be desirable to attempt to integrate the compensation and social security systems, so that all people who, for whatever reason, cannot support themselves receive adequate levels of support".³⁵

This writer believes that in a national scheme, earnings-related compensation should be provided for only a limited period. The limit set on that period would probably be arbitrary, but a limit of, say, six months would not be unreasonable. This accords with the present limit on workers' earnings-related compensation which only runs for six months from the date of the incapacity.³⁶ After that period, the victim would be entitled to a set flat-rate payment, plus the continuing provision of long-term care and rehabilitation services. This writer's concern with the Commission's chosen base

of compensation is that although the principle of restitution has been limited in a number of ways (through limits on the levels of benefits, and a short waiting period for commencement of benefits) it will still be perpetuated in the long-term for accident victims. This will make it considerably more difficult in the future when the scheme is extended to other areas and benefits will have to be restricted or limited. People will continue to be influenced by the restitution principle and will strongly resist a change in the benefits.

In making the recommendations of earnings-related benefits in the long-term, the Commission has solved the possible dilemma of recommending to the State Government a scheme that would be politically unacceptable because it does not conform to community expectations which are influenced by the existing common law. Instead, the Commission has made future modification of the levels of benefits more difficult, and possibly more distant.

This does not mean, of course, that the government should not implement the proposals. They should be implemented immediately. However, the government should be forward-looking and implement immediate reform that can easily be extended into an integrated national scheme.

Administrative efficiency

As the Woodhouse Committee stated, the fifth basic principle speaks for itself. Administrative efficiency must be a major feature of a new scheme. The common-law system has been criticised for its wasteful use of resources and general inconsistency and inefficiency: "There is a clear need for the new process to be handled on a co-ordinated basis and for the collection of funds and their distribution as benefits to be organised promptly, consistently, economically and without contention".³⁷ Harold Luntz has demonstrated how wasteful expenditure of money is inherent in the common-law system.³⁸ He describes a typical fault-based claim where investigators are employed, and experts, solicitors and barristers are engaged. Along with scarce medical resources, the numbers are duplicated because of the adversary nature of the system. If the case gets to court then the court's time is used up inordinately hearing the claim. There is also considerable pressure to settle on unfavourable terms.³⁹ He concluded: "The answers which the Woodhouse Report proposes to the inefficiency of the common law are to do away with lump sums, to provide for speedy assessment, to allow for interim

payments and to discourage adversary proceedings".⁴⁰ These features must be a part of any comprehensive national scheme.

It may be observed that cost considerations and administrative efficiency have now become the modern "catch-cry" in accident compensation reform. Escalating costs in workers' compensation premiums and insurance payouts, combined with the heavy financial burden on the courts, make cost considerations paramount in the 1980s. Professor Ronald Sackville has discussed this new slant on compensation reform⁴¹ and stated: "This concern with costs means that the climate in which reforms are now being considered is very different from that prevailing in the late 1960's or early 1970's. It does not necessarily mean that the time for boldness is past, although the times perhaps warrant a particular sensitivity on the part of the policy makers to the constraints or reforms".⁴² In the 1978 English *Pearson Report*⁴³ it was estimated that (in 1977 values) the average total tort payments over the years 1971-1976 were 202 million pounds *per annum* and that it cost some 175 million pounds *per annum* to collect and distribute this sum.⁴⁴ P. S. Atiyah examined these figures and stated: "On the basis of these estimates we can thus say that about 45 per cent of the total cost of the tort system is swallowed up in administration (including, of course, legal costs), i.e., that for every 1 pound collected by way of premium, 45 pence goes in costs and 55 pence goes to accident victims".⁴⁵ Atiyah criticised the Royal Commission for not making use of this information and for not asking the fundamental question: Are we getting value for money in our tort system?⁴⁶ It is suggested that while these figures are not directly applicable in Australia, they serve as a general indicator of the inefficiency of tort liability as a system of compensation.

The New South Wales Law Reform Commission has developed principles of administration in the proposed transport accidents scheme. They are: entitlement, including the recognition that everyone has a right to compensation; independence, to the government of the day as far as possible; flexibility; high quality decision-making; and finally, speed in decision-making and in providing compensation.⁴⁷ These five principles should also be the guiding principles of a national compensation scheme.

The problems of non-earners

Introduction

One of the most vexed questions the compensation reformers must answer is how to compensate people who do not earn an

income and suffer personal injury if the chosen basis of compensation is earnings-related. As discussed earlier, the needs-based, or disability-based compensation models do not take account of pre-accident earnings and there is no necessity to divide the population into the categories of earners and non-earners. One member of the New South Wales Law Reform Commission has stated, "Where a statutory scheme is based on earnings-related compensation, the problem of non-earners is an intractable one. There are no easy answers which can magically achieve a fair and consistent response."⁴⁸ The Commission itself conceded the difficulty of the problem when it stated, "We consider that compensation of non-earners embodies perhaps the most difficult issues that arise in relation to the structure of a no-fault scheme".⁴⁹ The questions which must be dealt with include: Who is a non-earner, possibly answered by asking who is an earner? Should non-earners be compensated for their losses? And if so, what are those losses and should they be quantified? What should be the basis for compensation of non-earners, and is that basis philosophically reflected in the scheme as a whole? These questions must be addressed and they serve as an indicator that no earnings-related compensation scheme can positively exclude non-earners.⁵⁰ Such a scheme would not be acceptable to the estimated 57 per cent of the population of New South Wales who were not in receipt of any earnings at the time of the 1981 census.⁵¹ It would not be acceptable to a number of interest groups and organizations which represent various non-earners.⁵² It is likely that a scheme which ignored any form of compensation to non-earners would be politically unacceptable. No government should ignore or play down the needs and potential needs of over one-half of the population whilst satisfying the rest. Non-earners make substantial contributions to society in many kinds of ways and at various stages of their lives. These contributions should be recognized in a substantial way. Non-earners must be entitled to compensation. Further, they must be entitled to rehabilitation and support services. A national comprehensive scheme should make extensive provision for the people who do not happen to work at the time of the accident.

