

FORUM

The object of Forum is to encourage thoughtful and intelligent debate on issues relevant to the law. Vigorous argument and analysis of current legal affairs is for the most part impossible in the general media, and it is hoped that the provision of a separate arena such as Forum, devoted to discussion of legal matters by the legal community, will promote better awareness and understanding of such issues within academic, professional, judicial and other circles.

Forum will appear in each Newsletter, and will be republished in the General Issue of the University of New South Wales Law Journal, to provide a permanent record of the debate. Contributions by readers to Forum are invited and should be a maximum of 1500 words in length, with minimal footnoting and referencing. Publication of contributions is at the editor's discretion. The opinions expressed are the personal views of the authors.

PROPOSED AMENDMENTS TO THE MOTOR ACCIDENTS ACT 1988 (NSW)

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A Bill to amend the *Motor Accidents Act* of 1988¹ has been passed in the Lower House of the New South Wales Parliament. It is presently awaiting the consideration of the Upper House Standing Committee on Law and Justice following resumption of Parliament this April.

Should the Bill be passed, the diverse array of thirteen thousand odd citizens who suffer injury in a motor accident in the twelve months following its becoming law will have two things in common. All will have been injured in consequence of the negligence of another and all will be at risk of receiving nothing in compensation for their pain and suffering and diminution of enjoyment of life.

In addition, if the Bill is passed a further three thousand citizens will learn to their dismay that their entitlements to compensation for pain and suffering in consequence of fractured necks, scarring, broken legs, back operations and similar injuries are so diminished by the amended Act that they are hardly worth having.

1 Bill to Amend the *Motor Accidents Act* 1988, 1995 (NSW).

The Government is proposing to remove injured citizens' rights because it has agreed to change the law in a manner sought by insurance companies.² The law will be changed by increasing the number of those people deemed by statute to be "less seriously injured". Such people will lose their rights to compensation for pain and suffering altogether. Further, the entitlements of those who are moderately to severely injured will be dramatically reduced. The Government asserts that these changes are necessary to keep motor car insurance premiums (ie greenslips) at an affordable level, which it and the insurers put at about \$350 per vehicle per annum.

When the motor vehicle insurance market was opened up several years ago, insurers competed for market share, and premiums dropped below \$200. The memory of the television advertising has not yet entirely faded. Whether the rapid lowering of premiums was a calculated move to wipe out smaller insurers by taking a short term loss or whether it was a result of poor judgment, the insurers wrote business which they now assert will cost them money rather than return them profits. The Government, in bad odour over broken promises to tollway users and others does not wish to preside over a massive escalation of premiums for motoring voters. The result is pressure to reduce by legislation the rights of those who will claim on the insurers, that is, the injured public.

It has been said that only those suffering 'minor' injury will lose their rights. A small child, brain damaged and confined to a wheel chair for life, with no movement save for his head is in terms of the *Motor Accidents Act 1988* (NSW), a "worst case". Under the present legislation a plaintiff who has sustained injuries of this order of magnitude would receive \$235,000³ for pain and suffering and loss of enjoyment of life.

All other cases are evaluated as a percentage of "a worst case". Those assessed at one per cent to 14 per cent of a worst case are categorised as "minor injury" cases and are to receive nothing at all for their pain and suffering under the amended Act.

Under the common law system, all such injuries would attract compensation. Under the 1988 Act presently in force, those assessed at one to eight per cent of a "worst case" receive no non economic loss compensation (NEL). Under the proposed Act, victims assessed at nine to 14 per cent (presently entitled to \$1650-\$13400) will also receive nothing. The one to 14 per cent range of a worst case includes injuries ranging in seriousness from lacerations and shock to fractured limbs, facial injuries and permanent scarring involving operations and significant hospitalisation. Sixty five per cent of all accident victims who make a claim are in this category.

Nor do the savings to the insurers stop at 14 per cent. Under the Act as proposed those in the 15 per cent range of a worst case, who are currently entitled to \$15,750, are to lose 87 per cent of that entitlement, setting their new entitlement at \$2,000. Reductions introduced by the amending Bill affect current entitlements

2 The annexed chart compares non-economic loss (NEL) figures suggested on behalf of insurers with those proposed by the Bill.

