

# ACCIDENT COMPENSATION

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## FROM COMPENSATION TO CARE — A CHANGE OF DIRECTION FOR ACCIDENT VICTIMS?

### 1. COMPENSATION TO CARE — A CURRENT TREND

#### a) "Care" — the New Catchword

The word "care" has been conspicuous in recent short titles of accident compensation schemes. It started with the Report of the New South Wales Law Reform Commission on a *Transport Accidents Scheme for New South Wales* which was released in December of last year under the short title of *TransCare*. Now the Victorians have *WorkCare*<sup>1</sup> and it is rumoured that the Law Society of New South Wales' yet-to-be-disclosed alternative to the Law Reform Commission proposals may be called *WageCare*! Such variations on the theme of care would seem to have no limit. But more to the point, what does such rich harmony signify?

I can speak for neither the Government of Victoria nor the Law Society of New South Wales. As a member of the New South Wales Law Reform Commission I take some pleasure in the thought that imitation is the sincerest form of flattery. But idle speculation aside, the New South Wales Law Reform Commission Report provides ample support for the conclusion that, as a description for the proposed transport accidents scheme, *TransCare* was more than just a catchy title. In the provision of medical, hospital and related services,<sup>2</sup> it is recommended that, as far as possible, transport accident victims should be users of the general health care system. The link with *Medicare* is therefore obvious but the choice of words has a more fundamental and pervasive significance than that. The word "compensation" does not appear even in the full title of the Scheme and, while compensation remains a prominent feature of the recommended benefits, there is a significant redirection of resources towards the prevention of accidents and minimization of their consequences through rehabilitation. This does not mean an abandonment of every aspect of the compensation model. Traditional heads of damage in a claim for compensation for personal injury include care related items, the most obvious of which are past and future medical, hospital and related expenses now extended by *Griffiths v Kerkemeyer*<sup>3</sup> to the value of nursing and attendant services gratuitously rendered. Defenders of the traditional system also attribute a care-oriented function to lump sum awards by way of general damages which, they argue, provide the accident victim with financial independence conducive to readjustment and rehabilitation.<sup>4</sup>

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1 *WorkCare* — Explanatory Notes on Victoria's New Approach to Accident Prevention, Rehabilitation and Compensation, 30 June 1985.

2 *A Transport Accidents Scheme for New South Wales* New South Wales Law Reform Commission (1984) (N.S.W. Report) Ch.13.

3 (1977) 139 CLR 563.

4 Eg. Submission to the New South Wales Law Reform Commission from the New South Wales Bar Association referred to in Appendix to the *Working Paper on A Transport Accidents Scheme for New South Wales* (1983)

Common ground aside, the care model does require a fundamental change of direction. By definition, compensation is concerned with making good a loss. It is assessed by reference to the past (pre-accident) condition of the accident victim compared with his or her present (post-accident) condition. Compensation represents, as far as is possible in monetary terms, the difference between the two. A care-based system is oriented to the present and future. Its principal concern is not what has been lost but rather what can best be done to maximize recovery and alleviate suffering. This may often mean provision of services and long term attendant care rather than monetary payment.

Only in one sense is the victim's pre-accident past relevant to the care-based system. Unless and until we have a comprehensive national scheme covering both injury and illness, the injury complained of must be connected causally with the source of compensation whether geographical or in terms of a particular activity. If the scheme emanates from a particular State or Territory, was the injury suffered in circumstances connecting it with that State or Territory in the required manner? Was the injury caused by the use of a motor vehicle? Was it suffered in the course of employment? Answers to such questions require a causal connection to be established and this can only be done by a comparison of past and present. But once the causal connection and therefore entitlement has been established, the compensation model continues to draw on the past in assessing benefits while the care model does not.