Who are the non-earners?

The people who fall into the category of non-earners include full-time homemakers, children, school leavers yet to commence work, students undertaking training or tertiary education after they have left school, people on leave from employment, long-term

or short-term unemployed people actively seeking work, and unemployed people not actively seeking work.⁵³ Although this category represents a numerical majority of the population, it is one of the least represented in the accident compensation debate. The reasons for this invisibility are that it lacks cohesiveness, it has little or no active or effectively organized representation, and it does not even perceive itself as an identifiable group. Those who "set the agenda", namely the lawyers, insurers, politicians and other vested interest groups, are virtually unanimous in their perception of non-earners as marginal or even irrelevant in the debate.

Should non-earners be compensated?

There has been a significant lack of consideration given to the problem of non-earners in the past. Earlier reports have given the issues cursory attention.⁵⁴ Even the Woodhouse *Report* failed to give detailed reasoning for the way in which it "deemed" non-earners eligible to receive the minimum notional weekly earnings. The New South Wales Law Reform Commission has been praised for its presentation of the relevant issues in the *Working Paper*.⁵⁵ However, it must be noted that the Commission's discussion in that paper only related to non-earners who were "wholly incapacitated for work or other activities".⁵⁶ Therefore the Commission did not seriously consider issues of compensation for partially incapacitated non-earners. In other words, the Commission did not discuss compensating non-earners in the short-term, but only in the long-term.⁵⁷

The Commission decided on a broadly-worded title for the economic loss faced by non-earners, naming it "loss of economic capacity" in the *Working Paper*.⁵⁸ There are a number of arguments against compensating non-earners for loss of economic capacity. One major argument claims that non-earners have suffered no demonstrable loss of earnings or earning capacity. They had no earnings immediately prior to the accident and they have no expectation of future earnings in the short-term. Therefore, in a compensation scheme based on lost earnings, or earning capacity, it is argued that there is no sound basis for paying earnings-related compensation.⁵⁹ Another argument against compensating non-earners claims that predictions of future entry into the workforce and future possible earnings are too arbitrary. Of course, this criticism is equally true of the common-law system where the court attempts to assess the future economic loss of a non-earner.⁶⁰ One further argument that has been advanced

would deem an individual assessment of the losses of non-earners as an administratively inefficient and costly exercise.⁶¹

The Commission has identified three main arguments in favour of compensating non-earners for loss of economic capacity. The first argument is that many non-earners perform indispensable functions which have substantial economic value: "If a homemaker, for example, is incapacitated through accidental injury, the family unit suffers economic loss. The services previously provided by the homemaker either have to be purchased or provided by other family members, thus reducing their capacity to do other things, including earning an income".⁶² This argument is directed towards the non-earner's household or family rather than the injured non-earner. A closely-related argument would be that it is the injured non-earner who suffers the loss of not providing services to the household. That loss is a real loss and should be compensated. This would be consistent with the approach taken under the *Family Law Act* 1975 where provision is made for alteration of property orders. The court is obliged to consider the indirect contribution of a homemaker or parent⁶³ and that contribution must be recognized *not* in a token way, but in a substantial way.⁶⁴ The rationale for this position is explained by the High Court: "The contribution of a homemaker or parent is to free the other party to the marriage, usually the husband or father, to devote his time and energy to the pursuit of financial gain and so to make a real and substantial contribution to the acquisition, conservation or improvement of property where the moneys gained are used for any of those purposes".⁶⁵ The Family Court of Australia summed it up by citing the metaphor that: "The cock can feather the nest because he does not have to spend most of his time sitting on it".⁶⁶ The law's recognition of the contribution of homemakers and parents is long overdue. This recognition must be extended to any no-fault scheme. Generally, women and those who perform large amounts of unpaid work have not been regarded in the past as being engaged in "economic" or "productive" work. However, the inability to continue this work must be a compensable loss and assessed as such.⁶⁷ The second argument in favour of compensating non-earners for economic loss may be called the "lost opportunity" argument. Even though non-earners have no immediate prospects or intention of becoming earners, an accidental injury may deprive them of the option to enter or re-enter the workforce.⁶⁸ This argument takes into account the changing pattern of the workforce in Australia. Labour force statistics have demonstrated how women have become more active in the workforce and that their activities

alter at various stages of their lives.⁶⁹ The argument highlights the arbitrary nature of earnings-related compensation based on workforce status. One commentator has noted that, "a scheme which bases a victim's continuing entitlement to compensation on workforce status at the date of the accident is no more equitable than a scheme which bases entitlement on admissible evidence of fault."⁷⁰ The "lost opportunity" argument may apply to any non-earner who is a potential earner, and includes school children and students in tertiary institutions, homemakers and parents, mature-age students and the unemployed. The third argument is a more general one which was advanced by the Woodhouse Committee. To accord with the principle of comprehensive entitlement, the Committee recognized that: "The elderly and the young must be considered on a basis which recognizes past or potential contributions to the productive effort of the nation: and the housewife because of her direct and continuing contribution to that effort."⁷¹ The New South Wales Commission reached the "tentative" view in the *Working Paper* that "some" compensation should be provided to non-earners for their loss of economic capacity. As noted, however, this view related *only* to non-earners injured in the long term. The Commission expressed no opinion about compensation in the short term. At the stage of the *Working Paper*, the Commission was unsure of the proper basis on which to assess the compensation for non-earners injured in the long term. This "extremely difficult" issue was discussed by mooting four possible options. It is instructive to examine those options in the light of the Commission's final recommendation in the *Report*.

