COMPENSATION REFORM SUBMISSION

NSW Legislative Council Inquiry – closing date 11 March 2005

Personal injury and disability compensation reform:

the need to provide for care, irrespective of blame

Submission by Ian M Johnstone

Submission

The ideal reform would be a National Compensation and Rehabilitation Scheme as recommended in the Woodhouse Report. A recommendation could be made to the State Government that it should seek the cooperation of the Federal Government in achieving this. Failing that, NSW should implement the recommendations of the Sackville Report for a no-fault traffic accidents scheme for NSW. (For references to these reports, see list below).

In a nutshell

Our present "system" of compensation for injuries and disabilities from accidents is antiquated and obsolete. It does not provide rehabilitation and compensation for all accident victims fairly and equally. Recent so-called 'reforms' to tort law make the expensive and lengthy litigation process a worse travail and financial disaster for the unsuccessful plaintiff, and a gross burden even for the successful one; it is now higher risk for reduced returns.

The recent amendments, as neatly summarized in the Committee's Information Sheet, have increased the absurd complexity of compensation laws, and done nothing to improve fairness to people disabled in accidents. No-one seems to know the percentage of those disabled, even for example in car accidents, who successfully negotiate the maze of laws to recover compensation, but it must currently be about 25% or less. Our concern must now surely be for those in the unsuccessful majority, who are increasingly reliant on their friends and colleagues for fund-raising to help them out.

It is time we had a calm assessment of our "system", which often overcompensates a few, and provides no compensation at all for the rest, and in between these extremes has a no-fault system of moderate compensation for injuries which happen at or on the way to work. The "system" has some absurd anomalies and some undesirable tendencies. It could be, and should be, radically reformed just as the New Zealand system was over 25 years ago.

Some anomalies.

1. A few benefit handsomely from their injuries, while others who cannot find someone to blame who is insured, get nothing. Before the recent tort law reforms about one third of all car accident victims with substantial injuries or disabilities in NSW managed to recover compensation. So there are two classes of people in wheelchairs: those who had good lawyers and got a verdict or settlement ("the settlement-rich") who

now own race horses or whatever, and those with only the Commonwealth Disability Allowance, who usually struggle financially just to live.

2. The "settlement-rich" are free to spend their money foolishly, and when they do that, they can then receive the Disability Allowance.

3. The "settlement-rich" often die leaving their money as a windfall to their spouse and/or children.

4. High contemporary insurance premiums for Public Risk Insurance eg for activities like riding a horse, playing football, surfing, bush walking, ballooning, abseiling, white water rafting, hang-gliding etc. – normal activities for active and adventurous Australians – have now curtailed many of these activities, even though most have a very low accident record.

5. Doctors, and especially obstetricians, now have huge professional indemnity insurance premiums, which push them out of bulk billing. Many doctors also now suffer low morale arising from the risks and realities of lengthy litigation.

6. When relatives recover compensation after an accidental death, their entitlement is discounted for any contributory negligence by the deceased. The genuine needs of the relatives in such circumstances should be the sole test.

7. The procedure for recovering damages is slow and hazardous. First the intending plaintiff must find a lawyer to take on the case on reasonable terms. Some lawyers require an agreement under which a large proportion, up to 40%, of the damages recovered go to the lawyer as costs if there is a win and nothing to the lawyer in an unsuccessful case. Secondly a defendant has to be found, and that defendant has to be insured. A further hazard is that the insurance company doesn't collapse like HIH Insurance or go overseas like James Hardie. Thirdly the defendant has to be proved to be negligent. In many cases this requires numerous witnesses, the police, eye witnesses, expert witnesses – specialist doctors, and so on. Fourthly the disabilities have to be substantial enough to pass the threshold test tightened in the recent NSW tort law reforms.

<u>Some undesirable tendencies.</u>

1. Injured people tend to find someone to blame, no matter how implausible this may be, rather than taking responsibility for their own actions, as the money rewards for succeeding in this are so great, and the alternative is so bleak.

2. Lawyers acting for injured plaintiffs on a "no win, no costs" basis long to manipulate evidence to get a favourable result.