#### **b) The Care Factor in Current Reform Initiatives**

Accident prevention and rehabilitation are the two aims most frequently promoted in recent reform proposals. While prevention is thus associated with the new direction in accident schemes, it is equally compatible with compensation-based systems as with care-based systems. The real issue is whether adequate financial resources are being allocated to research and implementation of preventative measures when compared to those resources devoted to accident victims once injury has been sustained. This issue is not solved merely by a shift from compensation to care for the victim. However, there are reasons why the quest for greater attention to preventive measures has been linked with recent reform proposals. The latter more often than not recommend not only a shift away from the compensation model but also an abandonment of entitlement to compensation based on proving fault in another, in favour of a no-fault system. A compensation system based on fault offers little prospect of integration with an occupational health or road safety regime. The process of litigation is not conducive to a systematic collection of data which would assist in identifying hazards or evaluating the effectiveness of safety measures. On the other hand, a no-fault scheme, administered by a body responsible for ongoing care of accident victims can actively participate in, or contribute to, prevention programmes.<sup>5</sup>

Since the theme of this paper is a comparison of two approaches to what should be done for the individual accident victim in cases where preventive measures have failed, no more will be said about prevention, important as it is. In looking more closely at how current reform initiatives constitute a shift from compensation to care, I will concentrate

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5 As recommended in the *N.S.W. Report* paras. 15.24-15.26.

on proposals on rehabilitation which are the most conspicuous and convenient basis for comparison.

In 1980 the South Australian Tripartite Committee reported on *Rehabilitation and Compensation of Persons Injured at Work*.<sup>6</sup> The South Australian *Workers' Compensation Act* was criticised for its failure "adequately to emphasise the obligation or need for rehabilitation."<sup>7</sup>

The rapid rehabilitation of a worker back into the workforce should be a prime objective and would be beneficial to the employer and the employee.<sup>8</sup>

It was recommended that the Board established to administer the new Act, to be called the Workers' *Rehabilitation* (emphasis added) and Compensation Board,

should be given the statutory power and *duty* to oversee and confirm a rehabilitation program for a worker eligible under the Act.<sup>9</sup>

Earlier the Report had referred to the "disjointed approach" and "lack of any positive directives in the existing legislation".<sup>10</sup> Part VIA was subsequently added to the South Australian Act, operative from 1 July 1982. It sets up a Workers' Rehabilitation Advisory Unit whose functions include facilitation of an early hearing where an injured worker is becoming adversely affected mentally by the long delay.<sup>11</sup>

Part IX of the West Australian *Workers' Compensation and Assistance Act* 1981 is devoted to rehabilitation. Under s 155 an insurer or self-insurer is required to notify the Workers' Assistance Commission if any injured worker is still incapacitated after a period of twelve weeks. Under sections 156-159 the Commission may require a specialist medical examination and assessment of means and prospects of rehabilitation and other rehabilitation measures. It may co-ordinate a programme for rehabilitation and authorise expenditure up to \$2,000 on rehabilitation.

The *Report of the Committee of Enquiry into the Victorian Workers' Compensation System (The Cooney Report)* introduced its chapter on rehabilitation with the following observations:

It is widely acknowledged that the current system emphasises the compensation aspect of lost earning capacity as a result of work-related injury or disease and ignores the need for rehabilitation leading to re-entry into the workforce.<sup>12</sup>

The Report goes on to identify reasons for the inadequate attention given to rehabilitation including the absence of a proper infrastructure:

There is a paucity of rehabilitation services in Victoria, both in terms of adequate facilities and trained personnel in the area of vocational rehabilitation in particular.

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6 *A Workers' Rehabilitation and Compensation Board for South Australia — Key to Rapid Rehabilitation and Equitable Compensation for Those Injured at Work*, September 1980.

7 *Id.*, para 4.2, p 18.

8 *Id.*, para 4.3, p 19.

9 *Id.*, para 6.3, p 51.

10 *Id.*, para 4.3, p 21.