Options for assessment of compensation for non-earners

The flat rate principle

This was the method adopted by the Woodhouse Commission, where non-earners were attributed with notional earnings at a minimum flat rate of \$50 (in 1974).⁷² The main advantage of this method is its simplicity. It would be easy to administer and be administratively efficient. The benefits could be set by reference to the victim's needs, assessed on a standard basis.⁷³ The main difficulty with the approach is that: "The flat rate may bear no particular relationship either to the loss sustained by the non-earner (such as the inability to provide household services, and the ability to enter or re-enter the workforce) or to any other convenient benchmark (such as social security payments to people

disabled through illness). If the payments proposed are low, they may be thought to provide inadequate compensation to injured people. If they are set at a high level they may place a serious financial burden on the scheme and provide a windfall to some categories of injured non-earners".⁷⁴

The social security principle

Under this principle, compensation would be paid at the same level as federal social security payments. As with the flat rate approach, compensation would be paid without an individual assessment of loss according to standard rates. The advantage of this method is that compensation is assessed at the same rate for persons incapacitated through injury *or* illness and does not distinguish between the two. There would also be cost advantages in a State scheme, where persons eligible for federal social security (through the operation of a means test) would save payments from the State.⁷⁵ However, the Commission recognizes that social security payments would only be "modest" since most benefits are merely at subsistence levels and are below the poverty line. This would not be adequate compensation for loss of economic capacity.⁷⁶ At least two groups argued in their submissions that the minimum payment of compensation should not be less than the poverty line.⁷⁷ The New South Wales Society of Labor Lawyers further stated, "We oppose a system of separating the richer and the poorer non-earners, and which sends the poorer ones into the federal system with its oppressive enforcement and long delays in its appeal system".⁷⁸

The substitute services principle

This is the principle which the Commission eventually decided to propose.⁷⁹ Substitute services would be provided, or compensation would be paid by reference to the household or domestic work provided by the non-earner before incapacitation. The New Zealand⁸⁰ and Victorian⁸¹ compensation schemes utilise this principle. There are a number of difficulties with this approach. One is that the payments (if there are payments) would be to the household and not directly to the person suffering the loss. Also it excludes, by definition, any other category of non-earners who do not perform household services. Yet another method of assessment would have to be devised for them. There is the problem of determining the amount of services actually provided before the accident.⁸² "The amount of services provided would vary drastically from a child who washes up after

the evening meal, through to a teenage student who may tidy her or his room occasionally to a full-time child-carer/homemaker who spends virtually 24 hours day seven days a week providing care and services to a young family. Such a basis would require frequent individual assessment and reassessment into areas which it would be very difficult to quantify".⁸³ There is a fundamental objection to the substitute services approach. The argument notes that it is inconsistent with the method chosen for earners.⁸⁴ Since both earners and non-earners contribute to the housework to varying degrees, why should earners not be able to claim the value of their work over and above their other benefits? The principle is not philosophically consistent with the limits placed on compensation for earners. It has been proposed that compensation cease at 65 years of age for earners, but domestic and housework should not have such age limits.⁸⁵ Further, use of the principle may bring in two different assessments of incapacity. Non-earners would be assessed on capacity for paid employment. The result may be conceptual confusion of the principles which could promote litigation and create unnecessary complications.⁸⁶ The provision of substitute services for injured non-earners may not be fundamentally consistent with the treatment of earners. However, it does have a number of advantages. The provision of those services would be *as of right*. It would resolve much of the anguish suffered by the injured non-earners who cannot look after the household, and at the same time relieve the extra burden that usually falls on the other members of the household when someone is incapacitated.

The lost opportunity principle

Under this principle, compensation would be paid to non-earners in order to replace the income that could have been expected in the future but for the injury. The Commission recognized that the principle would create serious difficulties if each case had to be assessed individually. The problems would be the same as those which beset the common law in its assessment of future lost earning capacity.⁸⁷ There are two different methods of implementing a lost opportunity approach. One could compensate for the loss of the chance to earn an income. This was how the Society of Labor Lawyers saw the principle, and they argued that the concept was "very vague" and the compensation for a lost chance would be low.⁸⁸ The other method of compensating non-earners under this principle is to deem all non-earners as potential earners.

The Commission assessed the lost opportunity principle as

mainly applying to young adults and children who have not yet entered the workforce. This may be because of "the sentimental concern felt widely in our society for the young, who are seen in this situation as never having had a chance to prove themselves."⁸⁹ However, Fiona Tito argues that every person who is not an earner is a potential earner. This would provide a far more useful and consistent philosophic base for compensating non-earners. "As a philosophical base, it has the merits of simplicity and of consistency with that chosen for earners. They are both based on the concept of loss of earning capacity—one actual and one potential."⁹⁰ While this approach may be conceptually sound in that it accords with the base chosen for earners, it is still fraught with difficulties. Not every person who is a non-earner is a potential earner. What of those non-earners such as homemakers and parents who have no intention of joining or returning to the workforce? What of very young children or babies who are incapacitated? How does one assess their potential earnings? Such is the extent of the inherent problems for non-earners when the chosen base for the compensation is earnings-related.

The policy choices of the Law Reform Commission: Should they apply in a national compensation scheme?

The final policy choices of the Commission were presented in the 1984 *Report*. What follows is a brief summary and evaluation of those choices and an assessment of their applicability to a national scheme.

After tentatively concluding in the *Working Paper* that non-earners should be compensated for loss of economic capacity in cases of long-term disability, the Commission finally settled on a flat-rate principle. Thus, non-earners who are incapacitated for two years or more will be eligible to a notional earning capacity of 50 per cent of the average weekly earnings.⁹¹ The Commission did not propose to provide monetary compensation for loss of economic earning capacity to those non-earners suffering short-term injuries. Non-earners, whose incapacity lasts less than two years, are still eligible for a number of other benefits detailed in the scheme. Non-earners or their families will be provided with household services for a period of four weeks from the date of the accident.⁹² After four weeks, the provision of household services would be subject, in effect, to a means test. The criteria for this test are: the benefits and compensation already provided to the victim or the family arising out of the accident; the income of the spouse; and the resources, financial or otherwise, which

are available to the household family members to meet the need for household services.⁹³ It is proposed that the provision of these services be made through existing government or private agencies. In addition to household services, personal attendant care may also be provided. Such care will be provided through existing agencies, but the proposed Accident Compensation Corporation will have the power to pay a member of the family for personal attendant care of the victim.⁹⁴ One of the most novel benefits detailed by the Commission is the allowance for emergency family support.⁹⁵ In order to allow a spouse or child to be with the accident victim in the hospital or at home in the first month after the accident, the Corporation will pay the travel expenses and loss of earnings to the family member, up to a period of four weeks. This provision is not only novel, but is a good example of the way the Commission has shifted the emphasis in accident compensation from the provision of monetary compensation to the injured person, to attempting everything possible to alleviate the suffering of the victim. Allowing the injured person's family, including *de facto* family, to attend to the victim while in hospital is a most welcome step forward. The Commission also proposed that the Accident Compensation Corporation assist in the accommodation of disabled persons.⁹⁶ This will be achieved by granting home loans, providing home modifications, or arranging institutional accommodation. These services would probably not be offered to victims of short-term incapacity.

