

RUMINATIONS ON PERSONAL INJURY LAW SINCE 1960

I INTRODUCTION: FLEMING ON TORTS

The first issue of the *Adelaide Law Review* came out in 1960, the same year that I began my undergraduate law course in England under the guidance of Arthur Rogerson.¹ In the final term of my first year we studied torts, and I made my first acquaintance with *Fleming on Torts*,² recommended by Arthur as the most stimulating of the texts though not confined to English law. One other comment he made that stays in the memory from that term is that for the practicing lawyer, *Donoghue v Stevenson*³ was not the most important torts case of the interwar period: he gave that as being *Wilsons and Clyde Coal Co Ltd v English*.⁴ This gave an emphasis to personal injury law which reinforced Fleming's view of the function of tort law.

In their tributes to John Fleming, Peter Cane and Michael Kirby both point to the influence of realist jurisprudence and of Fleming James on his work.⁵ In the language of Jerome Frank, Fleming's analysis of the law of negligence and of the law relating to personal injury evidences both rule and fact skepticism.⁶ Commonly used judicial language was often described as 'mantra' or 'shibboleth', lacking any consistent conceptual base and used as a façade for decisions that were made on other policy grounds. Those decisions tended towards strict rather than negligence liability, whether through raising the standard of reasonable care to a high level or by a more explicit adoption of a strict liability doctrine. This was consistent with the function of the law which Fleming, like James, identified as being to cope with the inevitable losses stemming from an industrial, mass-producing and interdependent

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¹ In addition to his work in England, Arthur Rogerson went on to become an Emeritus Professor at the University of Adelaide, serving as Bonython Professor of Law from 1964–1978 and as Dean of the Faculty of Law from 1964–1968.

² John G Fleming, *The Law of Torts* (Lawbook, 2nd ed, 1961) ('*Fleming on Torts*').

³ [1932] AC 562.

⁴ [1938] AC 57.

⁵ Peter Cane, 'Fleming on Torts: A Short Intellectual History' (1998) 6(3) *Torts Law Journal* 216, 221; Michael Kirby, 'Comparativism, Realism and The Economic Factor: Fleming's Legacies' in Nicholas J Mullany and Allen M Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998).

⁶ Jerome Frank, *Law and The Modern Mind* (Anchor Books, 1963) viii.

society and economy.⁷ The tools which enabled the achievement of this object were enterprise liability, with a particular focus on strict product liability and endorsement of workers' compensation legislation backed by liability insurance with road traffic injuries covered by driver liability insurance.⁸ James called this 'social insurance',⁹ with the early editions of Fleming adding collectivisation of losses and loss distribution to the description. In all this, there are echoes of a slightly different American debate in the conflict of laws: in the event of a conflict between the law of the place of an accident, the law of the domicile of the main parties and perhaps the law of the state in which the vehicles were garaged or insured, which should be taken as the governing law? One answer, preferred by Moffat Hancock, was to choose the 'better' law.¹⁰ That paralleled Fleming's approach to personal injury law. Fleming was not content with simply giving a critical assessment of competing decisions. And even beyond common law developments he suggested that eventually personal injury law might be better dealt with by a comprehensive social programme which could spread losses much more widely than to employers, manufacturers and drivers, replacing the role of tort law.

Sixty years later we can see much of this as either prescient of Australian law or as indicative of Fleming's influence on it. 'The imperial expansion of negligence'¹¹ has been marked in Australia although it has held the scope of strict liability doctrines such as *Rylands v Fletcher*¹² and liability for intrinsically dangerous things and kept vicarious liability and non-delegable duties within tighter limits than other common

⁷ Fleming James Jr, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57(4) *Yale Law Journal* 459, 550.

⁸ Fleming (n 1) 10ff. Cf Carolyn Sappideen and Prue Vines, *Fleming's The Law of Torts* (Thomson Reuters, 10th ed, 2011) 11ff.

⁹ See, eg, Fleming James Jr, 'Social Insurance and Tort Liability' (1952) 27(4) *New York University Law Review* 537.

¹⁰ Moffatt Hancock, 'Three Approaches to The Choice-Of-Law Problem: The Classificatory, The Functional and The Result-Selective' in Kurt H Nadelmann, Arthur T Von Mehren and John N Hazard (eds), *XXth Century Comparative And Conflicts Law: Legal Essays In Honor Of Hessel E Yntema* (Sijthoff, 1961).

¹¹ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 570 (Brennan J) ('*Burnie Port Authority*').

