

TORT REFORM AND THE DAMAGES DILEMMA

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The momentum which the renewed drive to alter the principles of negligence has gathered should be a matter of significant concern for all Australians. The current crusade to further curtail tort law is significant both for the speed with which it has gathered force at both the State and federal levels and the prevailing political attitude that major reform is now absolutely essential and must be implemented as a matter of priority. Swayed by misinformed media and carefully orchestrated campaigns by the insurance and medical industries, there is evident a seemingly unflinching political determination to rush to reform irrespective of the merits of the cases for and against that momentous step.

There must now be pause for reflection. Neither the popular press nor special interest groups can be permitted to set law reform agenda liable to impact on every citizen. Unless a clear and convincing case can be made for change there should be no interference with principle or the common law process. Once valuable rights have been withdrawn they are almost never returned.

Of all the matters into which the Review of the Law of Negligence ('Ipp Panel') was requested to inquire within the quite inadequate time frame of some three months, the inquiry as to the principles governing the award of damages arising from personal injury and death was, arguably, the most critical. Based on highly questionable, certainly unproven, premises,¹ the Ipp Panel was required, inter alia, to: 'develop and evaluate principled options to *limit* ... quantum of awards for damages'.² It is reform of that area of law which is liable to have the most significant affect on our day to day lives and on the community at large. It is the area to which most attacks on the tort system are directed and which has been the primary target of those now agitating for legislative change.

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1 'Terms of Reference: Principles-Based Review of the Law of Negligence' in Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) ix, ix–xii. The opening paragraph of the Terms of Reference reads:

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. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

2 *Ibid* [2] (emphasis added).

This commentary reviews core principles governing the award of damages by Australian courts for negligently inflicted personal injury and death, all of which have been identified as possible target areas. It evaluates various reform options mooted in relation to two critically important topics: compensation for loss of earning capacity and compensation for the cost of long-term future medical care.

I COMPENSATION FOR LOSS OF EARNING CAPACITY

Those whose capacity to earn money has been destroyed or impaired, temporarily or permanently, through the negligence of another are entitled to be compensated for that loss. The relevant loss is conceptualised as a loss of the capacity to earn rather than a loss of earnings. Damages are assessed on an earnings-related basis.

There has been criticism of the approach adopted by the courts to earnings-related compensation. At a practical level, it has been observed that, because the actual tortfeasor almost never pays the compensation ordered, the approach adopted permits inequitable wealth distribution. When a high income earner recovers damages there is a redistribution of wealth from equally innocent premium payers, who, in the main, earn far less. It has been argued also that earnings-related damages reproduce existing inequalities in society — they favour the rich at the expense of the disadvantaged and poor; men against women; ethnic majorities against ethnic minorities. The fact, the argument runs, that society values the work of one person (say a doctor) more highly than another (say a cleaner), and so pays higher wages to the former than the latter, provides no justification for distributing funds collected from the community at large in greater measure to the one than the other when neither person is working. Conceptual criticism of the approach adopted to compensate for this form of pecuniary loss has emerged as well. The courts make no allowance for the saving in effort that the plaintiff would have had to devote to the earning of the income on which they base the damages for loss of earning capacity.

A number of questions in relation to damages for the loss of the capacity to earn arise in the context of the current debate concerning reform of the tort system generally and the principles governing the award of damages. There is no doubt that the task which confronts courts when called on to value the loss of the capacity to earn in the future is a very difficult one. If the plaintiff is permanently unable to earn, or his or her ability to earn will be permanently limited, the court must make a finding as to his or her pre-accident expectation of the remaining years of working life up to normal retirement age. An assessment is required of the expected period of incapacity from which to derive a 'multiplier' to be applied to the net annual loss (the multiplicand). At its simplest level, the award of damages for future loss of earning capacity is the product of these two variables.

