The BENEFITS of COMMON LAW within statutory no-fault compensation schemes

By Nick Parmeter

This article examines the utility of no-fault accident compensation schemes and their capacity to exist alongside common law, fault-based compensation frameworks.

In their purest form, statutory no-fault compensation schemes act as a form of 'social insurance', under which society pools funds through taxation or compulsory levies to care for those injured, regardless of fault or the circumstances of injury. Conversely, fault-based insurance schemes cover only those who can find an at-fault party to sue for damages at common law, who is either insured or sufficiently pecunious to pay for the damages suffered by the injured party.

This article proposes that no-fault statutory insurance and fault-based common law perform two separate and complementary functions, both of which should be embraced by policymakers in this area.

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HISTORY OF STATUTORY NO-FAULT COMPENSATION IN AUSTRALIA

Statutory no-fault compensation schemes first emerged in Australia around the turn of the 20th century, following the importation of the British *Workers' Compensation Act* 1897 into South Australia in 1903. The British Act was based in significant part on German workers' compensation laws of 1884, widely considered to be the first no-fault compensation scheme of its kind in the world.

By 1914, mirroring workers' compensation laws were introduced into all Australian states and the Commonwealth territories.[1] Each of these schemes was largely uniform and permitted access to common law damages where fault could be proven.

Following the New Zealand Woodhouse Commission in 1967,[2] and the subsequent establishment of the New Zealand Accident Compensation Scheme, the Whitlam government attempted to create a similar scheme in Australia, with the introduction of the National Compensation Bill 1975. The Bill, which aimed to establish a comprehensive national no-fault scheme for personal injury, ultimately lapsed following dismissal of the Whitlam government in 1975. Concerns raised about the Bill included the vulnerability of such a scheme to constitutional challenge – a view supported by senior Queen's Counsel who subsequently became High Court chief justices.[3]

Since the 1980s, substantial variations have emerged in both statutory no-fault and common law compensation schemes, as different jurisdictions have sought to address concerns about scheme costs, fluctuations in liability insurance premiums and perceived inconsistencies in court decisions and damages awards. The result today is a myriad of government and privately underwritten compensation schemes, with varying levels of access to common law damages and inconsistent compensation awarded under different statutory schemes and heads of damages. In almost all jurisdictions, statutory frameworks for motor accidents compensation now provide either no-fault compensation to injured drivers,[4] or limit the liability of negligent drivers and compulsory third-party (CTP) insurers.

COST AS A DRIVER OF CHANGE

The most common driver of change to tort law as a basis for compensating injury has been cost. The 2002 Review of the Law of Negligence[5] (Ipp review) was an intergovernmental attempt to find ways of limiting liability of negligent parties, in the context of spiralling insurance premiums in public liability and professional indemnity.[6] While there is still significant conjecture over the cause of the alleged insurance crisis, governments were convinced that the simplest and most effective >>

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means of controlling insurance premiums was to restrict access to common law damages, and thereby the exposure of insurers to tortious claims.

Similarly, frameworks restricting rights of injured road-users and workers have largely focused on limiting the liability of negligent drivers and employers through the imposition of permanent impairment 'thresholds', upper limits on damages for economic and non-economic loss and restrictions on damages awards for attendant care.

Perhaps the most insidious form of limitation has been the imposition of 'discount rates', originally set by the High Court in *Todorovic v Waller* (1981) 150 CLR 402 at 3 per cent to reflect the net present value of compensation for future expenses, which could theoretically be invested for a modest rate of return. Discount rates are now almost universally set by legislation[7] as a tool to arbitrarily lower awards of damages for future care and future loss of income and, accordingly, impact most severely on the youngest and most severely injured.

INCONSISTENCY AS A DRIVER OF CHANGE

A common polemic thrown at the common law is that court-based systems of compensation frequently lead to inconsistent decisions, which can lead to perceived injustices and difficulties in accurately assessing risk under liability insurance policies.

In support of this notion is the consideration that judicial interpretation of tortious concepts of 'reasonable foreseeability', causation and remoteness, for example, have evolved as courts have attempted to determine the boundaries of 'general public sentiment of moral wrongdoing for which the offender must pay'.[8] As observed by McHugh J, "Negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable."[9] Accordingly, one of the commonly acknowledged benefits of the common law – its capacity to evolve and apply to the unique facts of any given case – is also argued to be its weakness when it results in decisions that appear inconsistent or which do not accord with society's moral code of justice.