3. Highly paid expert witnesses, who agree to be paid only if the plaintiff wins, lack the appearance of objectivity.

4. Courts tend to find negligence where no reasonable person would, such as a Council not specifically warning of sandbanks in the surf, and harbour or riverside house owners not specifically warning trespassers not to dive into shallow water. Councils are terrified lest someone trip on a footpath, and children's play equipment is often removed or reduced for fear of someone being injured and suing. Courts make these judgments because they know that there is no other form of compensation available. There is a tendency for judges at first instance to interpret negligence as any departure from the usual way of doing things, so conventional procedures become a legal form of political correctness, and innovative and improved methods are inhibited.

5. Doctors who would normally share experiences and seek second opinions are reluctant to do so, as this can be interpreted as an admission of error, and lead to their being sued. Doctors should actually learn from their mistakes, not hide them.

6. Premiums for Public Risk Insurance have risen so much that some events and activities, particularly those involving horses, have ceased, or become almost uneconomical. One well-meaning Sydney radio talk-back hostess thought she was being helpful when she asked a caller complaining about this problem "But have you thought of holding your gymkhana without horses?"

<u>What to do?</u>

Blame is a good principle upon which to punish a defendant, but no principle at all upon which to compensate a plaintiff. Compensating the disabled, and punishing the culpably careless, should be kept separate. We need to abolish Common Law claims for damages and to expand our existing no-fault schemes to cover *all* accident victims, regardless of whether their injuries are received at work, going to work, in a car accident, playing football, falling from a horse, or whatever.

Since 1972 in NZ, every person genuinely disabled in an accident has received from a state-administered fund, without any need for litigation, an adequate amount for rehabilitation where that is possible, and compensation for lasting disabilities. Those on high incomes can take out personal accident insurance cover to supplement the "no-frills" compensation payable under the scheme. The fund is raised from all those people who pay accident insurance premiums under a "system" like ours. Negligence does not have to be proved. Culpable carelessness causing personal injuries is punished separately, just as it is here in Australia, under Occupational Health and Safety legislation, by motor traffic infringements, doctors' disciplinary tribunals and so on.

Victoria, Tasmania and the Northern Territory already have no-fault schemes to compensate car accident victims. Three Canadian provinces have no-fault schemes to compensate general accident victims - British Columbia, Saskatchewan and Manitoba. A no-fault scheme was recommended to the Commonwealth Government in 1974 in the Woodhouse Report. Australia could learn now and benefit from reviewing the experiences of the existing State, Canadian and New Zealand schemes.

It is time for radical reform, and for uniform compensation laws in Australia. The Commonwealth Government has power to do this as a form of Social Security, with the

cooperation of the States in abolishing their existing "systems". It is time to remove the absurd anomalies and undesirable tendencies that make our "systems" so objectionable and unfair.

Some perceived objections to radical reform.

There are five major commonly held ideas which cloud clear thinking about genuine compensation reform. None of these preconceptions are substantial enough to prevent the introduction of a national, full, no-fault scheme of compensation and rehabilitation as proposed by the Woodhouse Committee to the Federal Government in 1974, but together they have so far subtly combined to form a blockage to any real reform. As Sir John Barry put it in 1964:

> *An essential pre-requisite to a rational consideration of the question is to escape from the shackles of the past and the constraints of familiar ways and the tug of self-interest.* (37 ALJ p344)

Thomas Carlyle famously remarked *Reform! Why talk of reform? Things are bad enough as they are!*

1. The Common Law of Negligence is somehow sacred.

The truth is that the Common Law of Negligence has served society adequately for a long time. Its roots are deep, but it came into its own when trains began to injure and kill people, and to set fire to crops adjoining railway lines. It adapted gradually and well to the internal combustion engine form of transport. Like all laws, however, it is a social expedient, and it has been rendered inadequate by technological improvements in transport, huge increases in the number of travellers by road, rail and air and the consequent increase in the number of people injured and killed . It should be recalled that the liability of airlines has been strict since about 1950, so there has been no need to prove negligence resulting from air accidents, and there has been an upper limit or cap on the compensation amount recoverable. So there has been a no-fault scheme in force for air passengers for over 50 years. Some believe it would somehow be sacrilegious, heretical, or at least unthinkable, to abolish Common Law Negligence claims for damages for personal injuries in order to substitute a legislative scheme of compensation, as NZ did in 1972. Patently that is absurd. This view is confirmed by many leading legal authorities on Tort Law, including Profs Fleming, Luntz, Winfield, Mazengarb and Atiyah, as well as many other lawyers including Oliver Wendell Holmes, Sir John Barry , Sir Victor Windeyer and Mr Justice Frank Hutley. (see list of references below).