Where reform of the principles governing the recovery of damages for this form of pecuniary loss has been introduced, it has usually taken the controversial

form of thresholds and/or caps on the sums recoverable. It is to this proposed method of reform that attention is directed under this section.³

There has been no serious suggestion advanced by those seeking major reform of the tort system (as opposed to some other regime) that the entitlement to compensation for the destruction or impairment of the capacity to earn a living should be abolished. Nor could there be — that right should be regarded as inviolate. The question then arises: if the right to recover damages for such harm is entrenched as a matter of principle, should there be full compensation for the loss sustained or should there be partial compensation pursuant to statutory limits? Is there a sound case for the introduction of thresholds and/or caps on the damages recoverable for the loss of the capacity to earn an income?

The proposals to introduce restrictions on the right to recover full compensation for loss of the capacity to earn are cause for serious concern. That concern is of both a principled and practical nature. As is the case in relation to proposals to impose restrictions on the damages recoverable for non-economic loss and for gratuitous services and expenses incurred by third parties, the major difficulty with reform of this nature is that it is entirely unsupported by principle. Whatever the nature of the threshold and/or cap introduced it will be utterly arbitrary and artificial. This is so even if limitations are linked to average earnings because plaintiffs are no longer treated as individuals but as a homogenous group. Attention shifts from what has actually been lost by the plaintiff injured to what is thought by the government of the day to be reasonable by reference to some notional standard. Arbitrary and artificial limits are not, of course, unknown in the law, but they should be avoided wherever possible. Certainly they should be avoided where the basis for their introduction is highly questionable and it is clear that they will operate in an unfair or prejudicial manner. As with proposals to impose restrictions of this nature in relation to the damages recoverable for non-economic loss and for gratuitous services and expenses incurred by third parties, that is the position in relation to those proposals concerning damages for loss of the capacity to earn.

The arbitrariness of reform of this nature is evidenced by the Australian experience. A number of States have introduced thresholds and/or caps in relation to motor vehicle compulsory third party schemes. The rules and calculations required are complex. They have been amended on more than one occasion. The regrettable but inevitable result of piecemeal reform of this nature is a mesh of different rules resolving claims arising in the same circumstances in different ways depending on when and where the tort occurred.⁴ The only constant is that plaintiffs are deprived of full compensation in the absence of any sound principle justifying that approach.

The ability to earn is a precious asset — it is probably the most prized asset one can possess. The proposal to restrict compensation for its loss flies in the

3 There has been much argument concerning the appropriate discounts to be applied to damages for all species of future economic loss. It is not possible to canvass that important debate here.

4 See, eg, *Motor Accidents Act 1988* (NSW) s 70A; *Motor Accidents Compensation Act 1999* (NSW) ss 124–6; *Transport Accident Act 1986* (Vic) s 93(7); *Wrongs Act 1936* (SA) s 35A(1)(d), (da); *Motor Accident Insurance Act 1994* (Qld) s 55A.

face of the established, sound, principle that tortfeasors must take their victims as found. For so long as damages are assessed in this country on an earnings-related basis, there is no acceptable reason of principle why a leading cardio thoracic surgeon deprived forever through the incompetence of a public authority of earning a livelihood in that capacity should be barred from recovering his or her full financial loss. Why should that group of wage earners be forced to bear the financial burden of the wrongdoing of others? People, quite reasonably, plan for their future having regard to their present and likely future financial circumstances. Leaving high earners without the capacity to service debts incurred on the assumption that pre-tort income would continue to be derived is both unprincipled and unfair. So too is forcing them to alter completely the financial structure of their lives simply because government considers that they could 'get by' on less than they earned before negligent behaviour robbed them of the ability to derive income. Penalising those who earn large incomes to the benefit of the incompetent and those who insure them is quite the wrong response to the need to ensure that the common law adapts to accommodate contemporary society and changing conditions. Safety standards will never improve if this sort of approach is adopted.

To the extent that thresholds have been advanced in the course of the debate concerning public liability there has been no suggestion that the introduction of a threshold be accompanied with a counterbalancing benefit scheme. It appears to have been assumed that it is appropriate that the injured earner bear the loss sustained, either personally or through the family network. The proposal advanced by the National Party of Australia illustrates both the arbitrariness of this type of approach to reform and the dangers to which it gives rise. The National Party has proposed that an overall threshold of A\$36 000 be imposed on common law claims.⁵ That is not a small or insignificant sum. For many Australian families, A\$36 000 is at least a year's after-tax income. For many families and individuals, a year without such income would cause severe financial hardship.