11 Section 86a(4).

12 Para 4.1.

There is a large degree of fragmentation in the types of services available, a lack of funds and a complete absence of co-ordination.<sup>13</sup>

The recommendations on rehabilitation which sought to remedy the situation described in the Report appear to have been influential in the formation of Part VI of the *Accident Compensation Bill* which will implement Victoria's *WorkCare* scheme. Part VI provides for the formation of the Victorian Rehabilitation Council whose objectives are defined in clause 158:

158. The objectives of the Council are –

- (a) to develop policies, standards and guidelines for the provision of occupational and social rehabilitation services for the purpose of rehabilitating injured workers;
- (b) to ensure the provision of adequate rehabilitation services for the needs of injured workers;
- (c) to promote research into occupational and social rehabilitation; and
- (d) to promote public awareness of occupational and social rehabilitation.

The recognition of past neglect and efforts to remedy this in the future has not been confined to work-related injury. In a review of the Victorian no-fault motor accident scheme, the Minogue Report<sup>14</sup> made a number of recommendations for improvements to rehabilitation services. In 1981, s 57A(1) was added to the Victorian *Motor Accidents Act* 1973. It states that:

[i]t shall be the duty of the Board [i.e. Victorian Motor Accidents Board] to design and promote, so far as possible, a programme designed to secure the early and effective medical and vocational rehabilitation of persons injured as a result of accidents to whom and on behalf of whom the Board is or may become liable to make any payment under this Act.

The Board has since undertaken specific initiatives to improve accident trauma services and to foster rehabilitation centres.<sup>15</sup>

Rehabilitation is given close attention in the Report of the New South Wales Law Reform Commission.<sup>16</sup> It is recommended that the provision of rehabilitation to (transport) accident victims be guaranteed by the creation of a statutory right to rehabilitation and that the Corporation responsible for the administration of the Scheme<sup>17</sup> be given broad powers to ensure provision of appropriate services, if possible through existing agencies, if not, as a service provider. As in a number of other contexts, rehabilitation is defined broadly to include medical, vocational and social rehabilitation and specific provision is made for the adoption of

13 Para 4.6.

14 *Report of the Board of Inquiry into Motor Accident Compensation in Victoria* (1978).

15 *Ninth Annual Report of the Motor Accidents Board, Year ended 30 June 1982* (Victoria 1983) paras 6-7.

16 *N.S.W. Report*, Ch 9.

17 The Accident Compensation Corporation.

particular measures to maximize the effectiveness of the rehabilitation process including support of training and research.<sup>18</sup>

Although rehabilitation has been singled out as the most conspicuous and fully developed (at least in theory if not practice) aspect of a care-based system, it is by no means its only feature. Long term care and support for the permanently disabled are features not found in the traditional compensation model. The New South Wales proposals, for example, include provision of household services and attendant care and aids to independent living such as home modifications and mobility allowances.<sup>19</sup>

## 2. CAN CARE AND COMPENSATION CO-EXIST?

### a) Care v. Compensation

The point was made earlier that the adoption of a care-based system does not mean the abandonment of every aspect of the compensation model. Monetary payments, even in a lump sum, may be seen as fulfilling the aims of rehabilitation, especially if made in conjunction with benefits provided on a periodic basis or as the need for them arises. The limited use of lump sum compensation as an aid to readjustment to changed circumstances is illustrated in the New South Wales Report's recommendations for compensation on death.<sup>20</sup> The lump sum payable to the surviving spouse, children and other dependent family members of a person killed in a transport accident is seen as a means of adjustment to changed circumstances which gives the survivors a "high degree of flexibility".<sup>21</sup> Similarly the lump sum payable for permanent disability is justified on the grounds that it

can give the disabled person the freedom to purchase alternative forms of satisfaction without risking loss of money required for accident related expenses or for replacement of earning capacity. In particular, the lump sum may be used to assist the disabled person to adjust to a new lifestyle.<sup>22</sup>

Put in these terms, lump sum compensation can be seen as an aid to rehabilitation and therefore a legitimate part of a care-based system.

More difficult to accommodate is earnings-related compensation whether paid periodically or in the form of a lump sum. The compensation of lost earnings or loss of earning capacity is restitution in the strict sense based on the loss of capacity to earn caused by the injury. The retention of earnings-related compensation by the New South Wales Law Reform Commission in its recommendations is acknowledged as an adoption of the "restitution model".<sup>23</sup> The limit to only 80 per cent of the loss is meant to provide some financial incentive to return to work<sup>24</sup> thus seeking to reconcile the otherwise incompatible aims of full restitution and rehabilitation. But a care-based system has most in

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18 *N.S.W. Report* paras 9.43 and 9.47.

