

Supplementary Submission of Harold Luntz

References

1. In my submission of 13 August 2010 (submission no 304), I argued that the proposed national disability insurance scheme should be the exclusive remedy for people eligible for its benefits. In particular, I contended that there should be no access to common law actions for damages, which —
 - are expensive to administer,
 - are slow to deliver compensation,
 - create inequities between people whose entitlements arise from different causes
 - and may have an adverse effect on rehabilitation.

Further, lump sum awards of damages may be inadequate to meet the long-term needs of the seriously disabled. Retention of the tort system of compensation for personal injuries could be justified only if it could be shown to encourage safety so as to prevent injury and disease to an extent that outweighed all these disadvantages. There is little evidence that this is the case.

2. I based my submission on over 40 years of teaching and research into methods of compensating for personal injury. I refrained from supplying any specific references for the assertions I made, though I offered to provide them if required. I was subsequently requested by the Commission to provide references, particularly, references supporting my criticisms of common law damages as being expensive to administer and potentially prejudicial to rehabilitation. I was also asked to support my view that there needs to be a separation between the provision of compensation and the provision of incentives to take care and to provide some evidence and examples where alternatives to common law deterrence perform well. I am happy to do so.

Official Reports

3. First, I should remind the Productivity Commission that it and its predecessor body, the Industry Commission, have investigated these issues in the context of workplace injuries and disease on more than one occasion. In its report *National Workers' Compensation and Occupational Health and Safety Frameworks*, these issues were fully considered and the Commission concluded by recommending —

that common law should not be included in a national framework for workers' compensation on the grounds that it:

- o does not offer stronger incentives for accident reduction than a statutory, no-fault scheme;
- o can provide lump sum compensation which may prove inadequate to the longer term needs of seriously injured workers;
- o may over-compensate less seriously injured workers who, in the normal course of events, could be expected to rehabilitate and return to work;

- o delays rehabilitation and return to work ...; and
- o is a more expensive compensation mechanism than statutory workers' compensation.¹

The evidence in support of these conclusions and the arguments for and against the retention of the common law action are set out in Chapter 8 of the Report (and also in similar, but not identical, terms in the Interim Report, 2003, Chap 7). Earlier, the Industry Commission, *Workers' Compensation in Australia*, “found that common law is not a cost-effective means of promoting prevention”.² The Industry Commission’s recommendation in this report that access to the common law be removed was cited in its report the next year on *Work, Health and Safety*.³

4. Previously, the issues were considered in the two inquiries over which Sir Owen Woodhouse presided, the New Zealand Royal Commission of Inquiry into Compensation for Personal Injury and the Australian National Rehabilitation and Compensation Committee of Inquiry. Both these reports emphasised that, as a matter of priorities, safety (or prevention) should come first, rehabilitation second and compensation third. Both inquiries concluded that the common law action was ineffective as a deterrent and was often harmful towards rehabilitation. They made recommendations for compensation to be provided separately from deterrence and rehabilitation. They concluded that this could be done at much less cost than under the common law system.⁴
5. In 1981 the New South Wales Law Reform Commission was given a reference to inquire into compensation for personal injury and death suffered through the use of a motor vehicle or other means of transport. The terms of reference included whether any no-fault scheme should be in substitution for all or any existing law. After an extensive inquiry, including commissioning much original research, it recommended a no-fault compensation scheme for transport accidents and that the common law action for negligence should be completely replaced by the new scheme.⁵ Chapter 3 of its report contains a full description of the common law negligence action, with arguments in support and against, including the issues of deterrence, delays, effects on rehabilitation and costs.⁶

¹ Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No 27, Canberra, 2004, p 248.

² Industry Commission, *Workers' Compensation in Australia*, Report No 36, Canberra, 1994, p 60.

³ Industry Commission, *Work, Health and Safety: An Inquiry into Occupational Health and Safety*, Report No 47, Industry Commission, Melbourne, 1995, p 186.

⁴ See, eg, *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry*, Govt Printer, Wellington, 1967, Pt 1 (Summary of Report), paras 2-3, Pt 3 (The Common Law Action), Pt 7 (Safety and Rehabilitation); *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry*, Australian Government Publishing Service, Canberra, 1974, Vol 1, Pt 3 (The Negligence Action), chaps VII (The System in Practice), VIII (The Value of Damages), IX (The Effect on Rehabilitation) and paras 151-62 (The Cost of the System); Vol 2 (Rehabilitation and Safety), including chap XXXV (Economic Incentives).

⁵ *A Transport Accidents Scheme for New South Wales*, The Commission, Sydney, 1984.

⁶ See especially paras 3.37-3.39 (Fault and Deterrence), 3.71-3.77 (Effects of the Common Law on Rehabilitation), 3.84-3.93 (Burden on the Court System and Legal and Administrative Costs).

6. Following the report of the NSW Law Reform Commission on a Transport Accidents Scheme, the Victorian Government in May 1986 produced a Government Statement on Transport Accident Compensation Reform.⁷ At that time, Victoria operated a common law scheme with limited no-fault add-on benefits. Chapter 2 (The Need for Reform) deals, inter alia, with the financial concerns that threatened the viability of the dual system. Chapter 3 answers the submission of the Law Institute of Victoria, which argued for the retention of common law. This Government Statement led to the creation of the present scheme, which is administered by the Transport Accident Commission (TAC). Although the Government was forced to compromise politically so as to retain some scope for the common law, the scheme has been largely a no-fault one. By most measures, it has proved to be highly successful in relation to safety, rehabilitation and costs. Almost certainly, it would have been even more successful if the Government's proposal for the complete abolition of the common law from the area had been able to be implemented.

Academic Proposals for Comprehensive Schemes

7. Several academic writers have proposed comprehensive social insurance schemes, in the context of which they have considered the defects of the common law and proposed its abolition. These include Terence Ison, who wrote his first book on the subject in England.⁸ Like the two Woodhouse reports, Ison recognised that accident prevention should have priority over the other objectives of a compensation scheme.⁹ He accordingly included a whole chapter (Chap 5) on accident prevention. In this, he evaluated existing deterrents in relation to road and industrial accidents, occupiers' and manufacturers' liability. In the area of employers' liability, he found that liability insurance and the practices of insurers in setting premiums meant that "[f]ar from being an aid to accident prevention, tort liability is in some respects a definite hindrance".¹⁰ Overall, he concluded that "although the value of tort liability as a deterrent against unsafe conduct, or as an incentive to care, varies ... and is extremely difficult to evaluate, it is thought on the whole to be negligible".¹¹
8. Ison's subsequent experience as Chairman of the Workers' Compensation Board of British Columbia did not change his view that the common law action for damages should be abolished. In his later book on the policy choices in the design of a system of compensation, he stated that the argument for the abolition of tort liability rests on the following propositions:
1. In relation to damages for personal injury, tort liability is unjust, inefficient, wasteful, and a barrier to the adoption of a more efficient system.
 2. The process of claiming damages causes therapeutic harm (explained in chapter 5).
 3. Tort liability has a negative influence on rehabilitation (explained in chapter 6).

⁷ Victoria, *Transport Accident Compensation Reform: Government Statement*, Govt Printer, Melbourne, 1986.

⁸ T G Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation*, Staples Press, London, 1967.

⁹ Ibid, p 80.

¹⁰ Ibid, p 85.

¹¹ Ibid, p 89.

4. It cannot be shown that overall and on balance, tort liability has any beneficial influence in relation to health and safety.
 5. If tort liability does have any beneficial influence on health and safety, it is in ways that could be incorporated in the alternative system.
 6. The replacement of tort liability by a social insurance system would promote health and safety in ways that are not possible through tort liability.¹²
9. Other writers have reached similar conclusions in calling for the replacement of the tort-insurance system by a system of social insurance. At the same time as Ison put forward his views in *The Forensic Lottery* and the Woodhouse Royal Commission reported in New Zealand, in the United States Marc Franklin described a plan, which he conceded was not fully elaborated or final, for “Replacing the Negligence Lottery” with “Compensation and Selective Reimbursement”.¹³ He argued for separation of the compensation and safety goals, preferring to achieve the latter through administrative remedies and reimbursement in some instances on the basis of causation, not fault. Also in the United States, Steve Sugarman advanced similar arguments first in a paper¹⁴ and then more fully in a book.¹⁵ Having considered the economic deterrence arguments, he concluded that there was “little reason to believe that personal injury law today actually serves an important accident-avoidance function. Worse, to the extent that it does influence behavior, there is good reason to think that much of the result is socially undesirable.”¹⁶ Similar views were expressed by Bernzweig in considering the deterrent effect of tort liability in presenting the case for a comprehensive scheme of injury reparations.¹⁷
10. In 1970, Patrick Atiyah published in England his groundbreaking book *Accidents, Compensation and the Law*.¹⁸ Part 3, The Tort System in Operation, included Chapter 11, The administration of the tort system, describing the importance of settlements and the negotiations involved. Part 5, The Overall Picture, included Chapter 19, An appraisal of the fault system, and Chapter 21, The cost of compensation, comparing the costs of the tort system, the social security system and criminal injuries compensation. In Part 6, Objectives, accident prevention by means of the tort system and its alternatives was

¹² T G Ison, *Compensation Systems for Injury and Disease: The Policy Choices*, Butterworths, Toronto, 1994, p 50.