2. Blame and Compensation are inseparable.

There is certainly a strong natural tendency to look for someone to blame after an accident, and even after a natural disaster like the recent Indian Ocean tsunami. This instinctive reaction has the benefit of ensuring causes of accidents are sought with fervour, although not always with calm dispassionate, scientific objectivity.

> *In the absence of God, blame has become the prevailing religion of the age.…The concept of blame permeates every area of life. The compensation culture demands that someone be held responsible for every scrape and tear.* (Simon

Jenkins *Fault Lies in Ourselves, not the Stars* in an article about the recent tsunami disaster, reprinted in the Weekend Australian 1-2 January 2005 p20 from The Times).

Whenever there is an accident causing injury or death to a person, or substantial damage to property, there are four main questions to be answered:

(a) How and why did it happen and whose fault was it?
(b) Should anyone be punished for culpable carelessness?
(c) Is it likely to happen again in a similar way and should any steps be taken to prevent a recurrence?
(d) What help, financial and otherwise, should be rendered to the injured or disabled, or the relatives of the deceased?

These four issues are separate matters and best considered separately. To combine blame and compensation enables plaintiffs to use the law as a form of payback, to make the defendant driver's or doctor's or employer's life as uncomfortable as possible by means of extended litigation. Vengeance is not, of course, an acceptable, civilized or legitimate use of the law.

Coroner's inquests were originally society's way of gathering information about causes of fires and sudden unexpected deaths, so that appropriate action could be taken to prevent an avoidable repetition of the fire or death. Medical researchers into sudden deaths from heart attacks, for instance, benefited from coroners inquests' findings. Unfortunately now the coroner's inquest has shrunk in importance and usefulness, largely because of the unwillingness of the police to do the investigating and paperwork in circumstances where it is unlikely that any culprit will be criminally prosecuted. This has meant that the original purpose of inquests has largely been lost. The original role of inquests could be restored and possibly enlarged to cover accidents resulting in serious injuries, if a no-fault scheme of compensation is introduced. In any case, Common Law Negligence claims are not an efficient way of finding ways of preventing accidents.

Blame is a useful stimulant to the discovery and prevention of accidents, but there is no reason to make compensation claims of genuinely disabled people depend on finding someone to blame.

3 <u>There are insuperable constitutional problems in enacting a National Compensations and Rehabilitation Scheme.</u>

If there are any Constitutional problems, which from the Woodhouse Report seems to be doubtful, these could be overcome by the States agreeing to pass complementary enabling legislation so that a Federal Act could be validly enacted. Basic validity for Commonwealth legislation for a national compensation and rehabilitation scheme comes from the Social Welfare power

4. <u>Any radical change would disrupt the lives and incomes of some lawyers to an unacceptable degree.</u>

The present "system" of compensation is lucrative for plaintiffs' lawyers and lawyers' associations oppose all changes to it. The views of those lawyers practising in personal injury claims are strongly and regularly stated by the Plaintiff Lawyers Association, but seldom stated directly and explicitly. They mostly simply argue defensively against any change to the present law as being unfair to plaintiffs, and then deny that any self-interest is motivating them. Non-lawyers, and those without a vested interest, more readily understand that all progress and social change brings with it some hardship for some people who have to adapt their livelihoods to the changes. This happens regularly with events like company takeovers, the downsizing of large corporations like Telstra and the failure of big companies like Ansett Airlines, HIH Insurance, and so on.

5. Currently both Conservative and Labor Governments prefer not to set up any more government-run welfare schemes.

The current fashion is to privatize or outsource as many government activities as possible, including even Telstra. Governments accept existing welfare schemes including Centrelink, Medicare and government superannuation schemes, but they are wary about adding any more social welfare schemes, which is what a National Compensation and Rehabilitation Scheme would be. For example, moves to introduce a National Dental Health Scheme have been unsuccessful. The only answer to this attitude is like the one Churchill gave about democracy being a terribly costly and inefficient form of government, but all the alternatives being worse. His actual words in the British House of Commons on 11/11/1947 were "it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time."