Consider this scenario. A young married man with two pre-school children sustains a broken ankle when he trips on a step in building. The step gives way because the building has been inadequately maintained. The man is self-employed. He is a gardener. Due to his leg being in plaster he is incapable of earning income for three months. He loses A\$15 000. He then makes a full recovery. He is symptom free. He returns to work. General damages can be assessed at A\$10 000. Even when medical expenses are added to these heads of loss, it can be seen that the man will not reach the proposed threshold of A\$36 000. If this threshold was implemented, the man would have no right to recover for loss of his capacity to earn (or any other loss) suffered as a consequence of the clear negligence of the building owner or occupier. That is the position notwithstanding that the loss of the A\$15 000 is economically

5 See National Party of Australia, Victoria, *Proposal for Changes to Meet the Crisis in Insurance Availability and Cost* Discussion Paper (2002) 3, <http://www.vicnats.com/news/pdfs/insurance_plan.pdf> at 17 November 2002; National Party of Australia, 'Insurance Council Backs Nats Plan' (Press Release, 13 August 2002).

crippling to this man and his family. Many Australians would be similarly affected.

On what sound basis can it be argued that this young man should be deprived of a common law remedy? What principle is said to justify the introduction of measures which force him to risk financial ruin due to injury caused through another's carelessness — which injury, it can be expected, would be more likely to occur if reform is implemented reducing the financial incentive for proper maintenance and the preservation of safety standards? The potential denial of access to justice and compensation to large sections of the community is unacceptable. There is a danger that those who may well be able to demonstrate that they clear any limitation imposed will be dissuaded from running the risk of failing to do so for fear of incurring legal costs they cannot hope to meet. The net effect of that impact would be that those with a reasonable entitlement to damages for their injuries do not recover and those who are responsible for such harm escape any obligation to pay for the consequences of their carelessness with virtual impunity and no incentive to ensure that others do not suffer similar injury at their hands.

Monetary thresholds of the order proposed by the National Party of Australia will impact particularly adversely on disadvantaged and poor members of the community. Low income earners, part-time earners, the elderly, women, those who stay at home, the unemployed, pensioners and youth are the most likely to be unable to meet the monetary mark for participation in the litigation process. Thresholds on the damages recoverable for the loss of the capacity to earn would also operate unfairly on those who sustain injuries which, although they do not affect their ability to work, cause great pain and suffering (for example, those which result in hideous scarring and disfigurement).

It must be emphasised that the introduction of thresholds does not remove the cost of injury to the community. What they do is cause the cost to be shifted from the wrongdoer to the injured person and the community at large. The community suffers, not only because access to justice is denied to many, but because of the removal of incentives to maintain high levels of safety to avoid injury and because of increased taxation necessary to fund to hospital, medical and social welfare expenses no longer met by tortfeasors. Caps on damages give rise to similar problems. They undermine an individual's right to compensation as well as undermining courts' capacity to award full and fair compensation to those who prove their common law entitlement to it.

Despite the proliferation of State legislation designed to limit the quantum of damages recoverable (and talk of the introduction of further examples and variations), little overall benefit to the tort system would be achieved by reform designed to limit the quantum of damages recoverable for loss of the capacity to earn by way of thresholds and/or caps. There is no acceptable evidence that the cost of insurance or the administration of the tort system generally has been reduced in those jurisdictions where statutory limitations of this nature have

been introduced.⁶ On the contrary, the prevailing view within the insurance industry appears to be that large damages awards are not a significant cause of rising premiums and that, consequently, capping awards will not solve that problem.⁷ This is consistent with actuarial advice.