¹³ M A Franklin, “Replacing the Negligence Lottery: Compensation and Selective Reimbursement” (1967) 53 *Virginia Law Review* 774. The description by Ison, Franklin and others of the tort system as a “lottery” has recently been criticised as an inaccurate metaphor, which tends to obscure the real issues involved: T D Lytton, R L Rabin and P H Schuck, “Tort as a Litigation Lottery: A Misconceived Metaphor” (2010) Forthcoming *Boston College Law Review*. These authors “emphatically do not oppose no-fault alternatives to tort”, whose merits they do not consider in this particular essay.

¹⁴ S D Sugarman, “Doing Away with Tort Law” (1985) 73 *California Law Review* 555 (Sugarman, Tort Law).

¹⁵ S D Sugarman, *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business*, Quorum Books, New York, 1989.

¹⁶ *Ibid*, p 3. His sources and refutation of contrary arguments are set out in the notes at pp 24-34. See also Sugarman, Tort Law, above n 14, at 587 (“Based on a review of the literature, I conclude that theorists who defend torts on deterrence grounds have no convincing empirical support for their position”).

¹⁷ E P Bernzweig, *By Accident, Not Design: The Case for Comprehensive Injury Reparations*, Praeger, New York, NY, 1980, pp 65-71.

¹⁸ P S Atiyah, *Accidents, Compensation and the Law*, Weidenfeld & Nicolson, London, 1970.

considered at pp 545-64. Chapter 24 described and criticised the economic theory of general deterrence. The final chapter, 25 (Reform), argued for the abolition of the tort system and the use of the money saved for the improvement of the UK social security system. In 1997, in a book written for a lay audience, Atiyah still argued that the tort system should be abolished, though he thought the social security system was out of favour.¹⁹

Peter Cane's Views

11. Atiyah's book on *Accidents, Compensation and the Law* has been edited in recent editions by Peter Cane, a professor at the Australian National University, and one of the members of the panel of experts appointed by the Treasurers of the Commonwealth, States and Territories to review the law of negligence.²⁰ The current edition²¹ contains the critical appraisal of the fault principle in Chapter 7 (commencing at p 175). Deterrence and prevention are now discussed in Chapter 17.7 (commencing at p 424), while general deterrence is in Chapter 17.8 (commencing at p 439). These sections contain many references to the empirical literature on the topics. The book states that:

Almost all writers who have considered the matter have come to the conclusion that there is no reliable evidence that liability to pay tort damages has any significant effect on the level of accidents or accident costs; although logically, of course, the absence of evidence does not prove that liability to pay the costs of accidents has no substantial deterrent effect.²²

It considers the arguments for a dual system that retains the common law and concludes:

On balance, ... the case for a dual system is not convincing. The fact that the objectives of the tort system might be thought desirable does not justify retention of a system which achieves those goals so inefficiently, and in many respects not at all.²³

... the practical barriers to the fulfilment of the deterrence function are so substantial that it is unsatisfactory to attempt to justify the tort system in terms of the goal of deterrence.²⁴

12. In 2007 Peter Cane delivered the McPherson lectures in Queensland.²⁵ His starting point was that "the arguments for abolition based on the inefficiency and expense of the tort system and on the inequities it generates between various social groups, are strong and securely based in a reasoned appreciation of what we know about the way tort law operates in practice".²⁶ He points out that —

Research conducted in various jurisdictions over the past 40 years allows us to say with some confidence that administrative costs represent between 40% and 50% of the total costs of the tort system – as much as \$4.5 billion annually. It is widely agreed that the administrative costs of personal

¹⁹ P S Atiyah, *The Damages Lottery*, Hart Pub, Oxford, 1997.

²⁰ Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, Canberra, 2002 (Ipp Review).

²¹ P Cane, *Atiyah's Accidents, Compensation and the Law*, 7th ed, Cambridge University Press, Cambridge, 2006.

²² *Ibid*, p 456.

²³ *Ibid*, p 472.

²⁴ *Ibid*, p 479.

²⁵ P Cane, *The Political Economy of Personal Injury Law*, University of Queensland Press, St Lucia, Qld, 2007.

²⁶ *Ibid*, p 4.

injury insurance (as opposed to liability insurance), and of the social security system, are relatively very much less than those of the tort system – around 10-15% as opposed to 40-50% of total costs.²⁷

He notes that —

There is a significant body of empirical research about the deterrent efficacy of the tort system, which can perhaps be summarised by saying that tort law has more deterrent effect in some contexts than others, but that in no context does it deter as effectively as the economic theory of tort law would suggest.

... we lack empirical evidence to support informed and systematic judgments either about the relative efficacy of various deterrence mechanisms or about their relative enforcement costs, and it seems unlikely that we will ever have such evidence.²⁸

He concluded the second lecture with his view that —

because there is considerable doubt about the deterrent efficacy of tort law, and given the availability of much cheaper compensation mechanisms, the conclusion that tort law is not worth what it costs is an attractive one ...²⁹

Economics and Law Theory and Empirical Research

13. In 1960, Ronald Coase, who went on to win a Nobel prize in economics, published his seminal paper,³⁰ which according to Google Scholar has been cited on more than 15,000 occasions. Although Guido Calabresi demonstrated that economic theory does not necessarily show that negligence liability is superior to strict liability,³¹ several theorists — particularly those associated with the Chicago School — argued that the negligence standard caused potential tortfeasors to take — and to take only — cost-justified precautions. This earned the following jibe from Patrick Atiyah in a lecture in the United States:

There is something paradoxical, almost comical, about the fact that, in the last decade or so, the main thrust of the literature on this question has concerned the highly abstract and the theoretical economic arguments about efficiency in the resource allocation sense. Once it had been thoroughly and convincingly demonstrated that the tort system was, by any comparable standard, highly inefficient in practice, new legal and economic theorists appeared on the scene to assure us that it was, nevertheless, extremely efficient in theory.³²

14. I should explain at this point why in my original submission I said that there should be separation of compensation from incentives to take care. The economic theory of general deterrence, as I understand it, requires that the costs should be allocated to the activity that caused them, or at least to the party best able to evaluate whether the costs of the harm exceed the costs of taking precautions and is in a position to do something about it. Internalising the harm to the creator of the risk does not mean payment must be made to

²⁷ Ibid, p 51.

²⁸ Ibid, pp 55, 56.

²⁹ Ibid, p 69.

³⁰ R H Coase, "The Problem of Social Cost" (1960) 3 *Journal of Law and Economics* 1.

³¹ See, eg, G Calabresi, *The Costs of Accidents; a Legal and Economic Analysis*, Yale University Press, New Haven, 1970.

³² P S Atiyah, "No-Fault Compensation: A Question That Will Not Go Away" (1980) 54 *Tulane Law Review* 271 at 12-13, citing as examples R A Posner, *Economic Analysis of Law*, 2nd ed, Little, Brown, Boston, 1977, Ch 6; and R Posner, "A Theory of Negligence" (1972) 1 *J Legal Stud* 29.

the injured victim; payment to a fund if cost-justified precautions are not taken should be equally effective as an incentive. This avoids the difficulty of proving causation in a case where, say, a polluting factory causes an increase in the incidence of cancer in a community, but it cannot be shown whether any individual's cancer is due to the increase brought about by the factory or would have occurred anyway.³³ The needs of all the cancer-sufferers do not vary according to the cause and each should be compensated irrespective of the particular cause (even if it could be known). On the other hand, the polluting factory should be made to bear the costs of an increased number of victims where epidemiology can show how many they are.³⁴

15. After the increase in economics and law theorists, many attempts were made to prove empirically that the tort system did deter. Most of the studies are based on North American data and are not always transferrable to the Australian context. As mentioned by Peter Cane, these studies do suggest that tort law may have more deterrent effect in some areas than in others, but in no context does it deter as much as the economic theory claims. Cane cites as an example a survey by torts scholar Gary Schwartz.³⁵ That survey — and in particular its reliance on anecdotal evidence — is heavily criticised by Mello and Brennan,³⁶ part of the team which conducted the Harvard Medical Study.³⁷ The Productivity Commission in its report on *Workers' Compensation* referred to the survey of the empirical literature by Dewees, Duff and Trebilcock.³⁸ Although they recognised that not everyone agreed on the goals of the tort system, these authors proceeded to evaluate it by reference to the extent to which it met the goals of deterrence, compensation (or distributive justice) and corrective justice. They made a similar evaluation of alternative systems such as regulation, no-fault and criminal sanctions, considering in each instance the theoretical economic “inputs” and “outputs”.³⁹ They did this for five types of accident: automobile, medical, product-related, workplace and environmental. I shall refer to some

³³ Compare *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111 (plaintiff could not prove that his exposure to asbestos by any one or all of the defendants caused his lung cancer, though each exposure did increase the risk to some extent).