¹² (1868) LR 3 HL 330.

law jurisdictions.¹³ The *Trade Practices Act 1974* (Cth)¹⁴ (now the *Australian Consumer Law*¹⁵) established strict manufacturer's liability, workers' compensation law has been considerably extended, and a very considerable degree of strict liability has been brought into several state transport accident schemes. A combination of a wider conception of what is reasonably foreseeable, the principle that even unlikely risks that can easily be eliminated should be dealt with, and the corollary of contributory negligence legislation that looking for a single or dominant cause of damage is wrong, together with a heightened appreciation of the physical and economic consequences of personal injury and disability, led to negligence liability becoming increasingly stringent. This resulted in a backlash where some judges argued extrajudicially that the concept of personal responsibility of people for their own safety had been lost.¹⁶ The civil liability Acts,¹⁷ enacted soon after the turn of the 21st century, were based on the recommendations of a committee whose terms of reference explicitly identified the objective of its remit as 'limiting liability and quantum of damages arising from personal injury and death'.¹⁸

¹³ See, eg, *NSW v Lepore* (2003) 212 CLR 511 and *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, in contrast to *Bazley v Curry* [1999] 2 SCR 534, *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1. See too the restrictive approaches to the scope of liability in *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 (vicarious liability), *Burnie Port Authority* (the doctrine in *Rylands v Fletcher*) and *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22. Although some writers have seen the seeds of a willingness to adopt less restrictive approaches to vicarious liability and breach on non-delegable duties in *Prince Alfred College* (see, eg, F Santayana, 'Vicarious Liability, Non-Delegable Duties and the 'Intentional Wrongdoing Problem' (2019) 25(2) *Torts Law Journal* 1520), the judgments offer support only for a relatively limited broadening of the scope of vicarious liability and none at all for the extensive argument put forward by counsel for the respondents on non-delegable duties.

¹⁴ *Trade Practices Act 1974* (Cth) pt VA. See also corresponding state legislation.

¹⁵ *Competition and Consumer Act 2010* (Cth) sch 2, ss 138–49.

¹⁶ JJ Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76(7) *Australian Law Journal* 432. See also IDF Callinan, 'Problems in Insurance Law' 2002 (25(3) *University of New South Wales Law Journal* 859, in which the then Justice discusses the issue with reference to the opinions of his judicial peers, including Sir Harry Gibbs and James Burrows Thomas.

¹⁷ See Des Butler, 'A Comparison of the Adoption of The Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13(2) *Torts Law Journal*, 203, which contains various tabulates detailing the adoption of Ipp Report recommendations across Australian jurisdictions.

¹⁸ *Review of The Law of Negligence* (Final Report, September 2002) 25 ('*The Ipp Report*').

II TORT THEORY: APOTHEOSIS AND NEMESIS

Those 60 years have also seen grand scale theorising about the role, morality and utility of the common law of torts. Cases for a combination of fault liability and full compensation for losses have been argued from very different directions by Law and Economics,¹⁹ and by corrective justice scholars. Law and Economics focuses on issues of deterrence and efficiency: it is concerned that when the costs of avoiding or minimising damage to another person are less than those which will be suffered by that other person, the actor who does not take the available precautions should pay the full amount of all the harm that is inflicted as a penalty for choosing an economically inefficient course of action. Conversely, when the cost of taking the precautions is greater than the damage inflicted, it is more efficient to carry on with the activity and let the injured person bear the cost of the harm.²⁰ Corrective justice scholars start from a formal premise that the object of private law is to redress wrongs by making a wrongdoer put a wronged person in the position they would have been in had the wrong not been committed.²¹ They essentially define a wrong as behavior that does not recognise the moral right to equal respect that the actor owes to the person who has suffered harm. While it has often been claimed that these are descriptive accounts of the objectives of the common law derived from its doctrines, they obviously have a normative aspect which has been used not simply to criticise the correctness of particular decisions or doctrines but to argue for preferable directions in which the law should move.

In stark contrast to these views is the movement to remove the law of personal injury from the sphere of private law altogether and to replace it with a scheme that compensates all accident victims — and ideally all disabled persons — by a state authority on a no fault basis. The proponents of tort law focus very much on the principles that govern liability and devote much less time to the procedures that establish it and their costs. Those who criticise and condemn tort law's operation in the field of personal injury point to its heavy costs in relation to both finding liability and assessing damages, especially for non-economic losses, and emphasise its haphazard and unequal coverage with respect to persons with similar disabilities and needs. Most of the critics have a major concern for fairness in terms of compensation as well as for the wastefulness of the costs of the tort system, though in his last writings on the subject Patrick Atiyah advocated the abolition of tort law in personal injury cases even without any formal replacement system at all.²² But the most common position

¹⁹ See, eg, G Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).

²⁰ *Ibid.*

²¹ For a detailed analysis of corrective justice theory, see Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995). See also Jules Coleman, *Risks and Wrongs* (Oxford University Press, 2002).

²² PS Atiyah, 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable' in Peter Birks (ed), *Wrongs and Remedies in The Twenty-First Century* (Clarendon Press, 1996) 1; See generally PS Atiyah, *The Damages Lottery* (Hart Publishing, 1997) ch 8.

is that the savings from very simplified administration of claims, and the abolition or severe reduction in compensation for non-economic losses, should be sufficient to fund a much more comprehensive coverage of accident victims to compensate them at a reasonably high earnings related level.