The mobility of the accident victim will be assisted by the Commission's proposals for vehicle modification and/or purchase,⁹⁷ and a mobility allowance of 5 per cent of average weekly earnings (\$21 per week, in June 1984) to severely disabled people. The allowance will be payable after a six-month period.⁹⁸

Non-earners who suffer from a permanent disability will be eligible for the lump-sum payment depending on the extent of the disability.⁹⁹ The payment is intended to compensate for non-economic loss and will act as solace to the injured person. Non-earners who suffer in the long term will be eligible to apply for increased benefits by claiming a potential for advancement. Those who can demonstrate that their earnings would have increased or that they would have commenced earning but for the accident, and the earnings are substantially greater than the notional earning capacity, will be entitled to more compensation.¹⁰⁰

Evaluation

In evaluating the Commission's treatment of non-earners it is important to understand the extended definition given to earners.

A person will be regarded as an earner if he or she were in full or part-time employment (a) at any time during the eight weeks prior to the accident; (b) for at least 13 weeks during the year before the accident; or (c) for at least 26 weeks during the two years prior to the accident.¹⁰¹ The definition also includes people who have made firm arrangements to enter the workforce¹⁰² after two years from the date of the accident (assessed after six months of incapacity).¹⁰³ This extended definition demonstrates the lengths the Commission has gone to in order to accommodate as many non-earners in the earnings-related parts of the scheme as is philosophically justifiable. However, a substantial portion of the 57 per cent formerly identified would still be excluded.

In formulating its treatment of non-earners, the Commission has utilised aspects of three of the principal assessment options described earlier. There is a flat-rate principle, after two years' incapacity, a substitute services principle in all cases, with limitations, and a sort of lost opportunity principle. The lost opportunity principle was not recommended in the way that some commentators would have preferred.¹⁰⁴ It will be available (in the form of the potential for advancement provision) only after two years, and would not assist incapacitated non-earners in the short-term.

The Commission decided against compensating non-earners in the short-term for loss of economic capacity because of the "strong" argument that they have suffered no demonstrable loss of earnings or earning capacity.¹⁰⁵ This is not really an argument, as such. It is the pure logic of an earnings-related scheme. Non-earners are by definition excluded and any concessions that are granted to them are exactly that—concessions.

The choice of two years as the length of short-term incapacity should be questioned. The Commission recognized that the decision may have been an arbitrary one. "This is not necessarily the most appropriate period and, if anything, we may have erred on the side of caution in selecting a period which permits only the most seriously incapacitated non-earners to claim compensation for loss of earning capacity."¹⁰⁶ It is suggested that the above is an understatement to say the least. Working within their earnings-related compensation model, the Commission could have considered other possible options for determining the length of short-term incapacity. Why, for instance, was a *one*-year period not considered? The Commission could have considered a graded method whereby notional earning capacity would be assessed at, say, 30 per cent average weekly earnings after six months, 40 per cent average weekly earnings after one year, and 50 per cent after

two years. This would be fairer treatment for the many non-earners who would not be fortunate enough to establish firm employment commitments at the time of the accident, or those who could not establish a potential for advancement after a two-year period. Accordingly, the Commission could have considered a reduced period for non-earners claiming for potential for advancement. A non-earner, whose notional earning capacity commenced six months from the date of the accident, should have the benefit of claiming for potential for advancement from that date.

All of this, of course, would cost much more money. However, if the earnings-related compensation provided to earners in the scheme were limited to six months, as argued in Chapter 2, there would be substantially more funds to distribute to the 57 per cent majority. There would easily be enough to provide *all* non-earners with some level of notional earning capacity from the date of their injury. This should have been recommended by the Commission. After six months, both earners *and* non-earners would receive a standard periodic flat-rate amount. There could even be enough funds left to further extend the support services and rehabilitation provisions.

Considering, however, that the Commission did recommend an earnings-related scheme, it has certainly gone to great lengths to accommodate non-earners. Apart from the long period for short-term incapacity, the extended definition of earners, the provision of substitute services, attendant care, accommodation and mobility provisions, rehabilitation, potential for advancement, and the lump-sum provisions for permanent partial incapacity, all add up to a great deal of consideration for non-earners in a limited State transport scheme.

However, what this seems to reveal is a fundamental contradiction in the Commission's work. On the one hand, there is the generally discussed and accepted method of traditional earnings-related compensation. On the other hand, there is quite considerable attention given to rehabilitation and on-going care and support for accident victims. The contradiction appears in the conflicting aims of restitution, which focuses on the past, and a care-based system which looks at the present and the future. Both these systems are present in the Commission's work. The difficulties will be considered in the final section of this book.

Non-earners in a national scheme

The New South Wales Law Reform Commission argues that its transport accidents scheme can be extended to, and integrated

with, a national comprehensive compensation scheme.¹⁰⁷ "In our view, the Scheme is based on sound principles and is capable of universal application. Nonetheless, we recognise . . . that there is no single solution, or set of solutions, to the policy questions posed by the preparation of no-fault scheme."¹⁰⁸ It has been clearly demonstrated that this is true. But the statement could be interpreted by some as a "cop-out" regarding the realities of the future extension of the scheme into a national one and the eventual extension of the scheme to cover not only all cases of personal injury, but all forms of incapacity caused by sickness as well. This was the goal of the Woodhouse Committee.