³⁴ Compare Franklin, above n 13, at 813.

³⁵ G T Schwartz, “Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?” (1994) 42 *University of California Los Angeles Law Review* 377.

³⁶ M M Mello and T A Brennan, “Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform” (2002) 80 *Texas Law Review* 1595.

³⁷ P C Weiler *et al*, *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation*, Harvard University Press, Cambridge, Mass, 1993.

³⁸ D Dewees and M Trebilcock, “The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence” (1992) 30 *Osgoode Hall Law Journal* 57; D N Dewees, D Duff and M J Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously*, Oxford University Press, New York; Oxford, 1996, cited in Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No 27, pp 218, 227.

³⁹ “Our analysis of inputs assumes that, if a particular set of theoretical assumptions is empirically satisfied, then the tort system is likely to realize its stated goal. We focus, then, on whether the assumptions are satisfied by legal doctrines or empirical facts. The analysis of outputs examines performance itself, first identifying what changes the tort system has in fact induced, then judging whether these changes are of a kind or scale that satisfy the stated normative goal” (Dewees, Efficacy, above n 38, at 61).

of their findings in these particular areas below. Here, it is appropriate to quote the first two points of their overall summary and implications:

The tort system performs so poorly in compensating most victims of personal injury that we should abandon tort as a means of pursuing this compensation objective, turning instead to other instruments.

The tort system performs unevenly in deterring the causes of personal injuries, so its scope should be restricted to situations where its effect seems likely to justify its high cost.⁴⁰

16. Donald Harris, then the director of the Centre for Socio-Legal Studies in Oxford, and the lead author of a study of personal injuries in England and Wales,⁴¹ in a paper honouring Patrick Atiyah,⁴² discusses the empirical evidence for deterrence (and compensation) in the light of his Centre's survey and those by the Pearson Commission,⁴³ the RAND Institute for Civil Justice⁴⁴ and the Harvard Medical Study.⁴⁵ He contends that for the economic theory of deterrence to work, a high proportion of tort claims must be enforced, but these studies, particularly the last, show that very few claims are made and even fewer succeed. He also observes "that the widespread use of liability insurance seriously undermines the threat of potential liability upon the insured person for any specific instance of carelessness", adding that "experience rating of insurance premiums is seldom invoked by liability insurers".⁴⁶
17. Sloan and Chepke present an extensive survey of the economic literature on motor vehicle accidents; dram shop and social host liability; medical malpractice; tobacco litigation; litigation involving pharmaceutical, medical device, and vaccine manufacturers; and workers' compensation, to each of which they devote a chapter.⁴⁷ In their final chapter, in which they compare the different areas, they start by answering the question, "does tort liability improve the public's health?" with "sometimes, it does and sometimes it does not". Before looking at the alternatives, they comment that "[c]oupled with a mixed track record on deterrence are other deficiencies of tort".
18. Two wide-ranging surveys of the empirical evidence for the purpose of comparing the fault system and its alternatives are to be found in the first and second editions of the

⁴⁰ Dewees, Exploring, above n 38, pp 412-13. Compare "With respect to deterrence, the evidence in each of the five categories of accidents reviewed is quite mixed: first, in terms of what impact the civil liability system has on behaviour, and second, in terms of whether such liability induced changes in behaviour as have occurred have moved us closer to the social optimum" (Dewees, Efficacy, above n 38, at 131).

⁴¹ D Harris *et al*, *Compensation and Support for Illness and Injury*, Clarendon Press, Oxford, 1984.

⁴² D Harris, "Evaluating the Goals of Personal Injury Law: Some Empirical Evidence" in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah*, Clarendon Press; Oxford University Press, Oxford; New York, 1991, p 289

⁴³ Great Britain, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report*, HMSO, London, 1978.

⁴⁴ D R Hensler *et al*, *Compensation for Accidental Injuries in the United States*, RAND, Institute for Civil Justice, Santa Monica, CA, 1991.

⁴⁵ P C Weiler *et al*, *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation*, Harvard University Press, Cambridge, Mass, 1993.

⁴⁶ Harris, above n 42, pp 290-1.

⁴⁷ F A Sloan and L M Chepke, *The Law and Economics of Public Health*, Now Publishers Inc, 2007, also published in two issues (5 and 6) of (2007) 3 *Foundations and Trends in Microeconomics*, commencing at 331.

Encyclopedia of Law and Economics.⁴⁸ The former “concludes that the main focus has been the adequacy of the tort system as a system of compensation and deterrence. The law and economics literature has not shown much concern with efficient no-fault design”. The latter sets out at length the difficulties of isolating the role of tort from all the other factors that affect behaviour and measuring its effects. It also points to the conflicting results obtained by different researchers. It concludes that a full cost-benefit analysis is impossible because of lack of data, particularly on indirect costs, such as —

the costs of precautions by potential injurers; the opportunity costs of goods and services that are withdrawn from the market or whose introduction is forestalled; the opportunity costs of goods and services that are not bought because of liability-induced price increases; and the disruption costs of layoffs and bankruptcies caused by liability problems.

Furthermore, even if the benefits of the fault system could be shown to outweigh its costs, “the search for marginal improvements or more cost-effective alternatives remains an open question”.⁴⁹

19. A paper presented to a recent Institute of Actuaries of Australia conference, compares empirical evidence on fault, no-fault and hybrid schemes across seven “dimensions”, such as the numbers of injured people receiving benefits, the costs of the schemes and prevention incentives.⁵⁰ It reports that on most dimensions, the underlying features of the scheme design is more significant than whether it is a fault, no-fault or hybrid scheme. Nevertheless, it concludes:

No fault schemes come out ahead on this evaluation, with a higher portion of claimants covered, a higher portion of scheme cost going to claimants, better claimant outcomes, a more equitable distribution of claimant outcomes and a similar level of scheme costs, average benefits and prevention effects. This needs to be weighed up against potentially less equitable allocation of scheme costs and the freedom of people to pursue tort law remedies in response to their injuries and grievances.⁵¹

Specifically on the prevention incentive (dimension F), it observes that direct comparison is difficult because of differing propensity to claim under fault and no-fault schemes. It concludes:

Overall then, it appears that fault, no fault and blended systems may have similar performance in terms of preventing injuries. ... More importantly, the evidence indicates that there are far more important drivers of safety improvements than the threat of tort.⁵²

⁴⁸ R I McEwin, “No-Fault Compensation Systems” in B Bouckaert and G de Geest (eds), *Encyclopedia of Law and Economics*, Edward Elgar Publishing, Northampton, Ma, 1999, p 735; B C J van Velthoven, “Empirics of Tort” in M Faure (ed), *Tort Law and Economics*, Encyclopedia of Law and Economics, 2nd ed, Edward Elgar, Cheltenham UK, 2009, p 453.

⁴⁹ Van Velthoven, above n 48, p 29.

⁵⁰ K Armstrong and Daniel Tess (PricewaterhouseCoopers), *Fault Versus No Fault - Reviewing the International Evidence*, paper presented at the Institute of Actuaries of Australia, 16th General Insurance Seminar 9-12 November 2008, Coolom, Australia, November 2008 <<http://tinyurl.com/235bd9r>> (accessed 25 August 2010).

⁵¹ Ibid, p 34.

⁵² Ibid, p 27.