19 *Id.*, Ch 10.

20 *Id.*, Ch 12.

21 *Id.*, para 12.9.

22 *Id.*, para 11.42.

23 *Id.*, paras 5.57-5.59. The Scheme is an amalgam of the "Restitution", "Disability" and "Welfare" Models.

24 *Id.*, para 8.23.

common with the “welfare model”,<sup>25</sup> a hallmark of which is the maintenance of income during incapacity at a modest level such as that applied under our current social security system in the form of invalid pensions and sickness and unemployment benefits. While some monetary payments, whether lump sum or periodic, may form an integral part of a care-based system, compensation in the form of restitution of lost earning capacity has a less obvious claim for inclusion. Its inclusion is dictated more by current expectations and the availability of funds to meet the additional cost.<sup>26</sup> than by logic or social justice. As to the latter, there is a strong case for the view that payment of benefits on a differential basis, depending on a person’s pre-accident capacity to earn, from a fund to which all contribute equally, for example by way of a uniform third party motor vehicle premium, is highly regressive.<sup>27</sup>

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 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.

In one sense, differences of opinion about the appropriate level of benefits are no more than differences on matters of detail once the emphasis is effectively shifted from compensation to care. What has been persuasively argued is that such a shift is impossible without total abandonment of two features of the common law which are traditionally associated with the compensation model: the “once-and-for-all” rule and entitlement based on fault.

## **b) Care v. Common Law**

### **(i) The Once-and-for-All Rule**

A system which emphasises maximum rehabilitation and long term care cannot be reconciled with a rule which permits the award of lump sum compensation once only. The inevitable wait for the condition of the accident victim to stabilize before *any* compensation is payable can have a negative effect on rehabilitation both because it may leave the accident victim without adequate resources and therefore under severe financial strain during the waiting period and because the ultimate immutability of the award is an invitation to exaggerate symptoms in order to maximize the award. A dual scheme, under which common law rights are retained along with a limited no-fault component providing for immediate periodic payments, is little better. While the limited no-fault benefits do provide a degree of financial security and thus might be expected to assist recovery, this positive feature is off-set by the encouragement which such security offers to maximizing the common law claim. The effect is still anti-rehabilitative.<sup>28</sup>

### **(ii) Entitlement Based on Fault**

The need to prove fault is an expensive diversion in the compensation

<sup>25</sup> See n 23.

<sup>26</sup> *N.S.W. Report* para 18.10.

<sup>27</sup> H Luntz “The Benefits Payable under a Statutory Scheme” in *Accident Compensation: The Prospects for Reform*, University of New South Wales Faculty of Law Continuing Legal Education, August 1983, pp 12-13.

<sup>28</sup> *N.S.W. Report* para 6.33.

process. Not only is it of extremely doubtful relevance in those areas of accidental injury covered by compulsory insurance but it is instrumental in diverting both attention and resources away from the focus of a care-based system. Like the once-and-for-all-rule, it causes delay and thus impedes rehabilitation. The cost of proving fault, both legal and administrative diverts scarce resources away from the accident victim. The inequity which leaves a substantial proportion of accident victims uncompensated reflects a preoccupation with blameworthy conduct which is inconsistent with an approach which emphasises the minimization of the adverse consequences of the injury.

Thus it is an absolute minimum requirement of a care-based system that these two features of the common law be abandoned.

### 3. THE FUTURE

#### a) **The Dream and the Reality – Changing Direction or Just a Diversion?**

The preceding section says nothing new to those with even a nodding acquaintance with the compensation debate. The reason for a brief restatement of the familiar is to focus attention on two matters which are central to any serious effort at implementation of a care-based system:

- the need for careful evaluation of benefits and their method of delivery in order to determine their consistency with the aims of rehabilitation and long term care and support;
- the extent to which retention of the common law, even as a supplement to no-fault benefits, undermines those aims.