III GRAND THEORY THWARTED

Fleming did not elaborate on what precisely his concept of social insurance entailed, but it is reasonable to infer that it involved *de facto* or more probably *de iure* compulsory insurance; voluntary insurance leaves too many gaps in coverage, being one of the main reasons for making third party motor vehicle insurance compulsory in the period between the two World Wars. In any event the Australian experience has been that fault-based liability, a serious attempt to provide *restitutio in integrum* with respect to economic and non-economic harm, and personal injury insurance for third parties, is a combination that governments and the public see as unaffordable. Periodic liability insurance crises, notably in the 1970s and 1980s, established this with respect to motor vehicle accidents and industrial injuries, and the civil liability Acts were preceded by a crisis with respect to professional liability insurance for doctors and public liability insurance for local authorities. Neither the efficiency arguments of economists nor the moral arguments of corrective justice theorists have been able to withstand this brutal point, though economists have retained some influence in the field of industrial accidents.

Replacing the common law altogether with a national compensation scheme based on the principles of the New Zealand *Accident Compensation Act 1972* (NZ), as well as of the *Australian Woodhouse Report*,²³ ran into a much more fundamental objection. Even in New Zealand, the Accident Compensation scheme was seen as dealing with a very specific issue and as an exception to the principles of the social security system.²⁴ In Australia, the Poverty Commission — which reported very soon after Woodhouse — derided it as ‘a government effort to keep the rich in the luxury to which they have become accustomed and the poor in the penury which has been their lot’.²⁵ But the Poverty Commission’s own proposal for a guaranteed minimum scheme pitched at its poverty line levels was similarly not taken up by government, and has been a dead letter for decades. A fundamental principle of Australian social security is that its benefits are aimed at meeting frugal lifestyles to those in need as a matter of last resort and that, as a consequence of asset and income testing of benefits together with progressive taxation rates, it is among the most effective income redistribution systems in the world. Another is the ‘active society’ principle, which

²³ National Rehabilitation and Compensation Scheme Committee, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (Report, 1974) (*‘Australian Woodhouse Report’*).

²⁴ *Social Security in New Zealand: Report of the Royal Commission of Inquiry* (Report, 1972).

²⁵ Commission of Inquiry into Poverty in Australia, *Poverty in Australia* (First Main Report, 1975) 33.

emphasises the reciprocal obligations of the system to help beneficiaries to become self-sufficient and take up the opportunities provided.²⁶ In practice this translates into ‘mutual obligation’ schemes; and the Poverty Commission’s guaranteed income was as incompatible with this as the Woodhouse Committee’s adoption of non-means tested earnings related benefits.

The Commonwealth treats it as a corollary of the ‘last resort’ principle that, whenever another scheme provides compensation to a beneficiary, any sums that the social security, healthcare or National Disability Insurance Scheme (‘NDIS’) systems have paid to the beneficiary be a first charge on the sums that the other schemes provide or disqualify the beneficiary from further payments until the alternative compensation has been fully taken into account. This has been the subject of fierce and extended criticism, but the Commonwealth has been firm in its resolve to maintain it. The states have no option but to live with it and this places practical and political restrictions on what alternative schemes they construct. One way of coordinating Commonwealth and state benefits, for example, would be to set all state benefits at the same levels and subject to the same conditions as social security, so that the sources of revenue their schemes rely on simply supplement the overall budgets available for support to the disabled. But this would both require additional, expensive and probably duplicative administrative arrangements between the Commonwealth and the states; and produce strenuous opposition from employers, motor vehicle owners and others who fund state schemes, since they would see no additional benefit to claimants from their contributions.

American insurers opposed the introduction of compulsory vehicle insurance, partly on grounds that they would lose control over premium setting.²⁷ Another way of looking at this issue is to see it as reflecting the relationship between private and public law principles in the construction of Australia’s personal injury compensation schemes. In many ways, of course, public policy considerations dominate, though private law principles still retain a place in them. Most obviously in those areas where there is no statutory scheme in place, private law principles still govern premium setting. The most important of these principles are that insurance should be fully funded (meaning that the income from any period should cover all the liabilities arising during that period), and that premiums should as far as possible be consistent with risk so that higher risk insureds pay more than lower risk ones (otherwise by the process of adverse selection lower risk clients will give up their insurance). When insurance is compulsory in theory full funding is less important, but in practice the states encounter economic disadvantages in assessments of their overall financial

²⁶ Bettina Cass, *Social Security Review: Income Support for the Unemployed in Australia: Towards a More Active System* (Issue Paper No 4, 1988); Bettina Cass, Francis Gibson and Fiona Tito, *Social Security Review: Towards Enabling Policies: Income Support for People with Disabilities* (Issue Paper No 5, 1988). This does not at all imply that the authors approve of the way in which the concept has subsequently been developed and applied.