The approach to non-earners taken by the Woodhouse Committee was significantly different from the Commission's. In its proposed national scheme, the Woodhouse Committee gave non-earners a notional weekly earnings figure of \$50 (in 1974) payable after only 21 days of incapacity,¹⁰⁹ in addition to a periodic payment of 60 per cent of average weekly earnings for permanent partial disabilities,¹¹⁰ and a lump sum of up to \$10,000 for cosmetic impairments of real significance.¹¹¹ This was offered together with a fully coordinated national rehabilitation programme.¹¹²

In a future national scheme, non-earners should be entitled to some level of notional economic capacity from the date of the incapacity. As argued above, this could be achieved by paying earnings-related compensation to earners for a maximum of six months. After that, both earners and non-earners should be entitled to the provision of a flat-rate benefit. Thus, the principle of comprehensive entitlement—equal treatment for equal claims—could be implemented, and the provision of compensation would only depend on past workforce status for a minimal six-month period.

The Commission commented that, in the future, the benefits to non-earners in the proposed scheme could improve. "It would, of course, be open to the community to devote more resources to compensating incapacitated non-earners and thus increase the figure chosen to represent notional earning capacity."¹¹³ It has been argued that the community should compensate non-earners in the short and long terms. Such compensation should be above the present social security arrangements, and definitely not below the poverty line.¹¹⁴ However, it is not at present, and will not in the future, be "open to the community" to devote more resources to non-earners. Such a decision would be made by the legislators in conjunction with the advice and opinions of the interest groups that presently dominate the accident compensation debate. It is

suggested that the Commission is mistaken if it believes that the "invisible majority" of the population could somehow mobilise itself and initiate better provision for non-earners in the scheme.

The most valuable contribution the Commission has made to the treatment of non-earners is the rehabilitation and continuing attendant care and services proposals. These proposals indicate a strong emphasis away from the traditional concept of compensation. Because compensation invariably means money, the provision of these services *per se* is not considered to be part of the compensation. However, the Commission has consistently argued in its *Report* that the provision of these services should be an integral part of a compensation scheme.

If the legislators could make a commitment to the provision of rehabilitation and on-going care services to both earners and non-earners (and such provision must be as of right) the demand for monetary compensation that has been influenced by the common law will diminish. Then, our scarce resources could be directed to where they are most needed.

What follows is an examination of the current swing among law reformers away from traditional compensation goals to a broader concept of community responsibility in a care-based system.

From compensation to care

Introduction

One of the basic principles of tort law which applies to both personal injury and property loss is the principle of *restitutio in integrum*. The theory of this legal principle is that as far as possible, the injured victim should be returned to the same position which he or she was in immediately before the injury.¹¹⁵ "Of course, in the great majority of personal injury cases, full compensation in the whole physical and mental reconstruction sense, is a practical impossibility. Thus, when the plastic and other surgeons, together with the physicians, physiotherapists, and psychiatrists have done their best, dollars must suffice as adequate compensation for the victim's residual, continuing lack of physical and mental wholeness. Money damages may console but they cannot make the victim whole again."¹¹⁶ In practice, the traditional view is that the law can deal only with monetary compensation and cannot provide for continuing care and rehabilitation. The law is effectively prevented from providing on-going care facilities because of the operation of the "once-and-for-all" rule that damages can be assessed once only. If the victim's condition

worsens, he or she can have no "second bite of the apple".¹¹⁷

There is an emphasis emerging on rehabilitation and care for accident victims in current reform initiatives. This trend is described by Colin Phegan¹¹⁸ who argues that the proposed New South Wales scheme involves a "significant redirection of resources towards the prevention of accidents and minimisation of their consequences through rehabilitation". A care-based model would be fundamentally different from the compensation model, with its stated aim of restitution. Compensation is concerned with making good a loss, as far as possible, with money. It is a system which is backward-looking, in the sense of assessing entitlements. However, a care-based system is concerned only with the present and the future of the accident victim.¹¹⁹ "Its principal concern is not what has been lost, but rather what can best be done to maximise recovery and alleviate suffering. This may often mean provision of services and long-term attendant care rather than monetary payment".¹²⁰ One of the major components of a care-based system is rehabilitation. But the scheme should not stop there. It must include the provision of long-term attendant care and substitute services. It is directed as much to those who cannot be fully rehabilitated as to those who can. For them, the long-term care provisions will attempt to achieve what the common law is generally regarded as being incapable of doing.

Major recent care initiatives

In 1974, the Woodhouse Committee presented a plan for a nationally coordinated rehabilitation scheme. The Committee spent much time and resources developing its policy and plans. The goal of complete rehabilitation was deemed to be a primary objective of the scheme. That objective was given so much detailed attention (it occupied the whole of Volume Two of the *Report*) Geoffrey Palmer was prompted to comment, "The recommendations were so full and so detailed that they amounted to a cornucopia for the disabled".¹²¹ The more recent emergence of care and rehabilitation initiatives is outlined by the New South Wales Law Reform Commission in the *Final Report*.¹²² The Commission referred to the new rehabilitation provisions of the Victorian no-fault motor accident scheme, the operations of the comprehensive New Zealand scheme, and the international developments spearheaded by the United Nations.¹²³ The Commission further stated that: "There has also been a considerable amount of public attention focused on the problems faced by disabled people in the community through various

reports and inquiries.”¹²⁴ The Commission has made extensive recommendations for rehabilitation in its transport accidents scheme. The proposed Accident Compensation Corporation would have the power to ensure the provision of rehabilitation and support services through a separate Rehabilitation Section.¹²⁵ Apart from planning for a centrally controlled rehabilitation service utilising existing public and private facilities, the Commission also looked much further into the future. Because there is no single co-ordinator of rehabilitation and support services at present in New South Wales, the Commission predicted that a shortage of trained, qualified personnel would soon develop when the scheme was introduced, so they have planned for the development of training programmes for health care professions.¹²⁶