Commitment to the care model is in proportion to the degree of recognition and implementation on both matters. On this criterion, political commitment in this country has been found wanting.

Some recent attempts at overhauling the law of workers' compensation have produced pale imitations of the enlightened reforms originally envisaged. This is especially true in New South Wales. Having given the Law Reform Commission a reference on accident compensation in the widest terms, the Government decided to "go it alone" on workers' compensation, while the Commission proceeded with its Report on a scheme limited to transport accidents. In his second reading speech on the introduction of the *Workers' Compensation (Amendment) Bill*, 1985,<sup>29</sup> the New South Wales Minister for Industrial Relations heralded the legislation as a "major reform". Following the earlier separation of the Workers' Compensation Commission into the State Compensation Board and the Compensation Court,<sup>30</sup> the Bill provides for appointment of Commissioners, with conciliation powers, to reduce delays and ease the burden on the Compensation Court.<sup>31</sup> Other changes are made in the area of costs<sup>32</sup> and insurance<sup>33</sup>, but, despite some general encouragement

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29 24 April 1985. The Bill has now been enacted and all but Sch 1 (licensing of insurers) came into force on 30 June 1985.

30 Established by the *Compensation Court Act*, 1984 (N.S.W.).

31 *Workers' Compensation Act*, 1926, (N.S.W.) Part IVA.

32 *Id.*, s 18(9A).

33 Schedule 1 of the Bill.

towards promotion of safety and rehabilitation,<sup>34</sup> there is no effective move towards a care-based system. Common law rights remain intact and the only change to workers' compensation benefits is a limit on payments after normal retirement age!<sup>35</sup>

By comparison what is happening in Victoria does involve a real attempt to give rehabilitation a more significant place in the workers' compensation system. Reference was made earlier in the paper to the formation of the Victorian Rehabilitation Council. The *Accident Compensation Bill* which sets up the Council and introduces other reforms to workers' compensation has received the Royal Assent and is expected to come into operation on 1 September 1985. Unlike its New South Wales counterpart, it will effect substantial changes to available benefits and their method of delivery. An Accident Compensation Commission will be established, with overall responsibility for administration of the new system including occupational health and safety aspects,<sup>36</sup> as well as an Accident Compensation Tribunal with an emphasis on "informality, reduced legalism and dispute resolution, while preserving further rights of appeal."<sup>37</sup>

As to benefits, compensation for loss of income will be paid on a weekly basis,<sup>38</sup> common law rights for pecuniary loss are excluded<sup>39</sup> and the range of compensable treatment expenses will be expanded to include more rehabilitation costs.<sup>40</sup> However the most difficult but crucial step was not taken. Common law rights to damages for non-pecuniary loss are unaffected and limited rights to redeem periodic payments for loss of income are granted,<sup>41</sup> despite an earlier commitment to do away with such rights except in cases of "administrative rationality."<sup>42</sup>

The only Australian jurisdiction which has done away with common law rights entirely is the Northern Territory. This has been done in the area of motor accidents<sup>43</sup> and has been recommended for work-related injury.<sup>44</sup> However the motor accident scheme offers limited benefits which are not always compatible with the aims of a care-based system.<sup>45</sup> The Bradley Report, on which the motor accident scheme was based, acknowledged the need for adequate rehabilitation facilities but it made no detailed proposals. The ensuing legislation permits recovery of rehabilitation expenses, subject to a monetary limit,<sup>47</sup> but makes no

34 Second reading speech, *supra* n 29.

35 *Workers' Compensation Act*, 1926, (N.S.W.), s 60A.

36 *WorkCare*, *supra* n 1, Ch 4.

37 *Id.*, Ch 7, p 27.

38 In the case of total incapacity the payment will be equivalent to 80 per cent of pre-injury average weekly earnings subject to a ceiling of \$400 per week and a floor which varies according to the number of dependants. *Accident Compensation Bill* (Vic.), clause 93.