²⁷ Robert E Helm ‘Motor Vehicle Liability Insurance: A Brief History’ (1968) 43(1) *St John’s Law Review* 25, 48.

situation and credit ratings that have discouraged them from moving away from it altogether. In consequence, they only countenance pay as you go funding for limited periods. Since compulsion removes the possibility of adverse selection the classification of insureds into pools reflecting their levels of risk is also less important, but classification remains standard although without as much rigour. Both motor vehicle and workers' compensation schemes maintain feature rating at a general level, however, workers' compensation schemes often aim to restrict the number of classifications. One consequence of this is a demand for an element of experience rating even where there can be no statistically reliable base for it.

It is, however, inevitable that public policy and law considerations should influence and normally dominate the private law base. Whether a transport or workers' compensation scheme is based on the payment of premiums to an insurer or levies to a public authority, they are fixed or tightly controlled by a public authority and the level and terms of the cover are fixed by statute. Private sector companies may be brought in for particular purposes; such as the collection of premiums and the administration of claims, but the design of the schemes is the responsibility of governments, and their monitoring and supervision (when not the overall management and administration) the responsibility of regulatory authorities.

IV PERSONAL INJURY LAW TODAY: INCOME SUPPORT AND NON-ECONOMIC LOSS

Although there are clearly very significant differences between the *Social Security Act 1991* (Cth) provisions for the sick, injured and disabled as a provider of last resort, and those of the state schemes directed at people affected by specific activities, there are some core concerns that they share. The most obvious is a concern to keep the overall costs of benefits within acceptable limits and to try to prevent them from growing too far or too rapidly. This is achieved by a combination of restricting the eligibility rules for receiving a benefit, controlling the level of benefit, and having a major focus on reducing the length of time a claimant receives a benefit. In the case of the *Social Security Act 1991* (Cth), the first of these has been addressed in the current structure of benefits for sickness and disability. In many ways the basic benefit for a sick claimant, or one with a partial though substantial disability, is the Newstart Allowance, which is generally available to the unemployed.²⁸ Sickness Allowance is restricted to claimants who have current employment to return to,²⁹ and the more generous Disability Support Pension is available only to those whose

²⁸ *Social Security Act 1991* (Cth) pt 2.12. For an account of the introduction of this pattern see, eg, Terry Carney, *Social Security: Law and Policy* (Federation Press, 2006). See also its predecessors: Terry Carney and Peter Hanks, *Social Security Law, Policy and Administration* (Oxford University Press 1986); Terry Carney and Peter Hanks, *Social Security in Australia* (Oxford University Press, 1994). Together, these texts comprise probably the most ambitious and thoughtful attempts yet to put an area of Australian law into social and economic contexts.

²⁹ *Social Security Act 1991* pt 2.14, ss 666ff.

condition precludes them from working for fifteen hours a week, or from training to obtain such work now and for at least two years into the future, and whose physical or mental condition reaches at least 20 points on a legislated impairment scale.³⁰ There is an important definitional issue here.³¹ The law differentiates between impairment and incapacity to work. Impairment is an essentially medical issue as to whether a condition restricts the functional ability of the body or mind; while incapacity to work covers social, cultural and educational factors that combine with the condition to make the prospect of gaining employment improbable. So, the eligibility provision excludes any claimant whose impairment does not reach twenty points on the scale however unlikely it is that they will be able to find work and, effectively, transfers them to the Newstart Allowance.

The basic rate of the Newstart Allowance and Sickness Allowance for a single person as of March 2019 is \$550.20 per fortnight, an amount substantially below the Henderson poverty line for a single person receiving either of the Allowances³² and which has been increased only through indexation for nearly a quarter of a century, despite recently expressed and apparently bipartisan political support for an increase in its real value. The mutual obligation/active society principle makes their receipt subject to conditions as to seeking employment or training for employment, and there are special services available to help the disabled find work. Failure to keep to the conditions applicable to a claimant may result in either Allowance being withheld for a number of weeks, with potential for the amount withheld to easily exceed the fines for many regulatory and minor offences. One of the main objectives of this is to keep the length of time that the Allowances are received as short as possible, so the emphasis is on improving capacity for employment rather than on impairment.

The state schemes have the same core concern for cost and level of benefits, but because they are non-means tested and still earnings-related schemes covering specific types of accidents, they have added accident prevention and safety to the strategy of minimising the period of time for which damages or benefits are calculated or payable. Setting aside for the moment the issue of no fault liability, there has been some tinkering with the criteria for obtaining benefits, most obviously in the restatements of the principles governing liability in negligence for psychiatric harm and recreational activities,³³ as well as reviving demarcation disputes between workers' compensation and motor vehicle schemes, and shaving the limits of the compulsory third party vehicle insurance. More significant has been the statutory expression of

³⁰ Ibid pt 2.3, s 94. The current rate is \$843.60 for a single person.

³¹ Ibid s 16B.