Ironically, statutory frameworks designed to bring consistency to compensation for personal injury have arguably had the opposite effect. In many jurisdictions, the size of statutory payments and lump sums at common law now depend largely on the jurisdiction and circumstance of injury, rather than the actual impact of the injury on the plaintiff. The basis for inconsistency is now associated less with common law claims and more with the arbitrary application of medical assessment tools, such as the American Medical Association *Guides to the Evaluation of Permanent Impairment*, which preclude any assessment of the subjective impact of injury on the lives of those assessed.

While some jurisdictions have established no-fault arrangements for injury beyond workers' compensation – for example, in relation to motor accidents – most have merely restricted compensation rights for those negligently injured in an attempt to limit costs and reduce insurance premiums.

These inconsistencies have led to calls from the Productivity Commission and others for the creation of a National Workers' Compensation Framework[10] and, more recently, a National Injury Insurance Scheme.[11]

THE RATIONALE FOR NO-FAULT COMPENSATION

At a theoretical level, it is very difficult to mount strong arguments against no-fault injury schemes, which cover care, rehabilitation and treatment.

In principle, such schemes provide immediate care and treatment for all people injured through misadventure, regardless of fault. At-fault parties are treated no differently from those who have been negligently injured, reflecting a social imperative that people should not be 'punished' or left to suffer as a result of actions or inactions that may have very limited application to common perceptions of morality (for example, a momentary slip in concentration). It also protects those who have been injured when there is no one to blame and, therefore, no one from whom restitution can be claimed.

The biggest challenges to no-fault compensation frameworks occur at a practical level, in relation to cost and adequacy of coverage. No-fault schemes that accrue significant unfunded liabilities or require substantial increases in compulsory contributions or government funding in order to remain viable, become politically vulnerable.

For schemes that face rising costs associated with treatment and care, significant pressure emerges to either reduce those costs through reductions in benefits, eligibility and administrative costs, or to increase funding to meet liabilities through compulsory contributions or taxation. For example, in 2008 the New Zealand ACC announced unfunded liabilities of $23.175 billion (roughly equivalent to 17.1 per cent of the national Gross Domestic Product). The deficit has been increasing at a rate of 23 per cent per annum since 2006.[12] This increase prompted the Chair of the ACC to state, in the ACC's 2008/9 Annual Report:

> 'The most significant feature of the ACC's situation at the end of 2008-2009 is that its financial position has become unsustainable... the gap between the Corporation's assets and liabilities has grown to the point where the accounts now show a $13 billion deficit. That deficit grew almost $5 billion in the last year alone ... If this is allowed to continue, the Scheme's very existence could be under threat.'

Similarly, South Australian WorkCover presently has unfunded liabilities approaching $1 billion and charges employers the highest compulsory contributions in the country, at 2.75 per cent of payroll.[13]

These same cost pressures have also resulted in policymakers in some jurisdictions imposing significant restrictions on entitlements. For example, in 1992 the New Zealand Accident Compensation Scheme removed payments for pain and suffering and mental injury in response to cost concerns. In 1997, Victoria's WorkCover scheme restricted statutory benefits, lump sum payments and access to common law due to concerns about cost. These same concerns motivated substantial changes to New South Wales WorkCover in 2001.

However, the common factor in each of these cases is not the degree of access to common law. The New Zealand Accident Compensation Scheme and South Australian WorkCover schemes do not permit any resort to litigation and are some of the worst performing schemes in terms of premiums, cost and benefits to those insured. Conversely, Queensland's WorkCover scheme is very liberal in terms of common law access and has the lowest premiums in the country at just 1.3 per cent of payroll.[14]

Given the lack of solid empirical evidence to refute the utility of common law under no-fault insurance arrangements, it is worth examining some common criticisms.

CRITICISMS OF THE COMMON LAW

Criticisms of the common law include its indifference to those unable to find an at-fault party to sue, perceived delays and expenses associated with adversarial processes and transaction costs arising from legal fees and other costs associated with litigation.

While tort law evolved in line with principles of the criminal law, with emphasis on society's need for punishment, retribution and justice where one person has been wronged by another, it is often argued that the emergence of liability insurance largely nullifies any retributive impact on a tortfeasor arising from a civil claim.[15] Further, discrimination between right and wrong in the sphere of negligence often lacks a moral dimension, bringing into question the need to punish someone judged to be 'negligent' due to what might be a momentary lapse in concentration.[16]

In many respects, emphasis on punishment and retribution as a contemporary rationale for common law is misguided. There is a lack of recent curial discussion to suggest that punishment is an important motivation for common law actions – except perhaps in relation to claims for exemplary damages. In *Gray v Motor Accidents Commission*,[17] the High Court confirmed that criminal law is the more appropriate mechanism for punishment, refusing to order exemplary damages against an intentional tortfeasor who had already been convicted and sentenced for causing >>

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grievous bodily harm.