39 *Id.*, clause 135.

40 *Id.*, clause 99.

41 *Id.*, clause 115.

42 *Workers' Compensation Reform*, Victorian Government Statement on Accident Prevention, Rehabilitation and Compensation, December 1984, p 65.

43 *Motor Accidents (Compensation) Act* 1979.

44 *Report of the Board of Inquiry into the System of Workers' Compensation in the Northern Territory*, November 1984.

45 For example, the ceilings on payment for medical treatment and home and vehicle modifications, *Motor Accidents (Compensation) Act* 1979, ss 18 & 19.

46 *Report of the Northern Territory Inquiry into Motor Accident Compensation* (1979), p 80.

47 *Supra*, n 45.

provision for improvement of rehabilitation facilities or advancement of rehabilitation generally.

Announcement of reforms to the workers' compensation system in South Australia is imminent. There is still a possibility that South Australia will thus become the first Australian jurisdiction to introduce a scheme which does away with the common law and, unlike the Northern Territory, develops at the same time a philosophical basis for a real shift in emphasis from compensation to care. Such an initiative would offer some incentive for other States and Territories to follow.

By contrast, the emphasis in the New South Wales workers' compensation reforms on the reorganization of insurance arrangements and dispute settlement procedures, at the expense of restructuring of benefits and substantial changes to enhance rehabilitation, involves no real change of direction. The Report of the New South Wales Law Reform Commission appears to have had no influence. More to the point, the Transport Accidents 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. The slowness to respond at the Federal level is difficult to reconcile with declared Labor Party policy whose ultimate objective is

an integrated Commonwealth-State nationwide scheme which ensures speedy compensation at reasonable levels for all persons injured in any kind of accident.<sup>48</sup>

This objective was to be achieved on a step-by-step basis beginning with a

. . .no-fault motor accident compensation scheme. . .accompanied by abolition of common law claims arising from such accidents.<sup>49</sup>

The New South Wales proposals offered just that.<sup>50</sup> As Ronald Sackville, former Chairman of the New South Wales Law Reform Commission and architect of the New South Wales Scheme, observed at a recent Labor Lawyers' Conference:

. . .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 minimize 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. . .<sup>51</sup>

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48 Australian Labor Party, "Law and Justice Policy" launched by Senator G Evans, 23 February 1983, para 9.

49 *Ibid.*

50 *N.S.W. Report*, para 18.8.

51 R Sackville, "Accident Compensation: Changes and Choices", Australian Society of Labor Lawyers, 7th National Conference, Melbourne, August 1985, pp 7-8.

Such apparent lack of interest is an indication that the momentum towards reform has at the very least faltered.

**b) Is There Life After No-Fault for the Common Law?**

It has already been asserted that preservation of common law rights is inimical to maximum rehabilitation of the accident victim and therefore inconsistent with the fundamental aims of a care-based system. Does this mean that there is no place for the common law alongside a no-fault system based on care rather than compensation?

The common law, as it now operates through the tort of negligence in claims for damages for personal injury, has outrun its time. In an age of compulsory third party insurance in the two areas of human activity where most injuries occur, on the roadway and at the workplace, the fault of the defendant, on which liability in negligence is based, has become irrelevant. Negligence as a concept is also becoming meaningless because courts have expanded its definition to the point where conduct which departs in no significant way from that of the ordinary person in his or her everyday affairs is likely to be caught. In this form the common law can perform no useful function if its compensation role is taken over by a no-fault scheme.