³² The Melbourne Institute of Applied Economic and Social Research, *Poverty Lines Australia, September Quarter 2018* (Report, 2018) 1. The Henderson poverty line differentiates between persons in and out of the workforce because those in the workforce incur extra costs. It treats recipients of the Allowances as being in the workforce because of the costs of fulfilling their obligation to seek employment. On that basis it sets the poverty line exclusive of housing costs for a single person at \$705.04 per fortnight.

³³ Butler (n 15) 207, 210.

the reduction of damages or benefits to persons with blood alcohol levels above prescribed levels or under the influence of alcohol or drugs; and the provisions for the schemes to recover money from those drivers who are uninsured, unlicensed or affected by alcohol and drugs and have the assets to meet the obligation.³⁴

The continuing place of fault as a criterion of eligibility for damages or benefits from state schemes is more puzzling. In all states, it has been a part of the agreements establishing the NDIS that no fault schemes be established to provide funding for services to the permanently and severely disabled, so to that extent no fault schemes have been generally introduced. But in about half the states — including South Australia — victims of traffic accidents otherwise still have to prove that they were injured through the fault of another person,³⁵ although there is no persuasive evidence that the negligence requirement has any deterrent effect on drivers and the fact that many drivers who do not register vehicles or even drive with the consent of the owner of the vehicle are covered by the third party scheme demonstrates clearly that this is a social ‘welfare’ or ‘solidarity’ scheme for the benefit of the injured. The most plausible speculations are that the ‘undemanding’ fault criterion excludes recovery by the driver and in single vehicle accidents and this avoids some problems of moral hazard. Reform of the structure of damages, especially with respect to non-economic losses and the quantification of the proportionate reductions in damages formerly left to contributory negligence, has reduced the administrative costs of the system by curtailing litigation. These reforms make it less worthwhile for governments to risk any political opposition that a shift to no fault might generate. But the experience of the Victorian transport accidents scheme, and the more recent shift by New South Wales, indicates that these are hardly compelling reasons.

In those states where liability still depends on negligence as restated and modified by the civil liability Acts, damages are still normally awarded as a lump sum and their costs are constrained by overall caps on damages for both economic and non-economic losses, prescribed discount rates and limitations on awards of interest. Although the caps are generally relatively high, this lends additional force to the criticism that the negligence system falls short of fully compensating the most severely injured, a view which is only partially offset by the new provisions for lifetime care. This is reflective of a deliberate policy position that there should be limits on the amount of economic loss compensable before social security provisions take over, and that levels of non-economic loss which are incapable of objective assessment should be regulated and limited. The regulation of non-economic loss is commonly achieved by setting a maximum amount of compensation for the very worst cases and matching proportions of that sum to degrees of harm, either by reference to a statutory table, or by requiring courts to produce on a points scale. This has the practical effect of reducing the number of cases in which it is worth disputing the level of the award, and thereby contributes to the overall objective of keeping the cost of the system within the limits of affordable premiums.

³⁴ Ibid.

³⁵ See, eg, the law in the ACT, Queensland, South Australia and Western Australia.

The Northern Territory is alone in having a no fault scheme for motor vehicle accidents that offers compensation until recovery, retirement or reaching pension age that excludes access to all common law remedies. It is also distinctive in that compensation for loss of earnings is not based on the prior earnings of the injured person, but on a proportion of the average weekly total earnings for all employees in the territory.³⁶ Apart from medical, rehabilitation, and attendant care it provides payments for non-economic losses based on an impairment table. Tasmania has long had a no fault scheme which pays limited earnings-related benefits until recovery, retirement or reaching pension age, but the scheme also allows for periodic compensation to be redeemed in a lump sum, and for unrestricted access to common law claims while ensuring there is no double recovery.³⁷

New South Wales now has a no fault scheme which provides earnings related benefits subject to a generous cap on allowable weekly earnings, with the proportion of earnings reducing after three months and the benefit ceasing after two years unless common law proceedings have been instituted.³⁸ There are no statutory benefits for permanent impairments or non-economic loss, though there is a separate scheme that meets the state's obligations related to the NDIS with respect to care and treatment for those with permanent and serious disabilities.³⁹ Access to common law remedies is denied where injuries come within the statutory definition of 'minor', but is otherwise available with earnings related damages subject to the same weekly cap as statutory benefits and a prescribed discount rate. Non-earnings related benefits are only available where there is a minimum assessed impairment level and are subject to a cap, but there is no requirement that the award match a measured level of impairment and — though the State Insurance Regulatory Authority may publish information that may be useful to those assessing them — the *Civil Liability Act 2002* (NSW) leaves it to the courts to establish a tariff system.⁴⁰ That Act also governs specific aspects of the award of damages.