The inadequacy of the present rehabilitation and care facilities in this State is a major problem facing the implementation of a compensation scheme. In a report for the Council of Social Services of New South Wales called *Cold Comfort*,¹²⁷ it was made abundantly clear that the situation is in urgent need of attention. The report was a regional analysis of the distribution and need for services for disabled people in this State. This extremely comprehensive report reached two “inescapable” conclusions. First, for New South Wales as a whole, there is an astronomical and across the board shortfall in services for disabled people. Secondly, with the occasional exception of the Northern Sydney area, this overall shortfall is reflected in varying degrees for all areas of the State and for all types of services for disabled people.¹²⁸ One of the Commission’s *Research Papers* also studies the provision of post-accident care in New South Wales.¹²⁹ The *Report* stated that, at present, accident victims have to travel through a “maze” of services and agencies. “Among the determinants of the path followed by the victim will be the nature of the accident; how, where and by whom it was caused; the kind and extent of injury suffered; the victim’s age, sex, ethnicity and marital status; the victim’s educational, occupational, socio-economic and insurance status prior to the accident; the advice given to and the decisions made by or for the victim after the accident.”¹³⁰

The ultimate aim of a national comprehensive scheme would be to abolish many of these variable factors. In a limited transport scheme, the cause of the injury would still be highly relevant. In a national scheme the causal requirement would be removed. In a national scheme, rehabilitation and support services would no longer be a “maze” and would be accessible to all injured persons regardless of the above factors that currently operate.

Can care and compensation co-exist?

If this country were willing to make a total commitment to a care-based system, there may be a fundamental conflict with the compensation system. As Colin Phegan states, earnings-related compensation may not have a place in a care-based system. Such compensation goes towards restitution in a monetary sense and does not aid in future rehabilitation and support. "Total commitment to a care-based system is unlikely to leave room for restitution of loss. To the extent that monetary compensation is payable, it must be justified as an aid to rehabilitation or as a necessary part of ongoing care and support, although within the latter, there is room for difference of opinion on how much support can be justified."¹³¹ The provision of monetary compensation may not of itself conflict with the goals of a care-based system. Monetary payments, even lump sums, could go part of the way towards rehabilitation. So, too, could periodic benefits as the need requires.¹³²

A truly comprehensive national scheme should facilitate the change from compensation to a care-based system. Both systems could co-exist, in the initial stages of reform, but sooner or later the change in emphasis to care must be made. This swing to a care-based system is the only way that equity and some semblance of equality can be achieved between earners and non-earners. The co-existence of two conceptually different personal injury schemes would operate against this goal.

If the vested interest groups and the legislators were committed to the goal of equality and equity in the treatment of accident victims, the "significant resources" to which Phegan referred earlier could be utilised in a much more organized, constructive and beneficial manner for the nation as a whole. The recommendations of the Commission have paved the way for such an approach.

No reform of accident compensation can be achieved in this country unless the political will exists, is mobilised and acted upon. The blueprints for reform have already been drawn. They have been drawn in extensive detail. Unfortunately, such reform does not depend upon political will alone. It depends very much on the attitudes of the interest groups. It is these groups that direct and control the debate to a large extent. The legal profession, the unions, the insurers and other groups must re-assess their positions and look towards the future. They must shed their legacies of the past and give the unfortunate victims of accidents a new and better start.

Footnotes

1. *Australian Woodhouse Report*, [254].
2. Harold Luntz, *Compensation and Rehabilitation* (1975), p. 9.
3. *Australian Woodhouse Report* [524].
4. *Ibid*, [255].
5. Commission's *Report* [5.19].
6. *Ibid*, [5.21].
7. *Ibid*, [5.19].
8. *Ibid*.
9. *Ibid*.
10. *Ibid*, [5.20].
11. *Ibid*, [17.37].
12. *Ibid*, [5.19].
13. *Australian Woodhouse Report* [256]. It should be noted that the Committee also referred to earnings-related compensation as "the primary purpose of the compensation scheme . . ." *ibid*, [365(a)].
14. *Ibid*, [256].
15. *Ibid*, [449].
16. See Volume Two of the *Report*.
17. *Ibid*.
18. *Australian Woodhouse Report* [138-144], Commission's *Report* [3.71-77] and H. Luntz *supra* n. 2, p. 12.
19. *Australian Woodhouse Report* [144].
20. Commission's *Report* [3.71].
21. *Ibid*, [3.75].
22. See generally *ibid*, Chapter 13.
23. See Andrew McCathie *No-Fault Plan May Bring Big Savings*, *Australian Financial Review* 22/8/84.
24. A. K. Clarke *No-Fault, Past, Present and Future* [1981] *Aust. Insurance Institute Jnl* 33.
25. Harold Luntz, *supra* n. 2, p. 9.
26. See Colin Phegan, *From Compensation to Care—A Change of Direction for Accident Victims* (1985) 10 *Adelaide Law Review* 74. This issue will be discussed later in this Chapter. See also, Marcia Neave, *The Place of Rehabilitation in Accident Compensation Schemes* (December 1985) 10 *Sydney Law Review* 98.
27. *Australian Woodhouse Report* [365(a)].
28. *Ibid*, [243].
29. Quoted in *Woodhouse Report*, *ibid*, [251].
30. Terrence Ison, *The Forensic Lottery* (1967).
31. *Ibid*, p. 55.
32. Commission's *Report* [18.10].
33. *Ibid*.
34. *Ibid*.
36. *Ibid*, [18.11].
36. Harold Luntz, (1983) *Oracle op. cit.* recommends this six-month period also. See, Michael Chesterman, *Can Earnings Related Compensation be Justified?* (December 1985) 10 *Sydney Law Review* 92.
37. *Australian Woodhouse Report* [258].
38. Harold Luntz, *supra* n. 2, p. 15.
39. *Ibid*.
40. *Ibid*, p. 18.
41. Ronald Sackville, *New Directions in Compensation: A Challenge for*