Motor Vehicle Liability

20. I have already referred to the report of the NSW Law Reform Commission, which rejected the view that common law liability under the compulsory insurance system provided any deterrence when a motorist was not deterred from driving carelessly by the instinct for self-preservation, criminal sanctions, possible loss of a driving licence, loss of a no-claim bonus or payment of an excess in respect of property damage.⁵³ In England, the Royal Commission on Civil Liability and Compensation for Personal Injury reached a similar conclusion when it said: “We agree with many of our witnesses that the criminal law and the fear of personal injury together provide a more effective deterrent [than the fault-insurance system].”⁵⁴
21. An early attempt to measure the effect of the New Zealand comprehensive accident compensation scheme in its first years of operation on motor vehicle accidents was made by Craig Brown, a New Zealand graduate working in Canada.⁵⁵ His comparison of accident and fatality rates from 1964 to 1980 showed that the removal of tort liability for personal injury in New Zealand, which occurred on 1 April 1974, had “apparently had no adverse effect on driving habits. In fact, statistics show[ed] a decline in accident and fatality rates.” He recognised that this decline could be due to other deterrent and enforcement measures and one could not say that the decline would not have been greater if tort had been preserved, but clearly its removal had not increased the accident-producing behaviour which proponents of tort-deterrence would have predicted.⁵⁶
22. The year before Brown’s study was published, another Canadian, Christopher Bruce, published a survey of the empirical studies on deterrence and tort, which he claimed had been ignored by participants in the debate on fault and no-fault.⁵⁷ He criticised torts scholars who took the view that accidents were inevitable and that the focus should be on compensating the victims. He demonstrated from the literature that drivers can be deterred from dangerous conduct by criminal sanctions and variable premiums. I would not dispute this, but would argue that criminal sanctions are much more effective than tort ones. One may compare failure to wear an available seat belt. At common law, this may amount to contributory negligence and result in a reduction of damages.⁵⁸ I take the liberty of quoting from my own case book:

Victoria was the first common law jurisdiction to attach criminal sanctions for failure to wear an available seat belt. The legislation came into force towards the end of 1970. It was followed in all other states. Estimated user rates went up from less than 20 per cent to nearly 90 per cent in some instances. There followed a dramatic fall in fatalities and in the number and severity of injuries. The House of Representatives’ Standing Committee on Road Safety, in its report, *Passenger Motor Vehicle Safety*, 1976, stated:

⁵³ NSW LRC, *A Transport Accidents Scheme for New South Wales*, above n 5, paras 3.37-3.39.

⁵⁴ Above n 43, para 989.

⁵⁵ C Brown, “Deterrence in Tort and No-Fault: The New Zealand Experience” (1985) 73 *California Law Review* 976.

⁵⁶ *Ibid.*, at 1002.

⁵⁷ C J Bruce, “The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature” (1984) 6 *Law & Policy* 67.

⁵⁸ *Froom v Butcher* [1976] QB 286 (CA).

The committee was presented with 1974 figures on fatalities and injuries involving *vehicle occupants*, which show that for Australia there was a 26 per cent fall in fatalities and a 21 per cent fall in injuries from the predicted levels. At the same time the fatalities and injuries of road users other than vehicle occupants have not shown a corresponding decline.

Some economists, on the other hand, have asserted that drivers compelled to wear seat belts indulge in compensating risk-taking behaviour, which increases the total number of accidents. Empirical research seems to refute this.⁵⁹

23. In 1989 Ian McEwin studied the fatality rates from 1970 to 1981 in three Australian jurisdictions which had introduced no-fault motor compensation schemes and in New Zealand.⁶⁰ It is difficult to extract his conclusions from the statistical analyses in the paper and it is more convenient to describe them as he himself did in his later survey.⁶¹ There he said that he had “found that add-on no-fault schemes did not increase automobile fatalities but in schemes where tort liability was abolished altogether fatalities increased by 16 percent”. He adds that he “admitted that the size of the impact is questionable given the problems involved in isolating the various determinants of road fatalities”.⁶² There are more problems than that in reaching this conclusion. Other than New Zealand, where as we have seen from Brown’s paper, fatalities did not increase, the only common law jurisdiction which abolished tort liability was the Northern Territory, which introduced its no-fault scheme on 1 July 1979,⁶³ so that there would be less than two years of no-fault experience to take account of in this study. Secondly, in so far as McEwin offers an explanation for the conclusion, he seems to suggest that it is the inability of a driver to recover non-economic losses from other, negligent drivers that leads to the taking of less care. But the tort right to recover non-economic losses was continued under the Northern Territory scheme and not abrogated until after the years included in the study.

24. The paper presented to the Institute of Actuaries of Australia refers to an apparently unpublished paper which —

summarises evidence from Australia, which in fact indicated that over the period 1985 to 2000, Australia’s no fault states (Victoria and Tasmania) have in fact achieved *lower* accident rates than their common law peer jurisdictions and notes that Victoria’s road fatality rate was amongst the lowest in the western world during the 1990s with the Victorian road safety agencies being the focus of many international benchmarking exercises. [The author of the paper] argues that this is probably because there are far stronger deterrence factors at play, including police enforcement activities, public attitudes

⁵⁹ H Luntz *et al*, *Torts: Cases and Commentary*, 6th ed, LexisNexis Butterworths, Sydney, 2009, [6.2.11], citing A Cohen and L Einav, ‘The Effect of Mandatory Seat Belt Laws on Driving Behavior and Traffic Fatalities’ (2003) 85 *Rev Econ & Stats* 828; D J Houston and L E Richardson, ‘Risk Compensation or Risk Reduction? Seatbelts, State Laws, and Traffic Fatalities’ (2007) 88 *Social Science Quarterly* 913 (which contains a literature review). See also Van Velthoven, above n 77, p 20.

⁶⁰ R I McEwin, “No-Fault and Road Accidents: Some Australasian Evidence” (1989) 9 *International Review of Law and Economics* 13.

⁶¹ I assume that both papers are by the same R Ian McEwin, though in the later paper McEwin is referred to in the third person.

⁶² McEwin, above n 48, p 740. See also Van Velthoven, above n 48, p 18.

⁶³ Motor Accidents (Compensation) Act 1979 (NT) s 2.

to support safer driving (notably drink driving) and loss of a “no claim” bonus under insurance policies.⁶⁴

The paper goes on to consider some other studies to some of which I have already referred or will refer below. It records the conclusion of Sloan and Chepke that “the deterrent value of the tort system may be only marginally (if at all) better than a well designed no fault scheme”.⁶⁵

25. Apart from New Zealand, the only comparable jurisdiction that has an exclusively no-fault scheme for motor accidents is the Canadian province of Quebec. Two studies made shortly after the scheme was introduced on 1 March 1978, by Gaudry and Devlin, are cited in all the surveys as showing an increase in fatal accident rates.⁶⁶ However, the surveys note that the researchers attribute the increase to other changes which accompanied the change to no-fault, such as the attraction of more high-risk drivers due to a flat rate premium structure. More significantly, the surveys overlook studies apparently published only in French — including a later one by Gaudry himself — which show a greater decline in the fatality rate in Quebec than in many comparable countries, including Britain, Scandinavian countries and the United States.⁶⁷
26. All the states of the United States, even if they have introduced some form of no-fault for motor accidents, allow actions to be brought in respect of negligence causing serious injury, including death. Nevertheless, researchers have compared fatality rates with and without no-fault. The results of these studies have been mixed. The most comprehensive study seems to have been done for the RAND Corporation by Loughran.⁶⁸ The RAND website summarises the outcome as follows:

No-fault auto insurance opponents frequently argue that no-fault may ultimately lead to higher auto insurance costs by reducing drivers’ incentives to drive carefully and thereby increasing the accident rate. The intuition behind this criticism of no-fault is simple: No-fault auto insurance lowers the cost of driving negligently by limiting first-party liability for the injuries suffered by third-parties in auto accidents. This book evaluates this criticism of no-fault by examining trends in fatal and non-fatal automobile accidents rates and rates of driver negligence in the United States between 1967 and 1989. Contrary to some earlier research, the author finds no evidence that the adoption of no-fault auto insurance between 1971 and 1976 in 16 states increased fatal accident rates in those states. This book also finds no correlation between the presence of no-fault auto insurance and a state’s overall accident rate or rate of driver negligence.⁶⁹

⁶⁴ Armstrong and Tess, above n 50, p 26 (emphasis in the original), citing A L Fronsco, “No fault versus Common Law, 75 years of Debate No Fault v Common Law Compensation for the Victims of Motor Vehicle Accidents”, Presented to the 2001 National CTP Claims Management Symposium, 2001.

⁶⁵ Ibid.

⁶⁶ See, eg, Dewees, Efficacy, above n 38, at 66-7.

⁶⁷ See D Gardner, “Automobile No-Fault in Quebec as Compared to Victoria” (2000) 8 *Torts Law Journal* 89 at 97-8.