The common law is also alleged to be administratively expensive, diverting benefits away from actual compensation toward legal and other costs and resulting in substantial delays due to protracted litigation processes. It is difficult to assess the veracity of these claims, due to the tendency of their sponsors to refer to highly exceptional cases to emphasise their point.[18] Reference is also rarely made to the actual cost of each claim under a long-tail liability scheme, which administers benefits over the entire period of the recipient's disability. Moreover, the comparative performance of workers' compensation schemes in Australia suggests that well-functioning hybrid schemes, such as in Queensland and WA, actually spend a higher proportion of scheme funds on direct payments and support services than most pure no-fault schemes.[19]

It is sometimes alleged that common law systems may have poorer return-to-work outcomes and higher disputation than pure no-fault schemes. This claim is simply not reflected in comparative performance of existing schemes.[20] Queensland and WA, which allow comparatively liberal access to common law, have both the lowest rates of disputation and are among the best-performing schemes in terms of return-to-work outcomes. Moreover, reports generated for the heads of workers' compensation authorities demonstrate that hybrid systems allowing access to common law compensation generally have better return-to-work outcomes than pure no-fault schemes.[21]

The deterrence factor

Professor Harold Luntz argues that, given the transaction costs involved, 'the retention of torts can only be justified if it succeeds in reducing the number of injuries, so that its benefits outweigh the costs'.[22] While the size of the deterrent effect of the threat of litigation is contentious, most acknowledge that common law provides at least some incentive for people to take reasonable care.[23]

Studies into the impact of the NZ ACC scheme on regulation of negligent conduct have found:

'...it is far from clear that the no-fault New Zealand accident compensation system provides a superior outcome in relation to medical misadventure than the schemes of any comparable country. Removing incentives is far from costless and most likely results in outcomes that are substantially less equitable.'[24]

This view was given support recently by the Chair of the ACC, who said 'New Zealand's rate of injury in the workplace, on the roads and at home continues to be of concern and in many cases is worse than comparable countries such as Australia'.[25] Similarly, South Australia has one of the highest rates of long-term injury among workers,[26] despite the capacity for experience rating of employers, which the Productivity Commission argues may be more effective than common law at addressing moral hazard.[27]

Potentially, proponents of pure no-fault arrangements underestimate the cost of removing common law as a deterrent. The most substantial savings within any scheme will arguably be achieved through deterring risk-taking behaviour and reducing the incidence of serious injury. By way of illustration, under the NSW Life Time Care and Support Scheme, the annual cost of providing care and support for a catastrophically injured person is around $100,000 per annum.[28]

The need for the powerful incentives provided by fault-based compensation systems appears to be recognised by policymakers, given that many no-fault schemes either permit access to common law or continue to enable fault-based assessments to determine the level of benefits. For example, the Victorian TAC, which is held out as a comprehensive model, is required to reduce statutory benefits under certain heads of damages if a claimant is found to have been intoxicated, culpable or contributorily negligent.[29] Similarly, the NZ ACC scheme permits access to exemplary damages for gross negligence, as a means of punishing or deterring culpable behaviour.[30]

BENEFITS OF HYBRID SCHEMES

Given the above analysis, it is reasonable to contend that common law and no-fault insurance perform separate and complementary functions. The common law provides incentives to take reasonable care and satisfies the victim's (and society's) desire for restitution; while no-fault schemes fulfill the social imperative of ensuring that relief is given to all victims of injury.

As noted above, there is evidence that common law systems are an effective deterrent against negligent or risky behaviour, and that this has substantial benefits in terms of savings in future care expenditure – the most costly element of any long-tail, no-fault scheme.

Allowing access to common law arguably also provides an important incentive to resolve disputes expeditiously, to avoid costly litigation. Anecdotally this is the case under the Victorian TAC, while Queensland WorkCover has both the lowest rate of disputation (3.1 per cent) and the greatest success in dispute resolution in the country, with over 20 per cent of disputes resolved within one month and over 90 per cent within six months. Conversely,

Comcare had one of the highest rates of disputation (12.1 per cent) and the poorest record in resolving disputes, with just 3 per cent of disputes resolved after one month and only 25 per cent resolved after six months.[31]

Common law settlements are also an important feature limiting the costs of no-fault compensation schemes. In this regard, the Commonwealth government's *Comparative Performance Monitoring Report* notes that the Queensland WorkCover scheme has the second-lowest premiums in the country (behind the Commonwealth):