3 \$222,000 before indexation on 29 September 1995.

through to those assessed as 38 per cent of a worst case. By way of example, the current entitlement of those in the 25 per cent range will be reduced from \$45,250 to \$14,000. The chart below shows that the 15 per cent to 25 per cent levels of a worst case, currently attracting \$35,250 to \$58,750 will have deducted from their awards for pain and suffering a sum starting at \$33,250, rising to \$44,750 over the range. Such victims will thus receive between \$2,000 and \$14,000 for pain and suffering. This 15 per cent to 25 per cent group comprises a further 16 per cent of accident claimants, raising the percentage of claimants affected by the Bill to 82 per cent of the total number of citizens injured each year, before taking into account those whose attorneys are unwilling to take the risk of recovering no costs,⁴ and accordingly advise against taking action at all.

Examples illustrate the operation of the proposed Act on claimants in the 15-25 per cent range. A middle aged lady with a broken neck, chest scarring, disrupted left knee and nerve damage to her left arm recently received \$40,900 for pain and suffering (24 per cent of a worst case) - she would get \$12,000 under the new legislation. A 49 year old lady with fractured ribs, sternum and clavicle with tears to the small bowel and disfigurement to the abdomen, who also sustained severe depression, recently received \$45,250 for her pain and suffering (25 per cent of a worst case). Were she injured in this way in the future, she would only receive \$14,000. A young man with a badly broken thigh and right arm, fractured jaw and lost teeth, with unsightly scarring from his operations, is similarly disadvantaged - his entitlement of \$59,950 at the moment (and that of the other three thousand people each year whose injuries are in this range) will in future attract an award of only \$25,000.

Trowbridge Consulting, for the Motor Accident Insurers Committee, assess⁵ that only 8 per cent of claims are assessed at more than 25 per cent of a worst case.

Nor is the Bill free of defects in other respects. The definition of injury⁶ limits cover to vehicles which are being "driven" at the time of injury. People in a stationary vehicle injured in consequence of the negligence of the owner or driver, by reason of a known defect for example, will not have the comfort of third party insurance. Under this definition the same situation would result were a passenger to be injured by a falling article stowed incorrectly on a bus, were the vehicle itself not involved in an accident. Children in a carelessly parked driverless car which drifts over an embankment would also not be within the definition's terms. Whilst ever the moving vehicle itself is involved in an accident, any injury which occurs, even though a consequence of its use, is outside the proposed definition of injury.

The amendments proposed require⁷ that all accidents must be reported to police, in writing, within 28 days of their occurrence. Should the police decline to accept the report or themselves make a report in writing (as sometimes happens) the proposed Act provides no assistance. In this regard, the Act fails to recognise that

4 Under the *Supreme Court Rules* (see *Ritchies Supreme Court Procedure*, Vol 1, NSW, Butterworths, 1984) no costs are awarded in cases falling in the 15-20 per cent range. In practice such cases will seldom be run.

5 Trowbridge Consulting, *NEL Severity Profile*, July 1995 - prepared for the MAISC.

6 See section 3.

7 See section 42.

off-road motor vehicle accidents occur in a work environment all the time. In these cases, accidents are likely to be fully recorded for worker's compensation, for occupational health and safety, and for statistical and employment purposes, but may well not be reported to police. No suggestion of fraud arises in these situations yet the Act will preclude recovery. Further, there is no reason why the Motor Accident Authority should have early access to police records, which are denied to potential plaintiffs, as the same section proposes.

It is also worth reporting that there is no foundation in fact for suggestions which appear regularly in the popular press that there has been some sort of blow-out in anticipated payments consequent upon awards by the courts. A report from the Civil Justice Research Centre commissioned by the Motor Accidents Authority has concluded that awards for non-economic loss by judges and arbitrators have not changed significantly over the past four years, remaining constant at about 22 per cent of the total award.

The Government's assessment that the new scheme will result in payouts totalling \$660 million per annum assumes judges and arbitrators are likely to increase their awards by five per cent, to offset to some extent plaintiffs' reduced entitlements. It should be borne in mind that over 95 per cent of claims are in fact settled by the insurers, and no input from the judges or arbitrators occurs.

There are fourteen insurers currently engaged in competition for the motorists' dollar. Some of these insurers are paying agents up to 15 per cent of the premium income, in addition to expending significant sums on television and general promotion. Such costs inevitably raise the general cost of insurance in this State, in comparison with other States. In Queensland, unrestricted common law damages are available at a premium cost of \$169.00 per annum, and in Tasmania, the same cover is provided for \$166.00 per annum.