Conclusion

A comprehensive no-fault scheme has been referred to as a radical reform, but it is really only curing an anomaly. We are strangely and illogically inconsistent in the way we provide government help for our sick, unemployed and needy and those disabled in an accident. If I am sick, I am treated under Medicare regardless of my fault in bringing about my own sickness, even if my problems come from obesity or addictions to alcohol, nicotine or other drugs. When I am old, or in need of a pension, again the government comes to my aid, subject to my means of supporting myself. Again fault is not a factor in deciding my eligibility for any pension, sickness benefit, disability allowance, supporting parent pension or unemployment benefit, except, of course, when my unemployment is virtually self-inflicted. However, when I am disabled by injuries in an accident, or someone I depend on financially is killed accidentally, the government virtually turns its back on me and leaves me to the mercy of the courts and lawyers. I must take my luck in the lottery of litigation and sue for damages for negligence, except if I am entitled to workers' compensation which is a no-fault scheme.

But why does it matter so much how I was disabled? What difference should it make if it was in an accident at work, in a car, train, plane, helicopter, bicycle etc. In law at present it makes a huge difference, both in what compensation I can receive and also whether I can receive any compensation at all.

We are fastidious about fairness in administering welfare payments. Yet we live with huge anomalies in a primitive, obsolete muddle of death and accident compensation schemes.

Genuine and comprehensive compensation reform, based on the NZ experience, is the last big social welfare step we must take to become a caring , civilized society.

Some Useful References

1. 1964. Sir John Barry *Compensation without Litigation* 37ALJ p339. He refers to earlier books and articles on p342. This is a classic statement of the facts and principles supporting a no-fault scheme.

2. 1968. D.W. Elliott and Harry Street *Road Accidents* (Penguin Books 295pp)

3. 1972. *No Fault Liability* 107pp published Victorian Council and Law Institute of Victoria.

4. 1974. *Compensation and Rehabilitation in Australia* Report of the National Committee of Inquiry (Australian Government Publishing Service 407pp – "the Woodhouse Report").

5. 1980. P.S. Atiyah *Accidents, Compensation and the Law* (Weidenfeld and Nicolson 3rd edition 695pp – 1st edition 1970).

6. 1982 *Accident Compensation: try again* Reform – Journal of the Commonwealth Law Reform Commission pp7-9. This is a brief but helpful comment about the reference of accident compensation to the NSW Law Reform Commission.

7. 1982. *Accident Compensation Issues Paper* NSW Law Reform Commission 106pp.

8. 1984. Prof. John G. Fleming *Is there a Future for Tort?* 58ALJ pp131-142. This is helpful for its references as well as for its characteristically lucid and persuasive content.

9. 1984. *A Transport Accidents Scheme for New South Wales* NSW Law Reform Commission Accident Compensation Final Report Oct 1984 LRC 43/1 2 vols 396pp and 384pp ("the Sackville Report"). The Summary of Recommendations is on pages xxxix to xlix in vol 1.

10. 1990. Ian Malkin *Unequal Treatment of Personal Injuries* 17Melbourne Law Review pp685-713. Although some of the details in this article are now dated, most of the anomalies remain.

11. 1996. Prof. Patrick S. Atiyah *Personal Injuries in the 21st Century: Thinking the Unthinkable* This is a chapter in *Wrongs and Remedies in the 21st Century* ed. Peter Birks (Clarendon Press, Oxford pp1-46)

12 1999. Richard Gaskins *Rebuilding the New Zealand Accident Compensation Scheme: an International View* 7Torts Law Journal pp289-295.

13. 2000. Stephen Todd *Private Sector Delivery of Accident Compensation in NZ* 11Australian Product Liability Reporter no 1, Feb 2000 pp4-9.

14. 2002. Richard Torbay MP, Member for Northern Tablelands, speech and debate in the NSW Legislative Assembly 5-6 September 2002, calling for consideration of a personal injuries no-fault compensation scheme. Hansard 52nd Parliament of NSW.