- Pragmatic Times* (June 1984) paper delivered at Adelaide, *Workers' Compensation—New Directions*.
42. *Ibid*, p. 2.
 43. *Royal Commission on Civil Liability and Compensation for Personal Injury, Report H.M.S.O.*, London 1978.
 44. *Ibid*, Volume 2, Table 158, p. 207.
 45. P. S. Atiyah *What Now?* in *Accident Compensation after Pearson* (1979) p. 241.
 46. *Ibid*, p. 244.
 47. Commission's *Report* [15.6-13].
 48. Fiona Tito *The Problem of Non-Earners Under a Statutory Compensation Scheme* paper delivered in Sydney on 4th August 1983 at a Conference titled *Accident Compensation: The Prospects for Reform* p. 18.
 49. Commission's *Working Paper* [7.22].
 50. As the New South Wales Law Society compensation proposals purport to do: see Chapter 2.
 51. Australian Bureau of Statistics *1981 Census of Population and Housing—census Statement 4 (N.S.W.)* (October, 1982) sheet 5 cited by the Commission *Working Paper op. cit.* [7.2].
 52. Such as The Women's Co-Ordination Unit, the Feminist Legal Action Group, and the Women's Legal Resources Centre. These groups made submissions to the N.S.W. Commission.
 53. Commission's *Working Paper* [7.2].
 54. See Fiona Tito *op. cit.* pp. 3, 4.
 55. E.g. D. R. Hall *The New South Wales Law Reform Commission's Working Paper on Transport Accidents* [Feb, 1985]; 8 *The Queensland Lawyer* 30 at p. 37; also Regina Graycar *Non-Earners and Accident Compensation—Women Sold Out Again?* [April 1985] *Legal Service Bulletin* 86 at p. 87.
 56. Commission's *Working Paper* [7.4].
 57. The Commission did note that partial incapacity created "even more difficult questions" than permanent, or long-term incapacity and invited submissions on the issue. *Ibid*, [7.25].
 58. Commission's *Working Paper* Chapter 7.
 59. *Ibid* [7.5].
 60. *Ibid* [7.6] [3.34, 35].
 61. *Ibid* [7.7].
 62. *Ibid* [7.9].
 63. *Family Law Act*, s. 79(4)(b) and (c).
 64. Per Gibbs C.J., Mason and Wilson JJ. in *Mallet v Mallet* [1984] F.L.C. 91-507, approving *Rolfe v. Rolfe* [1979] F.L.C. 90-629.
 65. *Mallet v. Mallet* *ibid*, pp. 79-108.
 66. *Wardman v. Hudson* [1978] F.L.C. 90-466 at p. 77, 385 (Full Court of the Family Court)..
 67. See, Regina Graycar, *Compensation for Loss of Capacity to Work in The Home* (March 1985) 10 *Sydney Law Review* 528, and, *Hoovering as a Hobby: The Common Law's Approach to Work in the Home* [1985] *Refractory Girl* 29. See also, in the context of the now abolished loss of consortium action, Margaret Thornton *Loss of Consortium: Inequality Before the Law* (1984) 10 *Sydney Law Review* 259.
 68. Commission's *Working Paper* [7.10].
 69. *Ibid*; see also Women's Co-Ordination Unit submission to the Commission No. W1, pp. 5, 6.
 70. D. R. Hall *op. cit.*, p. 36, see also Women's Co-Ordination Unit p. 4 and Fiona Tito *op. cit.*, pp. 5, 6.

71. Woodhouse Committee *Report op. cit.* [354(d)].
72. *Ibid* [366(b)].
73. Commission's *Working Paper* [7.12].
74. Commission's *Working Paper op. cit.* [7.14].
75. *Ibid* [7.16].
76. *Ibid*.
77. The Feminist Legal Action Group submission No. W49, and the New South Wales Society of Labor Lawyers No. W53.
78. The submission *ibid*, p. 11 states that there were 1,134 appeals awaiting decision in the Administrative Appeals Tribunal in April 1983, which was up from 694 in April 1982.
79. Commission's *Report op. cit.*, Chapter 10.
80. The New Zealand scheme pays compensation at replacement value to *both* earners and non-earners: *Accident Compensation Act* 1982 (N.Z.) s. 80(2)(g); see *Working Paper op. cit.* [7.17].
81. The Victorian *Motor Accidents Act* 1973 s. 30(1)(g), provides for 80 per cent replacement costs with a limit of \$2000 within five years.
82. Commission's *Working Paper* [7.18].
83. Fiona Tito *supra* n. 48, p. 8.
84. *Ibid*, p. 9.
85. *Ibid*, p. 10.
86. *Ibid*.
87. Commission's *Working Paper op. cit.* [7.19-21].
88. The New South Wales Society of Labor Lawyers submission *op. cit.*, p. 11.
89. Fiona Tito *op. cit.*, p. 6.
90. *Ibid*, 12. This is the approach taken by the Ontario Law Reform Commission's *Report on Motor Vehicle Accident Compensation* (1973); see quotation in *Working Paper op. cit.* [7.20].
91. Approximately \$210 at June 1984, Commission's *Report op. cit.* [7.86] [7.89]; note that the label "economic capacity" as used in the *Working Paper* has changed to "earning capacity" in the final *Report*.
92. *Ibid*, Chapter 10, Part II.
93. *Ibid* [10.6].
94. *Ibid*, Part III.
95. *Ibid*, Part IV.
96. *Ibid*, Part V.
97. *Ibid*, Part VI, B.
98. *Ibid*, C.
99. *Ibid*, Chapter 11.
100. See Chapter 7, Part IV, and Part V, 2.
101. *Ibid* [7.8].
102. *Ibid* [7.12].
103. *Ibid* [7.14].
104. For example, see Fiona Tito *supra* n. 48, pp. 13, 14, and Regina Graycar *supra* n. 55, p. 87.
105. Commission's *Report* [7.96].
106. *Ibid* [7.98].
107. *Ibid*, Chapter 18.
108. *Ibid* [18.9].
109. Including sickness, *Australian Woodhouse Report* [366(c)].
110. *Ibid* [397(c)].
111. *Ibid* [401(d)].
112. *Ibid*, Part 8.
113. Commission's *Report* [7.90].