⁶⁸ D S Loughran, *The Effect of No-Fault Automobile Insurance on Driver Behavior and Automobile Accidents in the United States*, RAND, Institute for Civil Justice (US), Santa Monica, CA, 2001. The RAND Corporation has since 1948 been “an independent, nonprofit organization dedicated to promoting scientific, educational, and charitable purposes for the public welfare” (from <<http://www.rand.org/about/glance.html>> (accessed 24 November 2010)).

⁶⁹ <<http://tinyurl.com/2wfmysv>> (accessed 24 November 2010).

Sloan and Chepke⁷⁰ find that it is uncertain whether switching to no-fault increases accident and fatality rates. On balance, it seems to them from the more recent and more econometrically sophisticated studies that switching to no-fault has reduced the deterrent effect that tort would otherwise have. They note that Loughran's study is to the contrary. They further note that "not all studies investigate the effects of experience rating, [but] those that do generally agree that experience rating is likely to enhance road safety". Experience rating has not traditionally been applied under Australia's compulsory third party personal injury schemes nor under the no-fault schemes in existence here. Even class rating, such as for motor cycles, where the accident rate would justify much higher premiums than those actually imposed, has often proved politically difficult to implement.

27. In a separate section,⁷¹ Sloan and Chepke consider the empirical evidence relating to the effect on motor accidents of so-called "dram shop liability" and social host liability. Some jurisdictions in the United States, by statute or common law, impose liability in some circumstances on commercial suppliers of alcohol for accidents caused by the people to whom the alcohol is supplied. Social hosts are usually held not to be under a duty of care in the supply of alcohol to their guests.⁷² According to the authors, the empirical evidence shows that dram shop liability deters injuries and does so even more effectively than the criminal law, whereas the evidence on social host liability (which would be likely to be rare) is more equivocal. Schwartz quotes one of Sloan's own studies as claiming that dram shop liability saves between 800 and 4000 lives a year.⁷³ Van Velthoven describes the rules on dram shop liability as appearing to have "a rather robust, significant, positive effect on traffic safety".⁷⁴ There is no similar liability under existing law in Australia. Indeed, the High Court of Australia recently held that publicans, in serving alcohol to their patrons, do not owe a duty of care at common law for their safety when they have left the premises, notwithstanding regulatory statutes requiring publicans to keep order on the premises.⁷⁵

Workplace Injuries

28. I have already reminded the Commission of its conclusion that the disadvantages of the tort system outweighed its deterrent effect and access to the common law should be denied under the framework for national workers' compensation.⁷⁶ This was after an extensive

⁷⁰ Above n 47, Section 3.

⁷¹ Ibid, Section 4.

⁷² Compare the Canadian case of *Childs v Desormeaux* 2006 SCC 18; [2006] 1 SCR 643, discussed by I Malkin and T Voon, "Social Hosts' Responsibility for Their Intoxicated Guests: Where Courts Fear to Tread" (2007) 15 *Torts Law Journal* 62.

⁷³ Schwartz, above n 35, at 418.

⁷⁴ Van Velthoven, above n 48, p 19.

⁷⁵ *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; (2009) 239 CLR 390, rejecting the view of the Supreme Court of Canada in *Jordan House Ltd v Menow* [1974] SCR 239. See also the criticism of an earlier decision of the High Court by G Orr and G Dale, "Impaired Judgements? Alcohol Server Liability and 'Personal Responsibility' after *Cole v South Tweed Heads Rugby League Football Club Ltd*" (2005) 13 *Torts Law Journal* 103.

⁷⁶ Productivity Commission, 2004, above n 1.

evaluation of the “strong views” expressed both in favour and against the retention of the common law. No doubt, the views against the retention of the common law included those of the late Eric Wigglesworth, who had extensive experience as a safety officer and researcher and who gave evidence to the Commission and presumably referred it to his published papers on the topic.⁷⁷ I shall accordingly not dwell on this type of injury. I shall merely quote two paragraphs from a more recent review of workers’ compensation in Victoria:

8.58. I have not considered the option of removing access to common law, which will continue as part of the Victorian scheme. I have interpreted my terms of reference (in particular, the Government’s recognition that the underlying principles of the accident compensation laws remain sound), as indicating that key elements of the scheme, including common law, should remain in the scheme.

8.59. At the same time, I believe that there are sound reasons for continuing to limit access to common law damages to the most seriously injured workers. Common law is a slow, expensive and generally inefficient way of delivering compensation to injured workers. In addition, the availability of common law damages in a workers’ compensation scheme can have adverse impacts on return to work outcomes and the health of injured workers.⁷⁸

Product-related Injury and Disease

29. Australia, following in the wake of the United States and Europe, switched from negligence liability to general strict liability in this area with the introduction of Part VA of the Trade Practices Act 1974 (Cth) in 1992.⁷⁹ The Australian Government’s adoption of the European directive as its model amounted to a rejection of an Industry Commission report on the subject.⁸⁰ A research report commissioned by the Productivity Commission in its later *Review of the Australian Consumer Product Safety System* discussed the role of insurers in this regard. It stated:

Insurers will seek to ensure that premiums reflect the risk associated with the insured activity and this will provide an additional signal to producers and consumers on the costs of risky behaviour. However, insurance markets tend not to provide consumers with protection for specific consumer products (apart for motor vehicles) because of information problems Thus, in practice, the ability of insurance markets to provide signals to consumers is limited.⁸¹

Deweese, Duff and Trebilcock found it difficult to reach a firm conclusion as to whether the tort system has reduced accidents caused by defective products. If it had, they thought the accidents avoided would be a small fraction of the total. Their recommendation was for the restoration of the negligence regime, preferably accompanied by a robust

⁷⁷ E C Wigglesworth, “The Fault Doctrine and Injury Control” (1978) 18 *The Journal of Trauma* 789; E C Wigglesworth, “Legislation and Injury Control” (1978) 18 *Medicine, science, and the law* 191.

⁷⁸ P Hanks QC, *Accident Compensation Act Review: Final Report*, 2008, pp 285-6.

⁷⁹ Earlier, Div 2A of Pt V of the Act had overcome problems of privity of contract in giving *consumers* direct rights of action against manufacturers based on strict liability for breaches of implied terms of contracts of sale.

⁸⁰ Industry Commission, *Workers’ Compensation in Australia*, Report No 36, Canberra, 1994.

⁸¹ Productivity Commission, *Review of the Australian Consumer Product Safety System*, Productivity Commission Research Report, Canberra, 2006.

regulatory compliance defence. They saw this as according primacy to safety judgments made by specialised regulatory agencies which had specifically addressed the risks.⁸²

30. Van Velthoven refers to the interesting topics for empirical research perceived in the switch from negligence to strict liability and the effects of recent tort reforms in the United States. However, firmly grounded results are scarce because of the paucity of relevant data.⁸³ With regard to asbestos, he thinks that eventually in the United States “tort did its job of safety regulation, and did it better than government regulation, which had been captured by the large asbestos producers”. But the costs were enormous: up to 2002, some \$40 billion was spent on litigation to produce \$30 billion in compensation.⁸⁴
31. Sloan and Chepke did not consider product liability as a separate category. Instead, they surveyed separately the empirical literature on tobacco litigation⁸⁵ and products liability for pharmaceuticals, medical devices and vaccines.⁸⁶ They found it difficult to see how tort liability for tobacco could deter, given the long latency period before harm appears. Nevertheless, they suggest that a strong case can be made that tort litigation radically changed the political balance between tobacco manufacturers and interests supporting tobacco control.⁸⁷ They observe that there is virtually no market for third party insurance in respect of tobacco manufacture. The empirical literature they discuss is mostly concerned with why people smoke and the effects of price increases on the incidence of smoking. They conclude by saying that it is the smoker who is asked to bear most of the cost that the habit generates.
32. In their section on pharmaceutical, medical device and vaccine manufacturers, Sloan and Chepke refer to the empirical literature on several case studies, viz Dalkon Shield, Bendectin, Diethylstilbestrol (DES), silicone breast implants and Vioxx. They state that it was tort, not government regulation, that removed the hazardous product that was the Dalkon Shield from the market. However, this was at the cost of virtually driving out IUDs, even safe and effective ones. It also sent up insurance premiums for contraceptives and reduced research and development to the detriment of women’s health. Similarly, the litigation involving Bendectin led to the withdrawal of an effective drug without scientific backing for its alleged dangers. On the other hand, it is not clear that it was tort that played a major role in removing DES from the market, though it did provide compensation for

⁸² Dewees, Exploring, above n 38, p 205.

⁸³ Van Velthoven, above n 48, p 24.