Victoria has an established no fault scheme for transport accidents which provides for earnings related benefits subject to a much more rigorous cap on prior earnings than New South Wales for up to three years, with an impairment assessment test after 18 months which can lead to an award of non-economic loss (*sub nomine* impairment benefit) if the assessment is above 10%.⁴¹ The maximum level of benefit is defined and awards are related to the level of impairment. Common law claims are only allowed where there has been a 'serious injury', which is established where there is a 30% level of permanent impairment according to the statutory tables or where the Commission accepts a permanent impairment as serious. Damages for loss of earnings are subject to both a cap on the prior earnings that can be taken into account

³⁶ *Motor Accidents (Compensation) Act 1979* (NT) s 13.

³⁷ *Motor Accidents (Liability and Compensation) Act 1973* (Tas) ss 27, 28A.

³⁸ *Motor Accidents Injuries Act 2017* (NSW) div 3.3, ss 3.5–3.12.

³⁹ *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW).

⁴⁰ *Civil Liability Act 2002* (NSW) s 17A.

⁴¹ *Transport Accident Act 1986* (Vic) ss 44, 46, 47.

and an overall cap, and damages for non-economic loss to a cap but otherwise to a tariff system devised by the courts. In both cases damages are not to be awarded unless they reach a specified amount. Victoria imposes the lowest limits on both statutory benefits and damages, and there is a clear policy towards skewing benefits in favour of those with lower earnings before the accident that may well go beyond simply aiming to limit the costs of compensating traffic accidents.

The pattern of no fault benefits in workers' compensation schemes is essentially to provide a high level of replacement of prior earnings for a few months, and a lower but still very substantial level for a more extended period with an overall time or financial limit unless a set level of permanent impairment is assessed or occasionally a determination is made that there is no work capacity and that is likely to continue indefinitely. Where the qualification for payments to continue beyond the usual limit is met, there is generally an option to pursue an action for damages subject to provisions to prevent double recovery. Compensation for non-economic loss is almost universally based on assessments of permanent impairment and proportioned to a maximum sum, though there is either a minimum level of impairment imposed, or minor impairments are compensated at very low levels.⁴² But, as with motor vehicle schemes, overall patterns are subject to an almost infinite range of variations in levels of compensation, particular methods for assessing impairments and degrees of impairment that are compensable. Victoria and New South Wales make a creative effort to take social security provisions into account in allowing compensation to continue beyond usual limits where a claimant is working for more than 15 hours a week (and so ineligible for the Disability Support Pension) but is working at the limit of their capacity, and that limit is likely to last indefinitely. The ACT and Northern Territory are the only Australian jurisdictions to bar access to common law remedies altogether, though the Commonwealth Comcare scheme only allows damages claims for impairment and non-economic loss; very serious attempts to provide more general long-term periodic compensation, remove or dramatically reduce rights to their redemption and abolish access to them in Victoria and South Australia did not survive the losses to which the schemes gave rise.

⁴² *Workers Compensation Act 1951* (ACT) ss 37–41 (weekly payments), s 51 (non-economic loss); *Workers Compensation Act 1987* (NSW) ss 33–41 (weekly payments), pt 5 (common law), s 66 (non-economic loss); *Return To Work Act 1986* (NT) ss 61A, 64, 65 (weekly payments), s 71 (non-economic loss); *Workers Compensation And Rehabilitation Act 2003* (Qld) ss 150, 151 163 (weekly payments), ch 5 (common law), ss 178–80, 192 (non-economic loss); *Workers Compensation and Rehabilitation Regulation 2014* (Qld) sch 4A (non-economic loss); *Return To Work Act 2014* (SA) ss 39–42, 56 (weekly payments) pt 5 (common law), ss 57–8 (non-economic loss); *Workers Rehabilitation And Compensation Act 1988* (Tas) ss 69, 69B (weekly payments), ss 133, 138A, 138B (common law), s 71 (non-economic loss); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 152–6 (weekly payments), s 327 (common law), s 211 (non-economic loss); *Workers Compensation And Injury Management Act 1981* (WA) sch1, s 18 (weekly payments), ss 93H–93S (common law), ss 31B–31D, 146A, sch 2 (non-economic loss); *Safety, Rehabilitation And Compensation Act 1988* (Cth) ss 44–5.

V BROADER ISSUES

Underlying the recent history of the common law and the statutory schemes are the basic issues that capacity to work is a very complex concept — especially as labour markets are constantly and rapidly changing — and that how to deal with permanent partial incapacity has always been a central and most difficult problem for compensation schemes. They are exacerbated when the costs of compensating economic loss are increased by longer periods of unemployment, as well as by the development of new medical procedures that command a higher price. These are the basic reasons for the various time and monetary caps on compensation and recourse in cases of serious disabilities (whatever their definition in a particular case) to one-off awards of damages or rights of redemption, generally calculated with prescribed discount rates that are not aimed at reflecting economic reality. They are exacerbated too by the shadow of moral pressures that undeserving claimants should be excluded from benefit. It is, for example, all too easy to contemplate that the positive aspects of the ‘active society’ policy have been warped by those pressures so as to allow the combination of inadequate benefits and stringent controls presently granted to and imposed on claimants for the Newstart Allowance.