The limitations embodied within the *Civil Liability Act 2002* (NSW) are illustrative. They require the court to disregard any net weekly earnings in excess of A\$2712.⁸ This corresponds to a pre-tax income of approximately A\$250 000. That is an income which only about 1 per cent of Australian adults are likely to exceed. Ignoring the small part of their income above this limit will have negligible consequences for the cost of insurance. This is particularly the case as damages for the loss of earning capacity are only part of the total compensation awarded. It has been announced that Queensland proposes to introduce a general limit on the damages recoverable for the loss of earning capacity set at three times the average weekly earnings (as is already the position there in relation to motor accident claims). As at November 2001 the average weekly earnings in Queensland were A\$640.80 per week. Three times this amount produces a pre-tax income of approximately A\$100 000 per year. That is an income which about 2 per cent of Australian adults are likely to exceed. The cost benefits to be derived from ignoring the excess above that level are highly debatable. Western Australia has also taken steps to introduce the same general cap on damages for 'loss of earnings'.⁹ Damages for total loss of earning capacity are now to be capped in South Australia at A\$2 200 000 (excluding any interest on damages for past loss and adjusted in accordance with the Consumer Price Index).¹⁰ Significantly, the *Public Liability Insurance Analysis for Meeting of Ministers* ('Trowbridge Report') concluded that 'caps on future economic loss at the levels utilised in the NSW, Queensland and SA CTP [motor vehicle compulsory third party] systems will not have any impact on current claims costs'.¹¹

6 See Chris Milne, 'SA Grasps Insurance-Crisis Nettle', *Australian Financial Review* (Sydney), 14 August 2002, 6, reporting the comments of Mr Foley, the Treasurer of South Australia, in relation to the recent reforms introduced in that State. Mr Foley 'said the overall legislation was designed to restrict payouts and bring down the cost of public liability insurance' but 'conceded there was no guarantee that premium rates would fall'. He expects 'the States and the Federal Government to 'come down on the insurance companies so damn hard' if they do not pass on savings from the reforms' and that they would 'agree to use the weight of the regulators, including the Australian Competition and Consumer Commission and the Australian Prudential Regulatory Authority, to make certain that insurers passed on the benefits of the reforms'. How exactly it is said insurers could be forced to reduce premiums is unknown. Whether this could be achieved is highly debatable.

7 Note the media reports of comments by the Executive Director of the Insurance Council of Australia, Mr Alan Mason, at the Insurance Council's New South Wales Conference on 8 March 2002: *Capping Payouts Won't Solve High Public Liability Premiums* — ICA (2002) ABC Online <<http://abc.net.au/news/>> at 8 March 2002; *Insurers Reject Claim Capping* (2002) News.com.au <<http://news.com.au>> at 8 March 2002.

8 See *Civil Liability Act 2002* (NSW) s 12(2).

9 See *Civil Liability Bill 2002* (WA) s 11, introduced into Parliament on 14 August 2002.

10 See *Wrongs (Liability and Damages for Personal Injury) Amendment Bill 2002* (SA) s 3, introducing a new pt 2A to the *Wrongs Act 1936* (SA) and ss 24, 24D(2) of that part. The Bill was introduced into Parliament on 13 August 2002.

11 See Trowbridge Consulting, *Public Liability Insurance Analysis for Meeting of Ministers 27 March 2002* (2002) 53 (26 March 2002).

In the absence of a principled basis for partial compensation only, or evidence that this would have the beneficial impact asserted in some quarters, limitations in the form of thresholds and/or caps on the sums recoverable for the loss of the ability to earn should not be introduced. That is the primary and preferred position.

It must be recognised, however, that the clear government trend is in favour of capping damages for economic loss. Although I am opposed to the introduction of thresholds and caps on damages as a matter of principle and practice, if some reform is to be introduced, a certain form of cap on damages for the loss of earning capacity could be contemplated, subject to certain important safeguards. Any modification of current entitlements would need to be very carefully structured to ensure that essential rights were not unacceptably curtailed or exposed to the risk that they would be unacceptably curtailed at some future date.

A cap lower than that embodied in the *Civil Liability Act 2002* (NSW) (A\$2712 per week) cannot be supported. The proposals mooted in Queensland and introduced in Western Australia based on lower average weekly earnings in those States should be rejected. Caps set at more commonplace levels of income should be strongly opposed. Damages capped at the proposed New South Wales level could, perhaps, be said to be palatable because they would affect only a very small group of high wage earners who, it could perhaps be argued, should be expected to obtain their own first party insurance if they wish to cover losses exceeding the capped figure. That said, as stated, there is little to recommend such an unprincipled strategy designed to penalise the fortunate few and, more importantly, likely to produce no or minimal benefit in terms of the cost and availability of insurance.