⁸⁴ Ibid, p 25.

⁸⁵ Sloan and Chepke, above n 47, Section 6.

⁸⁶ Ibid, Section 7.

⁸⁷ In Australia, tort litigation against tobacco manufacturers has so far been unsuccessful. Although one jury found for a plaintiff after the defendants’ defence was struck out, the judgment was set aside on appeal in *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197; (2002) 7 VR 524 (CA) and the High Court refused special leave to appeal, *Cowell v British American Tobacco Australia Services Ltd* [2003] HCATrans 384. The High Court also refused special leave to appeal against the striking out of the statement of claim in a group action: *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229; (2000) 170 ALR 487; SLR [2000] 12 Leg Rep SL 4 (21 June 2000). In both Scotland and New Zealand too litigation has been unsuccessful: *McTear v Imperial Tobacco Ltd* [2005] ScotCS CSOH_69 (31 May 2005); *Pou v British American Tobacco (New Zealand) Ltd* [2006] NZHC 451 (3 May 2006).

some victims. Silicone breast implants have remained on the market, but litigation forced one manufacturer, Dow Corning, to file for bankruptcy protection and enter into a \$4 billion dollar settlement, though the connection between the implants and any type of disease was never scientifically established. The Vioxx litigation provided a mechanism to question the safety of a drug that had been approved by the Federal Drug Administration, which actually voted to allow the manufacturer to resume sales one year after litigation had forced its withdrawal from the market. In Australia, the Federal Court held that negligence had not been proved, but found that there was a breach of strict liability provisions under the Trade Practices Act.⁸⁸ The judgment was stayed for 28 days to allow either party to appeal.⁸⁹

Medical Malpractice

33. The examples of beneficial drugs and devices being removed from the market because of the fear and costs of litigation may be seen as instances of over-deterrence. The area of medical malpractice may similarly be one where empirical researchers have found over-deterrence. There is probably a perception among many health professionals that they are likely to be sued which is greater than the actual likelihood. The false perception may lead to “defensive medicine”, which may take two forms. The one is to withdraw one’s services, that is to cease practising in a particular area, such as obstetrics, or at all, by retiring prematurely. The other form of defensive medicine is to subject patients to tests and procedures that are not clinically necessary, but are designed to counter allegations that the health professional did not do all that was reasonable. A recent Australian survey found a greater perceived impact on doctors who had previously experienced a medico-legal matter. The definition of “medico-legal matter” was wide, including claims for damages, complaints, and disciplinary and regulatory proceedings. Some of the changes were beneficial, such as improved communication with patients.⁹⁰

34. The fullest investigation of these issues in the United States was conducted by Mello and Brennan. Although they did find limited evidence of deterrence, they concluded that overall the evidence was thin.⁹¹ So far as deterrence of medical errors is concerned, they say:

The overall picture that emerges from the existing studies of the relationship between malpractice claims experience and medical errors is that evidence of a deterrent effect is (a) limited and (b) vulnerable to methodological criticism.⁹²

Much of their paper is taken up with discussion of methodological issues and the difficulties of sound statistical analysis.

On the effects of insurance, the authors have this to say:

⁸⁸ *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* [2010] FCA 180; (2010) 184 FCR 1.

⁸⁹ *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd (no 5)* (2010) 87 IPR 234; [2010] FCA 605.

⁹⁰ L M Nash *et al*, “Perceived Practice Change in Australian Doctors as a Result of Medicolegal Concerns” (2010) 193 *Medical Journal of Australia* 579.

⁹¹ Mello and Brennan, above n 36, at 1598. See also at 1606 (“Most defensive-medicine studies have failed to demonstrate any real impacts on medical practice arising from higher malpractice premiums”).

⁹² *Ibid*, at 1613. See also at 1615.

An important factor enervating deterrence is that physicians are nearly universally insured against medical malpractice. The existence of insurance always dampens incentives for taking safety precautions, especially where insurance premiums are not structured to be responsive to the insured's claims experience. The malpractice premiums for individual physicians are generally not experience-rated, except to the extent that premiums vary across clinical specialties and geographic areas according to known differences in claims risk. As a result, the deterrent effect of malpractice litigation is greatly blunted.

The possibility of experience-rating individual physicians has received considerable attention and has been experimented with by a few states and many major insurers. However, it is generally thought to be unworkable.⁹³

On the other hand, experience rating is used (at least, in the US) for hospitals, so that the deterrent effect is less blunted.⁹⁴ But the effect is blunted for another reason to which Harris's paper drew attention,⁹⁵ viz the poor fit between negligence and the numbers suing.⁹⁶ Having considered follow-ups of the Harvard Medical Practice study and some other studies, they conclude that overall the data do not support "the notion that the malpractice system sends a strong deterrent signal to providers".⁹⁷

35. In this they echo the earlier findings of Dewees, Duff and Trebilcock that "the current malpractice system seems poorly constituted to encourage optimal injury precautions".⁹⁸ The Canadian team also concluded that it was impossible to determine from existing data whether the system actually stimulates cost-justified injury prevention.⁹⁹ They regard tort compensation as totally inappropriate for medical injuries.¹⁰⁰ Mello and Brennan, however, retain faith in the market and go on to advocate a no-fault/enterprise liability instead of negligence. This, they hope, would bring the medical compensation system closer to workers' compensation, where they do find a deterrent effect due to experience rating.¹⁰¹
36. My colleague David Studdert, who is part of the same team as Mello and Brennan, has shown me a recent study by that team which has been submitted for publication. It seeks to measure the deterrent effect of negligence litigation on the standard of care in nursing homes in the United States. Its conclusion is that "[t]he threat of tort litigation provides minimal incentives to improve quality and safety because the best-performing nursing homes experience only fractionally less litigation than the worst-performing ones".¹⁰²

⁹³ Ibid, at 1616 (footnotes omitted).

⁹⁴ Ibid, at 1618.

⁹⁵ Harris, above, n 42.

⁹⁶ Mello and Brennan, above n 36, at 1618. They consider that this will always mean that individual providers will always lack strong tort incentives to improve the standard of care: see at 1623.

⁹⁷ Ibid, at 1620. A third factor which they note as weakening the incentive effects of tort is the externalisation of costs: see at 1620 ff.

⁹⁸ Dewees, Exploring, above n 38, p 104.

⁹⁹ Ibid, p 112.

¹⁰⁰ Ibid, p 117.

¹⁰¹ Mello and Brennan, above n 36, at 1624 ff.

¹⁰² D M Studdert *et al*, "Relationship between Quality of Care and Negligence Litigation in Nursing Homes" (2010) Submitted for publication.

37. Sloan and Chepke¹⁰³ also stated that it was difficult to find evidence that negligence liability deterred medical errors. Van Velthoven observes that although the almost universal insurance with minimal experience rating removes the ordinary incentives, loss of reputation and uninsured time provide others.¹⁰⁴ Sloan and Chepke did find some evidence that negligence liability had an effect on “positive” defensive medicine (adoption of practices and procedures that are not clinically justified), but the evidence that it is a major factor in driving up health spending was “weak at best”. “Negative” defensive medicine (making access to medical services more difficult) could not be shown at all.¹⁰⁵

Anecdotal Evidence

38. Gary Schwartz’s own review of the empirical studies led him to the conclusion that the economists’ strong claim that tort law systematically deters could not be supported. In most sectors the data was not available to do a full cost-benefit analysis. He nevertheless advanced a moderate claim that “sector-by-sector, tort law provides something significant by way of deterrence”.¹⁰⁶ In this section, I shall mention some instances where he thought that developments in the American law had led to increased deterrence. I shall compare these developments with the Australian law, which generally seems to have the opposite effect. I shall also add some references to some other recent cases in Australia which appear to remove any incentive the tort-insurance system might otherwise have.
39. I have already referred to Schwartz’s (and Sloan and Chepke’s and Van Velthoven’s) view that holding suppliers of alcohol civilly liable under dram shop laws saves lives. I observed that the High Court had rejected such an approach, at least so far as concerned the person to whom the alcohol was served. The autonomy of the patron was regarded as sacrosanct, notwithstanding government attempts to instil a culture of “responsible” serving.¹⁰⁷ Emphasis on autonomy has also led the High Court to deny a duty of care on the part of the board that made the rules of rugby towards players of the game;¹⁰⁸ and to

¹⁰³ Above n 47, Section 5.

¹⁰⁴ Above n 48, p 26.