> '...because of the relatively open access to common law provisions, and there are also slightly lower continuance rates. The resulting lower administrative costs along with strong financial and claims management, and business efficiencies allows for lower premiums.'[32]

Moreover, many of the alleged disadvantages of common law schemes are largely resolved within a hybrid, no-fault care and support scheme. Everyone is covered, regardless of fault, injured people have immediate access to care and rehabilitation and they are afforded the choice of seeking justice and independence through lump sum compensation if they have a claim at common law. Concerns about the 'stress' involved with common law litigation[33] are ameliorated, because care and treatment is handled separately and comprehensively covered until the conclusion of any claim.

The foregoing analysis demonstrates that the most effective compensation schemes are those providing a range of benefits through both no-fault and common law. As the appetite for further 'tort law reform' re-emerges, policy makers and legislators would do well to analyse the best-performing hybrid schemes as models for national uniformity. ■

Notes: **1** Industry Commission, 1996, *Workers' Compensation in Australia*, Commonwealth Government, Schedule D. **2** *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) [*Woodhouse Report*]. **3** Harold Luntz, *Looking Back at Accident Compensation: An Australian Perspective* [2003] VUWLRev 16. **4** For example, the Victorian Traffic Accident Commission and the NSW Life Time Care and Support Scheme. **5** Report of the Negligence Review Panel in the *Review of the Law of Negligence*, October 2002, Commonwealth of Australia. **6** *Ibid*, Terms of Reference, viewed at http://revofneg.treasury.gov.au/content/Report/PDF/04.pdf. **7** Except in the ACT, where the default rate set under *Todorovic v Waller* continues to apply. **8** *Overseas Tankships (UK) v Morts Dock & Engineering Co (The Wagon Mound [No 1]* [1961] AC 388 at 426 per Lord Aitken. **9** *Tame v New South Wales* (2002) 211 CLR 317 at 354. **10** Productivity Commission, 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Commonwealth of Australia. **11** Productivity Commission, 2011, *Draft Report of the Inquiry into Disability Care and Support*, Commonwealth of Australia, draft recommendation 16.1. **12** Department of Labour, 'Quality Assurance Review of PricewaterhouseCoopers' June 2009 Valuation of ACC's Outstanding Claims Liabilities (Sept 2009), pii. **13** Workplace Relations Ministers Council, Comparative Performance Monitoring Report, 12th edition, December 2010, Commonwealth of Australia, p23. **14** *Ibid*. **15** Productivity Commission, *Op. cit*, 11, p15.35. **16** *Ibid*, p15.34. **17** *Gray v Motor Accidents Commission* (1998) 196 CLR 1. **18** For example, the Productivity Commission (*Ibid*) refers to *Nagle v Rottnest Island Authority* [1993] as evidence of inconsistent judicial reasoning and undue delay – a case governed by the common law as it was in 1977 – without referring to significant statutory changes to public liability since that time. **19** Comparative Performance Monitoring Report (CPMR), 12th Edition, p33. **20** *Ibid*, pp9 and 37-8. **21** Australia and New Zealand Return to Work Monitor 2009/10, *Heads of Workers' Compensation Authorities*, August 2010, pi. **22** H Luntz, *Supplementary Submission to the Productivity Commission Inquiry into Disability Care and Support*, 29 December 2010 (submission No. 605). **23** Productivity Commission, *Op. cit*, 11, part 15.9. See, also, P Cane, *The Political Economy of Personal Injury Law*, University of Queensland Press, St Lucia, Qld, 2007. **24** Bronwyn Howell, *Medical Misadventure and Accident Compensation in New Zealand: An Incentives-Based Analysis*, June 2004, New Zealand Institute for the Study of Competition and Regulation Inc, Victoria University, p23. **25** New Zealand Accident Compensation Corporation *Annual Report 2009*, p5. **26** *Ibid*, 13, p8. **27** Productivity Commission, *Op. cit*, 11, p15.41. **28** NSW Life Time Care and Support Authority's *Annual Report 2010* (p30) states that its care and support expenses for 390 participants are around $38 million annually, equating to $100,000 per person. **29** *Transport Accident Act* 1986 (Vic), ss40, 102 and 110. **30** *Couch v Attorney-General* [2010] NZSC 27. **31** CPMR, *Op.cit*, 13, pp36-7. **32** CPMR, 10th edition, p18. **33** Productivity Commission, *Op.cit*, 11, pp15.29.

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