Two additional safeguards would need to be implemented if a cap of this nature was introduced. First, it would need to be stated expressly in any legislation that the level of damages recoverable are subject to indexation. Secondly, measures would need to be taken to ensure that that level could not be revised downwards without legislative amendment. There is always an inherent danger that any threshold or cap introduced today will be raised or lowered tomorrow because different governments have different ideas as to what constitutes 'reasonable' compensation, driven in large part by the desire to embrace popular sentiment. That is problematic and highlights the arbitrariness of reform of this type.

I would not support any type of cap other than one relating to weekly earnings. It has occasionally been mooted that caps on damages for loss of earning capacity be introduced not only in relation to weekly earnings but also in relation to the period of incapacity by which they are to be calculated. On that approach, the fact that a tort victim has been incapacitated for life and forever deprived of the ability to earn is ignored and allowances granted for some lesser set number of years of incapacity (and by reference to capped levels on weekly earnings). Any move to limit awards by reference to maximum periods of incapacity which may bear no resemblance whatever to the actual level of incapacity suffered should be strongly opposed. This strategy would be utterly

unprincipled, grossly unfair and serve to severely disadvantage the most seriously injured tort victims such as those catastrophically brain compromised: the greater the injury sustained the greater the unfairness and prejudice which would be wrought. Reform of this nature could not be justified on any basis.

II COMPENSATION FOR THE COST OF LONG-TERM FUTURE MEDICAL CARE

Concern has been voiced by some as to the levels of compensation provided for the cost of long-term future medical care. The same sorts of arguments said to justify departure from the 'once-and-for-all' rule and the implementation of a general power to award provisional damages in certain cases are advanced to support the case for modification of the principles governing compensation for the cost of long-term future medical care.

It is asserted by those seeking reform of this nature that compensation for the cost of long-term future medical care is inevitably inaccurate due to the impossibility of precise prediction of future needs; large awards may not be used for the intended purpose and may be dissipated by others resulting in recourse to the community based system; the award does not guarantee that the required services will be able to be purchased (particularly in rural and remote communities); in the absence of appropriate service networks people are often cared for in inappropriate settings and/or at a higher than necessary cost structure; the tort victim may die earlier than expected with the result that his or her estate receives a 'windfall'; lump sum awards cannot accommodate unforeseen changes in circumstances. It is said also that courts have been overly 'generous' in estimating life expectancy resulting in inflated awards for future care, a contention with which I do not agree. Nor do I accept the bold claim that 'one of the significant cost drivers' for the increase in medical indemnity insurance is the 'increasing size of future care' costs awards. No sound evidence has been adduced to substantiate that assertion. It may be accepted that there are significant problems in permitting civil juries to calculate damages awards for personal injuries and awards for this head of loss in particular and that serious consideration should be given to removing the vestiges of the entitlement to do so and entrusting this exercise to judges in all cases.

Those who seek reform of the principles governing compensation for the cost of long-term future medical care assert that, for the reasons identified above, a new system is required and that the rationale for the introduction of that new system is the need to 'deliver better outcomes for people with catastrophic disabilities and their families through the availability of accessible, timely, appropriate and cost effective services'. I do not accept the contention that the current common law principles governing the assessment of damages for the cost of long-term future medical care do not facilitate or are inconsistent with ready access to appropriate long-term medical and care regimes, or that the models proposed for reform will do so in a more 'accessible, timely, appropriate or cost effective' manner.