¹⁰⁵ But see D M Studdert *et al*, “Defensive Medicine among High-Risk Specialist Physicians in a Volatile Malpractice Environment” (2005) 293 *Journal of American Medical Association* 2609 (concluding that “[d]efensive medicine is highly prevalent among physicians in Pennsylvania who pay the most for liability insurance, with potentially serious implications for cost, access, and both technical and interpersonal quality of care”); Van Velthoven, above n 48, p 28 (“Increasing malpractice pressure appears to have a negative impact on the supply of medical services, and it would seem to affect the choice of tests and procedures in the direction of defensive medicine”).

¹⁰⁶ Schwartz, above n 35, at 443-4.

¹⁰⁷ *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; (2009) 239 CLR 390, above n 75, and the other sources there referred to. See also M Fordham, “Saving Us from Ourselves: The Duty of Care in Negligence to Prevent Self-Inflicted Harm” (2010) 18 *Torts Law Journal* 22.

¹⁰⁸ *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552, criticised by H Opie, “The Sport Administrator’s Charter: *Agar v Hyde*” (2001) 9 *Torts Law Journal* 131. See also *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; (2002) 208 CLR 460 (denying a breach of duty on the commercial provider of indoor cricket in failing to supply appropriate protective equipment or give a proper warning), criticised by K Burns, “It’s Just Not Cricket: The High Court, Sport and Legislative Facts” (2002) 10 *Torts Law Journal* 234.

deny a duty of care on police to prevent the suicide of someone they came upon in suspicious circumstances.¹⁰⁹

40. Schwartz also made the following claim:

Modern tort rulings, creating an interesting new category of liability, have often held landlords and commercial establishments liable for failing to provide invitees and customers with reasonable security against the prospect of criminal attacks. As a consequence of these rulings, landlords are now making considerable efforts to render their buildings crimeproof, or at least negligence-proof. Landlords are hiring extra lobby personnel and security guards, improving lighting in parking lots and lobbies, and training doormen on proper visitor screening.¹¹⁰

To the contrary, the High Court of Australia has held that the occupier of a shopping mall does not in ordinary circumstances owe a duty of care to employees of shop owners in the centre to take reasonable care to protect them from assaults by criminals on the premises.¹¹¹

41. Schwartz also claimed that potential tort liability helped risk managers to persuade their public authorities to spend money on accident prevention.¹¹² Decisions of the High Court placing emphasis on the limited scope of the duty of care on local authorities having the care and control of public land and bridges would surely have the opposite effect.¹¹³ Recent statutes following and going beyond the recommendations of the Ipp Committee in protecting public authorities have aggravated the situation.¹¹⁴ Not that the imposition of liability by virtue of a vague standard of reasonableness will necessarily have a deterrent effect.

42. In holding that a medical practitioner did not owe a duty of care to an unborn child not to cause it to be born with severe defects,¹¹⁵ the High Court must have reduced any deterrent effect on medical practitioners of the duty they owe to the mother. Admittedly, the earlier decision by a narrow majority that negligent practitioners are liable to the parents for the cost of bringing up the child¹¹⁶ would go the other way, but the almost immediate reversal of the decision by statutes in three jurisdictions¹¹⁷ would mean that the full cost of the negligence would not be sheeted home to the perpetrator in those States. Making a

¹⁰⁹ *Stuart v Kirkland-Veenstra* [2009] HCA 15; (2009) 237 CLR 215.

¹¹⁰ Schwartz, above n 35, at 416 (footnotes omitted).

¹¹¹ *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254. See also *Proprietors of Strata Plan 17226 v Drakulic* [2002] NSWCA 381; (2002) 55 NSWLR 659 (CA) (no duty to protect against intruder in common foyer of strata plan units); *Ashrafi Persian Trading Co Pty Ltd t/as Roslyn Gardens Motor Inn v Ashrafinia* [2001] NSWCA 243; (2001) [2002] Aust Torts Reps 81-636 (no duty of care owed by motel proprietor to protect against attack through sliding door).

¹¹² Schwartz, above n 35, at 416 n 196.

¹¹³ *Eg, Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330.

¹¹⁴ See, eg, Civil Liability Act 2002 (NSW) Pt 5 (ss 40-46)

¹¹⁵ *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52.

¹¹⁶ *Cattanach v Melchior* [2003] HCA 38; (2003) 215 CLR 1.

¹¹⁷ Civil Liability Act 2002 (NSW) s 71; Civil Liability Act 2003 (Qld) s 49A; Civil Liability Act 1936 (SA) s 67.

negligent party bear the full cost of the negligence is part of the theory on which deterrence is based.¹¹⁸ The High Court has also entirely removed any deterrent effect of medical malpractice liability in instances where the chance of the patient's recovery is less than 51%. It has recently held that there can be no liability for loss of a chance where the plaintiff does not prove it to be more probable than not that the harm would have been avoided in the absence of the practitioner's negligence.¹¹⁹

43. This is not the only area in which the High Court has insisted on strict proof of causation in its recent decisions. In these, negligent defendants have escaped liability because of the inability of the plaintiff to prove a causal link. Thus the court fails to send a deterrent signal to the defendants. In one, it exonerated a road authority that redesigned an intersection in such a way that approaching traffic was sometimes hidden from vehicles about to cross the intersection.¹²⁰ In another, it held not liable a restaurant and dance hall that probably supplied insufficient security personnel because it was not proved that an adequate number of guards would probably have deterred a gunman from entering the premises or shooting customers.¹²¹ In a third, it held several defendants who negligently exposed a smoker to asbestos not liable because the plaintiff had not proved that each one individually had more probably than not caused the cancer from which he was suffering.¹²²
44. In other recent decisions, the High Court of Australia has refused to extend vicarious liability to employers of independent contractors.¹²³ This encourages increased use of outside contractors in place of employees and almost certainly has a detrimental effect on safety. It has also held that a head contractor on a building site does not in many circumstances owe a duty of care to employees of independent contractors.¹²⁴ This not only creates anomalies with regard to compensation, but may also be detrimental to safety.¹²⁵

Expense

45. It is difficult to establish the precise cost of the tort-insurance system in Australia. The Productivity Commission's report *National Workers' Compensation and Occupational Health and Safety Frameworks* observed that the Ipp Review "noted that the costs of delivering compensation — primarily, legal costs and insurers' administrative costs — could be as high as 40 per cent of the total cost of compensating injury victims".¹²⁶ The

¹¹⁸ See, eg, Van Velthoven, above n 48, p 13.

¹¹⁹ *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537.

¹²⁰ *Roads and Traffic Authority v Royal* [2008] HCA 19; (2008) 245 ALR 653.

¹²¹ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420.

¹²² *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111, above n 33.

¹²³ *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 161; *Leichhardt Municipal Council v Montgomery* [2007] HCA 6; (2007) 230 CLR 22.

¹²⁴ *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35; (2009) 240 CLR 1.

¹²⁵ See *Pacific Steel Constructions Pty Ltd v Barahona* [2009] NSWCA 406 at [82]-[91].

¹²⁶ Productivity Commission, 2004, above n 1, p 242, citing the Ipp Review (above n 20), p 28. The Ipp Review, at the page cited, itself cites the discussion of the research by the Pearson Commission (above n 43) in the

Ipp Review's terms of reference — presumably representing the view of the combined Treasurers of the Commonwealth, its States and Territories — in fact commenced with the unsupported statement: “The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another.” The Productivity Commission noted the difficulty of comparing the costs of workers' compensation across schemes because of different methods of reporting.¹²⁷

46. In the United States, the most widely cited study of the costs of the tort system is by Kakalik and Pace.¹²⁸ A summary states:

The study indicates that plaintiffs with tort lawsuits in state and federal courts of general jurisdiction received approximately half of the \$27 billion to \$34 billion spent in 1985. The costs of litigation consumed the other half.

Sloane and Chepke record that only 40c to 50c in the medical malpractice premium dollar is paid to plaintiffs as compensation for their injuries, as opposed to much higher proportions returned to individuals under health and social insurance schemes.¹²⁹

More recently, the Congressional Budget Office has said:

[A firm of actuaries] estimates that only 46 percent of the total direct costs of the tort system go to victims in the form of economic and noneconomic damages; 54 percent go to transaction costs. By comparison, in the no-fault compensation systems for on-the-job and vaccine-related injuries, administrative costs make up only about 20 percent and 15 percent of total costs, respectively.