The states have also placed a very strong emphasis on accident prevention with motor accident commissions being given major responsibility for road safety, safety campaigns, and a major emphasis on the strengthening of workplace regulation. Motor vehicle schemes have a remit to support rehabilitation. Rehabilitation was also a central element of workers’ compensation schemes, but the inexorable narrowing of the broad and general concept of rehabilitation to return to work is reflected not merely in detailed accounts of the obligations of employers and employees with respect to it, but in the titles of the South Australian and Northern Territory *Return to Work* Acts.⁴³ The operation of the safety and return to work provisions reflects, however, a tension in all the industrial accident schemes. Strict economic theory argues that employers should be liable for the full costs of injuries to workers where it would be cheaper to provide better safety and rehabilitation than to meet them. And the pressure of economic argument has led all the schemes to allow for employers to become self-insurers where the regulators are satisfied that they will be able to meet their legislative liabilities. So large corporations which can afford strong safety protocols, and which can ease injured employees back into the workforce, become self-insurers, leaving smaller employers without comparable levels of resources to the insurance or levy system. So it is those smaller employers with lesser resources who are subjected to a measure of cross-subsidisation of higher risk by lower risk employers as a result of broader grained premium classification, and put pressure on the level of premiums or levies that in turn contributes to fixing levels of benefit which are less than the full costs identified by the economic arguments. In turn the market pressures on the provision of safety and rehabilitation are reduced for the self-insurers as their liabilities are limited, and so have to be augmented by regulations which mainly apply generally and increase the felt demands on the smaller

⁴³ *Return to Work Act 2014* (SA); *Return to Work Act 1986* (NT).

employers. It is an intriguing example of the complexity in balancing private sector and public sector policies and priorities.

With the expansion of no fault schemes, and the failure of guaranteed minimum income schemes to gain political traction, a great deal of attention has turned onto decision-making processes and the resolution of disputes in personal injury cases. These were scarcely matters of any concern until the 1970s; the Report of the Poverty Commission — *Law and Poverty in Australia* — did not address them at all, leaving them to the work of Committee on Administrative Discretions,⁴⁴ and its own focus on test cases and the provision of legal aid.⁴⁵ But after *Green v Daniels*,⁴⁶ much more attention was paid to the decision-making and review process under the *Social Security Act 1991* (Cth). The New South Wales Law Reform Committee's *Final Report on a Transport Accident Scheme* also served to herald a much greater focus on decision-making, review and appeals in the statutory schemes.⁴⁷ Concern to ensure that claims receive full and fair attention always had to compete with the imperative that the schemes would make decisions much more quickly and cheaply than the common law, and a balance has proved very difficult to reach and maintain. Common elements in the no fault schemes, most particularly with respect to workers' compensation, have been initial review at a more senior level than the initial decision-maker, conciliation and the removal of medical issues — in particular, assessments of impairment, and a reduction in the legal input of medical tribunals. Nevertheless, personal injury law has come to be much more involved in public law procedures over the lifetime of the *Adelaide Law Review*.

Commonwealth provision for the needs of the disabled other than income has become a matter of major concern, especially since the International Year of the Disabled in 1981. Disability organisations sought a major change in overall policy, opposing the then dominant one of institutionalisation in favour of emphasising abilities rather than disabilities, and aiming to provide disabled people with the facilities to enable them to live in the community. This led to the enactment of the *Disability Services Act 1986* (Cth), which in turn led to a great reduction in institutional care and a scheme based on subsidies to the providers of disability services. The Productivity Commission found in 2011 that this had led to a wholly inadequate system with a haphazard and inefficient distribution of services (though this was almost certainly

⁴⁴ See generally Committee on Administrative Discretions, Parliament of Australia, *Final Report of the Committee on Administrative Discretions* (Parliamentary Paper No 316, October 1973) ('*Bland Committee Report*'). See also Commonwealth Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee* (Parliamentary Paper No 144, 1971) ('*Kerr Committee Report*').

⁴⁵ Commission of Inquiry into Poverty in Australia, *Law and Poverty in Australia: Second Main Report* (Parliamentary Paper No 294, 1975).

⁴⁶ (1977) 13 ALR 1.

⁴⁷ New South Wales Law Reform Commission, *Accident Compensation: Final Report on a Transport Accident Scheme for New South Wales* (Report No 43, 1984) vol 1, ch 15. See also vol 2, ch 16.

exacerbated by consistent underfunding),⁴⁸ and recommended instead a scheme based on providing disabled people with the means to acquire the services they need. This produced in turn the NDIS to establish and manage the recommendation.⁴⁹ As part of the Commonwealth-state agreements about funding the scheme, the states have legislated no fault schemes providing funds for lifetime services to the long-term disabled.⁵⁰ The NDIS has already encountered not merely funding issues but definitional problems, many of which will be all too familiar to personal injury lawyers. Decision-making and dispute resolution are very likely to be continuing problems simply because schemes that provide services that are tailor-made for each individual are the most complex and difficult to administer.