Facile appeals to "inalienable rights" and "the inviolable purity of the common law" are no answer and recent claims, popular amongst some economists,<sup>52</sup> for a deterrent function for the common law, do not measure up to empirical data and are based on some very doubtful assumptions about human conduct.<sup>53</sup> However there is a more sophisticated argument in favour of the common law which cannot be so easily dismissed. It is based on a theory of law as a guardian of community values which both reflects and reinforces those values by providing means by which a person can be made to answer for offending them. It is further argued that as the welfare state expands (and the introduction of a no-fault scheme for accident victims contributes to such expansion) the accident victim is alienated from this value-reinforcement role.<sup>54</sup>

Like Geoffrey Palmer,<sup>55</sup> I have little sympathy for a system which merely encourages private vengeance but it may be unfair to suggest that the value-reinforcement argument is so limited. But even put at its most favourable, the argument, if used as a reason for rejecting a care-based system in favour of the preservation of the common law of negligence in its present form, is misdirected. Because of the extended definition given to negligence, it is highly suspect as a measure of community values on what constitutes reprehensible conduct. For it to accurately reflect that standard it would have to be redefined much more narrowly to exclude mere inadvertance or error of judgment. In other words a fresh start would be necessary after abolition of the existing common law action for personal injury.

52 See for example the comments of E Sieper and Professor P Swan in *Personal Compensation for Injury*, Proceedings of Seminar, Australian National University, August 1984, pp 85 & 154.

53 *N.S.W. Report*, para 3.38.

54 Kathe Boehringer "Transport Accident Compensation" 10 *Legal Service Bulletin* 88 (1985).

55 G Palmer *Compensation for Incapacity* (1979), p 276.

One way in which such a fresh start might be made has been demonstrated in New Zealand where the Court of Appeal<sup>56</sup> has upheld a claim for exemplary or punitive damages, notwithstanding the existence in that country of a comprehensive no-fault scheme under which "proceedings for damages arising directly or indirectly out of injury or death" are excluded from New Zealand courts.<sup>57</sup> Earlier first instance decisions had been inconsistent but the Court of Appeal took the view that, as a matter of interpretation, a claim for punitive damages was not one for damages arising directly or indirectly out of injury as that phrase was used in the context of the *Accident Compensation Act*. As a matter of policy there was

. . . a need to have effective sanctions against the irresponsible or oppressive use of power; and also to maintain a punitive remedy for the commonplace types of trespass or assault, if accompanied by insult or contumely which touch the life of ordinary men and women.<sup>58</sup>

It may be that such a policy, which is embodied in the law applicable to the award of punitive damages in both New Zealand and this country, would fail to satisfy those who espouse the value-reinforcement argument. However, in the changed circumstances of a comprehensive no-fault scheme, some judicial ingenuity could be applied to extend the range of conduct to which punitive damages apply to include extreme cases of irresponsible driving or reckless disregard of industrial safety in addition to intentional conduct. The fundamental issue is whether the reincarnation of a right to damages, even in such a form is a desirable adjunct to a care-based system for personal injury.

Michael Chesterman, in a Research Paper prepared for the New South Wales Law Reform Commission, has cogently argued in the negative.<sup>59</sup> He objects to the fact that a civil court concerned with adjusting civil rights between parties should be hearing claims whose sole function is that of punishing the defendant. He also points to the risk of double jeopardy. The better solution is to permit private prosecutions for criminally inflicted injury and to provide that the court may impose a non-insurable fine, of which part is payable to the victim.<sup>60</sup> In this way the accident victim is not closed out of the value-reinforcement process while the evidentiary criteria appropriate to criminal conduct are preserved and the respective roles of the civil and criminal law are not confused.

### c) Political Will and the Shackles of the Common Law

The trends described in the first part of this paper would suggest a significant movement towards a care-based system for accident victims, but in some jurisdictions and at the Federal level there are signs of a want of political will.

56 *Donselaar v Donselaar* [1982] 1 NZLR 97.

57 *Accident Compensation Act 1972 (N.Z.)*, s 5(1).

58 [1982] 1 NZLR 97, per Cooke J at 103.

59 M R Chesterman *Proposals to Modify the Common Law* Research Paper, New South Wales Law Reform Commission Reference on Accident Compensation, November 1983.

60 *Id.*, para 6.1.7.

The arguments in favour of such a system as a means of providing the most sympathetic and constructive solution to the plight of accident victims are compelling. But the implementation and effectiveness of such a system requires not only activation of political will but also a recognition of the need to shed preconceptions about the compensation process which are a legacy of traditional common law solutions.