Those who believe that the insurers should be excused their miscalculations (if indeed they did miscalculate) could perhaps ponder this simple idea - there are 3.3 million insured vehicles in New South Wales which at \$350 a greenslip generate income of \$1,155 million each year (premiums have for some time been considerably higher than \$350). The Government has said⁸ that its plan will reduce payouts to \$660 million per annum, leaving \$495 million or 43 per cent of gross receipts to meet insurers' administration costs, to fund investment and provide profits for shareholders. Next year, and every year thereafter.

8 Attorney General Jeff Shaw, "Government Takes Urgent Action to Halt Green Slip Crises", Media Release, 26 September; note 5 *supra*.

Comparison of Motor Accident Insurers (MAISC) Proposal to Government Proposal

% OF MOST EXTREME CASE	GROSS NEL AWARD	CURRENT NET NEL AWARD	MAISC PROPOSAL NET NEL AWARD *1	GOVT PROPOSAL NET NEL AWARD *2	% REDUCTION
1%	\$2,220	\$0	\$0	\$0	
2%	\$4,440	\$0	\$0	\$0	
3%	\$6,660	\$0	\$0	\$0	
4%	\$8,880	\$0	\$0	\$0	
5%	\$11,100	\$0	\$0	\$0	
6%	\$13,320	\$0	\$0	\$0	
7%	\$15,540	\$0	\$0	\$0	
8%	\$17,760	\$0	\$0	\$0	
9%	\$19,980	\$0	\$0	\$0	100
10%	\$22,200	\$3,700	\$0	\$0	
11%	\$24,420	\$5,920	\$0	\$0	
12%	\$26,640	\$8,140	\$0	\$0	
13%	\$28,860	\$10,360	\$0	\$0	
14%	\$31,080	\$12,580	\$0	\$0	100
15%	\$33,300	\$14,800	\$2,000	\$2,000	85%
16%	\$35,520	\$17,030	\$3,000	\$3,000	
17%	\$37,740	\$19,240	\$4,000	\$4,000	
18%	\$39,960	\$21,460	\$5,000	\$5,000	
19%	\$42,180	\$23,680	\$6,000	\$6,000	
20%	\$44,400	\$25,900	\$7,000	\$7,000	72%
21%	\$46,620	\$28,120	\$8,000	\$8,000	
22%	\$48,840	\$30,340	\$9,000	\$9,000	
23%	\$51,060	\$34,287	\$10,000	\$10,000	
24%	\$53,280	\$38,727	\$12,000	\$12,000	
25%	\$55,500	\$43,167	\$14,000	\$14,000	67%
26%	\$57,720	\$47,607	\$16,000	\$18,000	
27%	\$59,940	\$52,047	\$18,000	\$25,000	
28%	\$62,160	\$56,487	\$20,000	\$30,000	
29%	\$64,380	\$60,927	\$24,000	\$40,000	
30%	\$66,600	\$65,367	\$28,000	\$50,000	
31%	\$68,820	\$68,820	\$34,000	\$58,000	
32%	\$71,040	\$71,040	\$42,000	\$66,000	
33%	\$73,260	\$73,260	\$50,000	\$72,000	
34%	\$75,480	\$75,480	\$58,000	\$75,000	
35%	\$77,700	\$77,700	\$66,000	\$78,000	
36%	\$79,920	\$79,920	\$74,000	\$80,000	
37%	\$82,140	\$82,140	\$82,000	\$82,000	

COMPARISON OF COSTING OF INSURERS PROPOSALS TO GOVERNMENTAL PROPOSAL

	Estimate of Costs of Insurers Proposal *3	Estimate of Costs of Government Proposal *4
	\$m	\$m
Claims finalised 1994,95	346	352
Projection to 1995/96	540	550
Projection with 5% bracket creep	620	660

*1 As per costing prepared by Trowbridge Consulting for the MAISC proposal, 20 July 1995.

*2 As per proposal approved by Cabinet on 26 September 1995.

*3 As per costing prepared by Trowbridge Consulting for the MAISC proposal, 20 July 1995.

*4 As per costing prepared by Trowbridge Consulting for the MAA - see note 8 *supra*.