There may be certain practical difficulties with the provision of suitable long-term future medical care of the catastrophically injured but those problems are unconnected with the principles of law governing liability and the assessment of damages for that care or the quantum awarded. Deficiencies in the 'system', such as the shortage of suitable medical and care facilities in rural areas, cannot be met through legal reform but must be addressed via the political and other processes. It does not advance debate in relation to the case for modification of the law to support additional funding for existing and new disability services and 'improved quality and safety for patients'. No one would deny that such improvements are to be welcomed, but discussion of this type of issue in the context of law reform is both meaningless and misplaced. It serves only to cloud the issue at hand: is there a case for change to the law and, if so, how is that change best achieved? There may be a case for the introduction of an alternative mechanism by which the special needs of the most seriously injured are provided for, but it must be acknowledged by those who advocate such change that this is economically driven with the overall primary objective of reducing costs for insurers. The push for such major reform should not be disguised as a well-intended benevolent move to provide for some additional benefit to the most seriously injured victims of tort. The 'outcomes' for those who are now paid in one lump sum are not unacceptable¹² — they are fully compensated at the one time and have immediate access to fund all medical and care needs. As matters now stand, their requirements are being met as best as they are able to be in the light of service shortages — the real objection of those who seek reform is not that these requirements could be better provided for, but rather that the current cost of their provision is excessive. What is sought through reform is, in truth, a better and different 'outcome' for the tortfeasor, or more accurately, those who insure him or her, rather than a better outcome for the victim of the wrongdoing. To contend otherwise is disingenuous. What is really sought is the cheapest acceptable method of caring for and treating the most seriously injured tort victims over long periods. That may be a legitimate objective of proposed reform, but the debate must proceed on an intellectually honest basis and with the true purpose fuelling the push for reform firmly in mind. Any system which threatens the provision of appropriate care regimes for the most seriously affected victims of tort must be eschewed.

It has been suggested that damages for the cost of long-term future medical care should be removed from the common law system and that this specific head of loss should be provided for by way of statutory entitlements administered by a new 'appropriately skilled' entity. Reference has been made in this context to the three Australian jurisdictions which provide for no-fault motor accident benefits. Victoria, Tasmania and the Northern Territory make different provision for the effect of such benefits on the recovery of damages at common law. It has been

12 There is though the very real problem that high discount rates applied to future losses result in the dissipation of funds earlier than assumed by courts. In jurisdictions like Western Australia and Tasmania, where rates of 6 per cent and 7 per cent apply, this gives rise to very serious difficulties indeed. It is primarily for this reason that the long-term future needs of the catastrophically injured, particularly children and young adults, are seldom able to be met satisfactorily in those States.

argued by some that reform modelled on one or other of these schemes should be introduced, designed to provide for the cost of long-term future medical care in all personal injury cases. The question arises whether there is a sound case for the excision of this particular head of loss only from the common law and for payment to be administered by way of statutory benefits pursuant to a no-fault scheme covering all personal injury claims. Is there, in other words, a case for a general, but partial, no-fault scheme governing compensation for the cost of long-term future medical care?

It is to this particular proposal that attention is directed here. No analysis is made of the merits and disadvantages of structured settlements¹³ or periodic payment judgments in the context of consideration of alternative schemes to recompense those who require long-term future medical care. It suffices it to say that the use of one or other of these methods of providing for the cost of long-term future medical care may address many of the concerns raised by those who desire an alternative method of 'managing' the future care costs of the catastrophically injured.

Particular focus has been directed during the debate in relation to compensation for the cost of long-term future medical care to the scheme that operates in Tasmania. Section 27(1) of the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) provides that, subject to one exception:

if a liability has been incurred for the payment of damages to a person in respect of a personal injury the payment to that person of a scheduled benefit in respect of that personal injury shall, so far as it extends, be taken to be a payment in or towards the discharge of that liability, and the amount of those damages shall be reduced accordingly.

This does not specify by whom the liability to pay damages has been incurred. Only scheduled benefits are to be deducted. Services found by the court not to be reasonable or necessary are not included in the damages and payments made by the Motor Accidents Insurance Board, for these must not be deducted.

The one exceptional benefit that the Act says must not be deducted is a medical benefit payable to someone whom the court has certified is in need of daily care. Benefits of this type continue for so long as the person needs them. Because the Motor Accidents Insurance Board will continue to pay for them, no allowance should be made in the damages for them (even if they are not caught by the general prohibition in Tasmania of awards for *Griffiths v Kerkemeyer* damages). The liability of the Motor Accidents Insurance Board to make further payments of no-fault benefits ceases on judgment or acceptance of a payment in settlement, except to the extent that the judgment or settlement is unsatisfied. Therefore, future payments need not be taken into account in the assessment of damages.