114. This was argued by two groups in their submissions to the Commission. See fn. 77.
115. See Kercher and Noone *Remedies* (1983) p. 315.
116. *Ibid.*
117. *Ibid.*, p. 322.
118. Phegan *supra* n. 26.
119. *Ibid.*
120. *Ibid.*
121. Geoffrey Palmer *Compensation for Incapacity* (1979), p. 396.
122. Commission's *Report* Chapter 9, Part II.
123. *Ibid.*
124. *Ibid* [9.24].
125. *Ibid* [9.31-32].
126. *Ibid* [9.42-48].
127. Lyn Gain, Sue Ellis and Diana Gray *Cold Comfort* (August 1983).
128. *Ibid.*, p. 2.
129. John Dewdney and Ian Irwin *The Aftermath—Caring for Accident Victims in New South Wales* (September 1984).
130. *Ibid.*, p. 2.
131. Colin Phegan *supra* n. 26, p. 79.
132. *Ibid.*, p. 78.

APPENDIX

Nearly everyone has experienced some kind of accident in the past. It will be useful to outline the experiences of two people who have come into close contact with the compensation system. For their stories, this society has much to answer for.

In 1978, Peter¹ was injured when his motor cycle collided with a truck driven by Robert. The accident happened on a winding country road which had no centre line marked. There were no witnesses to the accident. Peter said that as Robert was negotiating an S-bend, the truck straddled the centre of the road. Peter said he was unable to avoid a collision and the truck drove over the front wheel of his motor cycle and slammed the bike down on to his leg. Robert, however, asserted that he was driving on the correct side of the road when he saw Peter appear in front of him well on to the wrong side of the road.

The trial judge decided that the plaintiff, Peter, had failed to prove that his injuries had been caused by the defendant's negligent management of the truck. Peter appealed. The Court of Appeal of the New South Wales Supreme Court looked at the trial judge's attempt to reconstruct the accident by the examination of gouge marks and an oil patch on the surface of the road. It also considered the position of the truck and the motor cycle after the accident. The court concluded that there was not enough evidence to prove negligence on Robert's part, and Peter's appeal was dismissed. Peter had to pay all the costs associated with this action. He also had to pay for all expenses incurred during his disability. Why? Even though Peter has been contributing to the compensation fund for motor vehicle accidents through his compulsory third-party premiums, he was not entitled to compensation because he did not prove fault. What is the rationale for this selective nature of compensation? However, even when accident victims are able to prove fault, the compensation they receive is found to be inadequate.

* * * * *

Mr. Brown² became a paraplegic as a result of a car accident in 1975. He was a qualified mechanic, 26 years old, and married with two children. He spent 10 months in a spinal unit and returned to his previous employment at a specially prepared workbench. He was able to establish fault, and in 1976 his claim was settled for \$210,000 (gross) on the basis that he could continue to work. After deducting past medical, hospital and legal expenses, he received \$186,000. He did not realise that these deductions would be made.

With his compensation, he bought a specially fitted car, invested in first mortgage home loans, repaid money owed to the Department of Social Security and later purchased a house. In 1979, three years after the settlement, a cyst developed on his spinal cord. Despite three operations, he has gradually lost the function of one arm and a hand. He is in danger of becoming a quadriplegic. He has been unable to work since 1981. His deteriorating condition has cost him a lot of money and nothing remains of his compensation payment. Mr. Brown currently receives the invalid pension. There is also the possibility that he will have to sell his house.

-
- [1. The names are fictitious. The case is *Angel v. Flemming*, a decision of the Supreme Court of New South Wales, Court of Appeal, 13th April, 1983. The case is part of a survey (Lump Sum Survey) conducted by the New South Wales Law Reform Commission *Case Study Booklet* (Research Paper No 2, 1984) [3.25].
 2. The name is fictitious. The case study is found *ibid* in the Commission's survey [4.17]]

The common law claims that it provides "full" compensation to victims of accidents. Mr. Brown's case is but one of hundreds of cases that prove the common law wrong.

If a national comprehensive compensation scheme for personal injury were implemented, both Peter and Mr. Brown would be eligible for periodic compensation. They would be paid on a regular basis throughout the term of their incapacity. They may also be entitled to a lump-sum payment for any permanent disabilities. They would be entitled to a fully co-ordinated national rehabilitation service, and the provision of attendant care and services. They would have these entitlements *as of right*.

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Accident Compensation in Australia No-Fault Schemes

Mark Anthony Robinson

Colin Phegan, of the University of Sydney, writes in his Foreword to Mark Robinson's book **Accident Compensation in Australia - No-Fault Schemes**:

"More than ten years have passed since the ill-fated attempt by the Whitlam Government, and later by Gough Whitlam himself as a private member, to introduce a national compensation scheme. In spite of the lapse of time, the philosophy of the Woodhouse Report, upon which the Whitlam legislation was based, remains as relevant today as it was when written in 1974.

This book, which takes up the story from 1974, includes an exposition of more recent proposals for reform of accident compensation law, only some of which have found their way into the statute books. The most important and far-reaching of recent proposals, namely the Transport Accident Scheme proposed for New South Wales by the New South Wales Law Reform Commission and the legislation for a no-fault Transport Accident Scheme in Victoria, are yet to be implemented.

The inappropriateness of a fault-based system financed from a compulsory third party insurance fund has been exposed repeatedly and the arguments are reproduced in the first chapter of the book. The remaining two chapters are devoted to a critical account of different benefit structures for no-fault schemes.

The publication of the book is particularly timely, given the uncertain future of proposed reforms in New South Wales, Victoria and also South Australia. Labor governments at both the State and Federal level have failed in their responsibility to elevate public debate on accident compensation reform . . .

In the face of such lack of commitment on the part of government, this book is a welcome reminder of fundamentally important principles. It also provides a most up-to-date account of what is, and what is not, happening at the legislative level. It is to be hoped that the book will reach a wide audience including not only lawyers who seek to properly inform themselves of the current state of the law and the choices available for its improvement but also every person interested in compensation reform."

The publisher, Legal Books Pty. Ltd. agrees with Mr Phegan and joins in recommending this book, which had its origin as an Honours dissertation for a Bachelor of Laws degree at Macquarie University in 1985, to the legal profession, academics and the general public all of whom must become aware of the complex and difficult issues that are involved in the accident compensation debate.

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