

Submission of Harold Luntz

1. I am an Emeritus Professor in the Law School of the University of Melbourne.
2. For over 40 years I have taught and conducted research into the law relating to personal injuries and alternative systems of compensation.
3. During this period, I have written books and articles on the law of torts and the assessment of damages for personal injuries among others. My work has been widely used by law students and legal practitioners and frequently quoted in the courts. For 18 years I have also been the Editor of the *Torts Law Journal*.
4. In 1975 I wrote a small book, *Compensation and Rehabilitation*, which was a review of the *Report of the National Rehabilitation and Compensation Committee of Inquiry* (Chairman, A O Woodhouse). Subsequently, I worked as a consultant to the Senate Committee on Constitutional and Legal Affairs in its inquiry into *The Clauses of the National Compensation Bill*.
5. Ever since reading the *Report of the New Zealand Royal Commission of Inquiry into Compensation for Personal Injury*, 1967, I have been a critic of the current systems of compensation. These systems are inequitable, since they treat people with similar needs differently:
 - An employee disabled as a result of work receives one level of compensation (which may itself vary from State to State and according to whether the employer is an agency of the Commonwealth or not);
 - someone disabled as a result of a transport accident receives another level of benefits, in some jurisdictions only on proof of fault; in others on a no-fault basis, sometimes supplemented by damages;
 - people disabled by defective products or professional negligence may be entitled to still another level of compensation;
 - while those disabled congenitally or by sickness are usually limited to social security benefits.The multiplicity of schemes also causes confusion among people seeking to ascertain their rights.

6. In particular, the common law provision of lump-sum damages as compensation —
 - usually requires proof of fault on the part of another, which is often difficult to satisfy;
 - denies an injured person who is contributorily negligent a substantial proportion of the damages;
 - is slow in providing benefits to those who qualify for them;
 - often proves inadequate in meeting the needs of the most seriously disabled;
 - is expensive to administer; and
 - may be prejudicial to rehabilitation.
7. The common law has not proved immune from legislative interference. The statutory imposition of high discount rates in the calculation of the damages for future loss has been especially detrimental in meeting the needs of the severely disabled who qualify for a lump sum, which is supposed to provide for the need for care.
8. Over the years I have come to accept that —
 - there should be no differentiation among disabled people whatever the cause of the disability;
 - there should be community responsibility for meeting the needs arising from disability; and
 - a social insurance scheme should provide the funding for this purpose.
9. The social insurance scheme should replace all the existing compensation schemes. In particular, the fault system of common law damages should not be available as a supplement or alternative for those who qualify for assistance under the social insurance scheme. This is because allowing some disabled people to access common law damages would mean that —
 - inequities would persist, since inevitably some people would receive more compensation than others, though their needs and disabilities may be the same;
 - wasteful costs would continue to be incurred in deciding who is to receive extra benefits and who is to be excluded from them;
 - the disability of some people would be consciously or unconsciously aggravated; and
 - rehabilitation would often be discouraged.
10. There is little evidence that the common law system is effective in reducing the incidence of disability. Even if it was, there is no logical reason why there should be a link between compensation and deterrence of unsafe behaviour. In trying to achieve both at once, the common law fails at both. There needs to be a separation of compensation for the disabled from the provision of incentives to take care on the part of those who cause disability.

11. The costs saved from the abolition of the common law remedy and its alternatives would be better spent on increasing the benefits to be received by the disabled under the social insurance scheme.
12. I have not supported my assertions above with references to authority. However, if the Commission requires such references, I would be happy to supply them.
13. I did not previously make a submission because I knew that I would be overseas during the period when the Commission was receiving submissions and holding public hearings. The extension of the date for making submissions has enabled me to submit this one.

Harold Luntz
13 August 2010