13 The Structured Settlement Group was formed at the beginning of 1999 with a view to introducing structured settlements in Australia. The founding members were the Law Council of Australia, the Australian Plaintiff Lawyers Association, the Insurance Council of Australia, United Medical Protection and Injuries Australia. The Australian Medical Association and other organisations joined later. The Taxation Laws Amendment (Structured Settlements) Bill 2002 (Cth), which provides a tax exemption for structured settlement payments, was introduced into Parliament on 6 June 2002 and passed by the House of Representatives on 18 September 2002. It is expected to be passed by the Senate in the spring sittings.

The 'once-and-for-all' rule should not be considered inviolate. There are reasonable arguments in favour of deviation from the general principle in certain cases. That said, the arguments for and against reform of this nature are finely balanced.

As a matter of general principle the introduction of no-fault systems cannot be supported. Despite its unpopularity, the common law of tort provides the best and fairest remedy for those injured through the avoidable carelessness of others and the best incentive for proper risk management. The current government trend is, however, in favour of the introduction of mechanisms to reduce the costs of caring for the victims of tort, particularly over long periods. I am of the cautious opinion that the proposal for the introduction of a general, but partial, no-fault scheme governing compensation for the cost of long-term future medical care is worthy of further consideration. If the proposed scheme were government funded no concern would arise as to the continued existence and viability of the party liable to make payments. Examination of the case for the introduction of a scheme funded in part by insurers through premium contributions can be supported. It must be recognised that although the introduction of the type of scheme contemplated warrants review, there are potential pitfalls. There may be very great difficulty, for example, in determining where the line is to be drawn between those victims who are classifiable as severely disabled and those who are not. A hybrid scheme, comprised in part of no-fault payments and in part of common law compensation, may well give rise to more problems than it resolves, but it is accepted that its merits and disadvantages should be evaluated in more detail. Close attention would need to be directed to address a number of concerns before introduction could be endorsed. Important measures designed to protect plaintiffs would need to be built into any new system.

One critical matter must not be lost sight of when contemplating change to the current system of compensating for the cost of long-term future medical care. Those who would be most directly affected by reform of the type mooted are the most vulnerable and most seriously injured tort victims. It is the catastrophically compromised who stand to lose the most from reform directed to reduce the costs of caring for them. Reformers must be vigilant to ensure that any modified scheme does not serve to compromise care needs or, equally importantly, increase the already significant emotional burden with which such patients and their families have to struggle on a daily basis. One potentially serious problem with the suggested scheme is that it assumes a benign bureaucracy which administers funds in a reasonable and timely fashion. That may or may not prove to be the position. Experience indicates that this does not always occur. Indeed, almost invariably, serious problems ensue. It is imperative that neither seriously injured persons nor their loved ones are placed in the position of having to negotiate unnecessary and/or unreasonable bureaucratic hurdles and to continue to fight for the care regime to which they should be regarded as entitled as of right. We should not subject the catastrophically injured and those who love them to the additional burden of having to fight with clerks and other bureaucrats for money to pay for proper care. Any system which threatens to frustrate the

provision of appropriate care regimes for the most seriously affected victims of tort must be rejected.

Another important fact has been ignored by those who support the introduction of a partial no-fault scheme to administer payment for long-term future medical care. There will be significant administrative costs associated with such reform. It has been assumed that those costs will not be so high as to defeat the purpose of excising this head of loss from the common law. That assumption may not be valid. No-fault schemes have proved to be far more expensive and cumbersome than envisaged. It is possible that the partial scheme contemplated would be as or more expensive overall as the current common law system. The associated costs will ultimately flow through and affect the community at large in the form of decreased services and impact on the availability and cost of insurance — the very antithesis of what was intended to be achieved by the reform. The cost implications of the introduction of the suggested scheme would need to be evaluated carefully before any step could prudently be taken to implement it.