VI CONCLUSION

Personal injury and disability services law in Australia is a very intricate and detailed affair, the ‘plethora of systems’ criticised by Atiyah being multiplied by the number of states and territories and the different powers constitutionally allotted to them and to the Commonwealth.⁵¹ At the base of it is the social security system, very specifically intended to relieve cases of acknowledged need in the context of a tax-transfer scheme that redistributes income and wealth. It is also specifically designed as a ‘last resort’ scheme, acknowledging and certainly not discouraging the existence of any alternative resources available to those in need. So while a strictly egalitarian approach to the financial needs of the disabled would argue for the abolition of common law recovery and the statutory schemes, Cane’s point that there is no political pressure for either, and that analysis of the present schemes and reform proposals should be pragmatic, must be the basis of any account of them.⁵² The reasons that explain that lack of pressure may begin just as pragmatically from a view that where there is an accessible source of funding (whether from vehicle owners or employers) the losses that Calabresi called ‘secondary’, which extend to the financial dislocations that arise from a sudden loss of income,⁵³ should be ameliorated. This reflects Cane’s position that all the compensation schemes, including the common

⁴⁸ Productivity Commission, *Disability Care and Support* (Report No 54, 31 July 2011) 2–3.

⁴⁹ *National Disability Insurance Scheme Act 2013* (Cth) ss 3–4.

⁵⁰ Where there are existing no fault schemes in place, this is done by adding to the benefits available. In the states where motor vehicle claims are still fault based, specific legislation has been enacted: see, eg, *Lifetime Care And Support (Catastrophic Injuries) Act 2014* (ACT); *National Injury Insurance Scheme Act 2016* (Qld); *Motor Vehicle Accidents (Lifetime Support Act) 2013* (SA); *Motor Vehicle (Catastrophic Accidents) Act 2016* (WA). The *Motor Accidents (Lifetime Care and Support) Act 2016* (NSW) predates the no fault *Motor Accidents Injuries Act 2017* (NSW).

⁵¹ PS Atiyah, *Accidents, Compensation and The Law* (Weidenfeld and Nicholson, 1st ed, 1970) ch 18.

⁵² See, eg, Peter Cane, *The Political Economy of Personal Injury Law* (University of Queensland Press, 2007).

⁵³ Calabresi (n18) ch 13.

law, necessarily involve distributional issues and are therefore subject to political considerations.⁵⁴ Those considerations may vary with different contexts. They are perhaps strongest in the workers' compensation field, where the employer is in an especially strong position to establish standard procedures and protocols and deterrence theory and trade union pressure alike demand acceptance of responsibility where they break down or are ineffective. Most of the issues that are common to all the schemes raise issues of the distribution of losses or responsibility whether as to fixing their limits, fixing eligibility or disqualification from benefit provisions, and the level and duration of benefits and level and classification of premiums or levies as well as the costs of administration. But the influence of matters outside any normal analysis of personal injury theory cannot be excluded. For example, South Australia privatised the operations of the Motor Accident Commission in 2016, a decision which has much more to do with the State's overall budgetary situation and other social priorities than with improving personal injury compensation.

To the extent that common themes can be identified among the multiplicity of schemes, the strongest are at present that the most severely disabled should be given priority, both with respect to income levels and the provision of facilities to give them an acceptable quality of life and opportunity to live in the community on comparable terms with other people. This gives rise to difficult issues in identifying who is to receive these benefits, which are very largely approached by assessing levels of impairment of physical and mental function as well as the even more difficult task of assessing the appropriate facilities. There are short waiting periods before benefits commence that may be covered by sick leave provisions or personal resources. Claimants with medium-term losses and impairments and who recover within set time limits are relatively well covered and protected from the rigours of the social security system, though levels of benefit vary from scheme to scheme and Victoria has a policy which seems directed to preference those on relatively lower incomes. As ever, the most difficult cases are those involving persons with long-term or permanent partial levels of impairment and only limited work capacity, who are most likely to find themselves moving to the social security system after a period to adjust to harsher circumstances.

Fleming's view that the law of torts and social insurance are central to the task of coping with the losses stemming from a mass-producing, industrial and inter-dependent society has been overwhelmed by his prediction that other social welfare programmes might take over the role. The law of torts and social insurance do retain a role, but a lesser one against those of the statutory schemes and the social security system. Australia does not and is unlikely to have the comprehensive social programme he envisaged at any time in the (even unreasonably) foreseeable future. The decades between the first issue of the *Adelaide Law Review* and the first issue of its 40th volume witness the difficulties in designing and implementing even partial schemes. The schemes and the reasons and policies that underlie them from time to time will require description and evaluation for at least as many decades again.

⁵⁴ Cane, *The Political Economy of Personal Injury Law*, (n 50).