Those comparisons are not entirely apt, ... Nonetheless, given the large percentage differences between the tort liability system and no-fault compensation systems, it seems safe to conclude that the tort system costs more than does an available alternative method of compensating victims.¹³⁰

47. In the United Kingdom, as already noted, the Pearson Commission's research indicated that the total administrative and legal costs of the tort system constituted about 85% of the benefits paid (or about 45% of the total of compensation and operating costs).¹³¹ On the

6th edition of *Atiyah's Accidents, Compensation and the Law*, pp 337-9 and the “useful discussion of Australian data in the New South Wales Law Reform Commission's *Report on a Transport Accident Scheme for New South Wales* [above n 5], paras 3.84-3.93”. It also refers to a recent estimate in a seminar paper given to the Institute of Actuaries of *defence* costs as around 20-35 per cent of total payments made by medical defence organisations.

¹²⁷ Compare Figure 5.1 Administration costs (p 125); Figure 13.2 Legal costs as a proportion of total claims costs (including common law claims where those are permitted) (p 325).

¹²⁸ J S Kakalik and N M Pace, *Costs and Compensation Paid in Tort Litigation*, The Institute for Civil Justice, RAND, 1986.

¹²⁹ Sloan and Chepke, above n 47, Section 2.6.3. See also D M Studdert *et al*, “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation” (2006) 354 *New England Journal of Medicine* 2024 (concluding that the “overhead costs of malpractice litigation are exorbitant”); Van Velthoven, above n 48, pp 14-15 (on average, it takes \$2.10 to deliver \$1 of tort compensation).

¹³⁰ Congressional Budget Office, *The Economics of US Tort Liability: A Primer*, Congressional Budget Office, Washington DC, 2003, <<http://tinyurl.com/38bgjeg>> (accessed 24 December 2010), p 21 (footnotes omitted).

¹³¹ Above n 43, Vol 1, para 83.

other hand, the total administrative costs of delivering social security benefits were about 11%.¹³²

48. By way of anecdotal evidence, I shall quote from one of my own papers.¹³³ I contrasted what happens to seriously injured motor accident victims in New Zealand under their Accident Compensation Scheme, with the treatment received by a New Zealander, who went on a working holiday to Australia in 1976.

On 13 July 1978, he was injured in a motor accident in the State of South Australia. He suffered severe brain damage and was left barely conscious. The Public Trustee was appointed to represent him in the litigation. An agreement was reached that the plaintiff would have to accept a 30 per cent reduction in damages on account of his contributory negligence. Damages were eventually assessed by the Court on 7 August 1992, 14 years later, at more than AU\$700,000 after the reduction for contributory negligence. An appeal led to an increase in the damages, including interest, to AU\$856,922. Thereafter, the plaintiff's costs were taxed at about AU\$361,000. Disputes as to costs and interest on them came before the courts several times, including an application to the [High Court of Australia] for leave to appeal, which was refused on 10 August 2000, no doubt incurring further costs. A taxing master made some further errors in dealing with the costs and the defendants again brought the matter before a single Judge of the Supreme Court, who remitted it back to the master. Thus, some 23 years after the accident, the case had not been finally resolved and the costs on both sides probably far exceeded the damages.

No doubt this case is exceptional, but probably not unique. In 1996 the author wrote an editorial comment on the medical negligence case of *Rogers v Whitaker*, in which the plaintiff had been awarded a little over AU\$800,000 in respect of total blindness. The subsequent litigation concerning the tax consequences of the pre-judgment and post-judgment interest on that award revealed that her costs alone were almost AU\$350,000. Recently, in a case brought before the HCA for special leave to appeal against a judgment for a child plaintiff in a horse-riding accident — the four Judges of the New South Wales Supreme Court having been equally divided on the liability of the defendant — the HCA approved a settlement in which the only money that changed hands was a payment of AU\$100,000 by the defendant towards the plaintiff's costs. Heydon J commented that if it had not been for the settlement the outcome could have been far worse for the plaintiff.¹³⁴

44. A more recent example comes from the judgment this year on an application to strike out parts of the pleadings in a case.¹³⁵ It demonstrates how attempts to alleviate some of the faults of the common law system — in this instance, the pioneering legislation in Western Australia allowing awards of periodical payments instead of a once-and-for-all lump sum — can still go hopelessly wrong. The plaintiff suffered serious brain damage in a motor accident in 1973 at the age of 16½. The Public Trustee acted as her next friend in the litigation that followed. Liability of the defendant was not at issue and the case was concerned only the assessment of her damages. At the original trial in 1977 a consent order was made for payment by the insurers of the defendant's motor vehicle (the MVIT) of a lump sum of \$75,000 and periodical payments for attendant care. It was contemplated that applications would be made to increase the amount of the periodical payments if they became inadequate. Despite their becoming inadequate in fact, the Public Trustee did not make application for their increase. Eventually, in 1989 an application was made to the Court for reimbursement of the difference between the actual

¹³² Ibid, Vol 2, Table 158.

¹³³ H Luntz, "A View from Abroad" [2008] *New Zealand Law Review* 97.

¹³⁴ Ibid, at 103-4 (citations omitted).

¹³⁵ *Donnellan v Public Trustee [No 2]* [2010] WASC 214.

costs of care and the amounts received. The application was opposed on the grounds that the original order did not provide for retrospectivity. The MVIT then sought to redeem future periodical payments by payment of a lump sum. Correspondence between the Public Trustee and the MVIT resulted in an application in 1993 to the Court for approval of a compromise under which the periodical payments for nursing care for the rest of the plaintiff's life were redeemed by a payment of \$240,000. The judge was not initially satisfied on the evidence that this was in the best interests of the plaintiff. After further opinions were obtained, the Court approved the compromise. The present proceedings were commenced in 2004, alleging negligence on the part of the Public Trustee in negotiating and accepting the compromise. It was alleged that in making the calculations for the lump sum, the wrong expectation of the plaintiff's life was used, that the net costs of an attendant were put forward instead of the gross costs, and that there were other errors. There followed what the judge described as "a wholly unedifying history of interlocutory pleading disputation in this matter",¹³⁶ leading eventually to the present judgment. In this judgment, the judge ordered a stay of various paragraphs of the statement of claim (as much amended) against the Public Trustee because they would inevitably amount to a collateral attack on the Court's approval of the compromise in 1993, which was not permissible. Other paragraphs were allowed to stand, so that presumably if the plaintiff can risk further costs the litigation may proceed.

Conclusions

49. The empirical surveys are unanimous in showing that the tort-insurance system delivers compensation to only a small proportion of injured people and that it is a very expensive way of doing so. They also confirm many other defects of the system, such as the long delays in meeting the needs of the injured and the adverse effects on their rehabilitation.¹³⁷ The common law's sole method of assessing damages by means of a lump sum determined once and for all means that the compensation will almost always be wrong. In the case of the severely injured the lump sum will usually prove to be too little, but occasionally — as where the plaintiff dies unexpectedly soon after judgment¹³⁸ — too much.¹³⁹ The retention of torts can only be justified if it succeeds in reducing the number of injuries, so that its benefits outweigh the costs. Although it apparently comes closer to this in some areas than others, the studies do not — and apparently cannot — show conclusively that this is so. They do also show that any benefits derived from variable insurance premiums — where this is indeed possible, as it is often not — can be built into alternative no-fault schemes, such as workers' compensation without the tort

¹³⁶ Ibid, at [62].

¹³⁷ In the context of workplace injury, see Productivity Commission, 2004, above n 1, pp 235-40. Note, however, G Grant and D M Studdert, "Poisoned Chalice? A Critical Analysis of the Evidence Linking Personal Injury Compensation Processes with Adverse Health Outcomes" (2009) 33 *Melbourne University Law Review* 865 pointing to methodological problems with many of the studies of different compensation systems.

¹³⁸ Eg, *Gilchrist v Estate of the Late Taylor* [2004] NSWCA 476.

¹³⁹ For a consideration of the arguments for and against lump sums and the conclusion that they may often be inadequate for meeting the needs of seriously injured workers and may be detrimental to rehabilitation, see Productivity Commission, 2004, above n 1, pp 232-4, 241-2 and the recommendations on p 248.

component.¹⁴⁰ These alternatives can certainly deliver compensation to more people, more speedily and at less cost. They can also generate more complete and reliable data, which may assist in devising methods for increased safety. Ideally, there would be only one source of compensation, based on need and irrespective of cause. Funds for such a scheme should come from social insurance, but could be augmented from levies on those who increase risks, whether or not the increased risk can be causally linked to an individual victim.

¹⁴⁰ See Productivity Commission, 2004, above n 1, Chap 10. P S Atiyah, “Accident Prevention and Variable Premium Rates for Work-Connected Accidents--I” (1975) 4 *Industrial Law Journal* 1; P S Atiyah, “Accident Prevention and Variable Premium Rates for Work-Connected Accidents--II” (1975) 4 *Industrial Law Journal* 89.