UNEQUAL TREATMENT OF PERSONAL INJURIES

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[*This article describes the plight of several hypothetical plaintiffs or claimants all of whom have suffered serious personal injuries. The differences that emerge in terms of their treatment under disparate legal regimes, either as a result of (i) the way in which their disabilities were sustained or (ii) the place in which they were incurred, are discussed. In doing so, certain inequities inherent in our mixed legal system — comprised of fault-based litigation and no-fault compensation schemes — are revealed and 'brought to life'.*]

INTRODUCTION [1]

On the assumption that one of the objectives of our legal system is — or should be — the fair and just treatment of all Australians, one must pause to ask: has this objective been met in the context of compensating individuals for personal injuries? Importantly, it must be recognized at the outset that the vexed concepts of 'fairness' and 'justice' are used here to convey equal treatment of like situations. If it is revealed that similarly injured persons are not treated in similar ways, is this satisfactory? Are we content with that result? Can that conclusion be tolerated? Or, rather, would such a finding provide a reason for reform?

Finally, if reform is warranted, what should be the nature of that reform? That is, what would be the most acceptable and suitable means with which to deal with situations where individuals suffer similar injuries but do so as a result of either different causes, or, alternatively, sustain identical disabilities from the same causes but in different jurisdictions? Both the manner of injury as well as the place where the injury occurs have decisive effects on the treatment one can expect. The rights — and moneys available — to particular victims are dependent on these factors.

In a modern, industrialised and relatively wealthy society like Australia, the community would expect to be governed by consistent, uniform laws and legal regimes — notwithstanding its federal structure — rather than the *ad hoc*, piecemeal systems that presently co-exist on the basis of jurisdictional differences. Likewise, the community might expect that similar disabilities should be treated in like manner, irrespective of the reason for and the cause of the incapacity. The onset of the new decade provides an appropriate time to re-examine the consequences of our mixed system of compensation payments and damages awards, in which an individual's well-being is contingent essentially on matters of happenstance. Although several of these points have been made in the

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[1] I would like to thank my Torts and Torts and the Process of Law Students for helping me formulate my thoughts for this paper, which is the product of on-going classroom discussion.

relatively recent past by commentators such as Atiyah,[2] Ison,[3] and Luntz[4] as well as the New South Wales Law Reform Commission,[5] they bear repeating in the context of modern examples of our compensation and tort systems at work. Moreover, with the advent of possible reforms of product liability law[6] by the implementation of yet another piecemeal regime governing another select group of injured individuals — those sustaining damage as a result of the way in which manufactured goods act — it is apposite that the current Australian amalgam of fault-based and no-fault compensation schemes be considered.

The fact that individuals suffering exactly the same disabilities enjoy unequal rights may be illustrated by the following scenarios. The 'rights' presently of concern involve the availability of entitlements to an injured person, ranging from dependency on a successful common law action for the receipt of monetary benefits to the provision of compensation on a 'no-fault' basis, where the right to sue has been eliminated by legislative schemes. The scenarios described in this paper are intended to focus attention on the plight of equally disabled people and their disparate treatment under our laws.

JURISDICTIONAL DIFFERENCES IN AUSTRALIA AND THE SIGNIFICANCE OF THE 'FAULT DOCTRINE'

Consider the plight of the following characters, all of whom are articled clerks, and have been disabled to the same extent:

1. Ann is injured by Barbara in a motor vehicle accident in Sydney, New South Wales.[7]
2. Carol is injured by Doris in a motor vehicle accident in Melbourne, Victoria.[8]
3. Ellen is injured by Frances in a motor vehicle accident in Darwin, the Northern Territory.[9]
4. Gina is injured by Helen in a motor vehicle accident in Hobart, Tasmania.[10]

2 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987).

3 Ison, T., *The Forensic Lottery* (1967).

4 Luntz, H., *Compensation and Rehabilitation* (1975).

5 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984).

6 Australian Law Reform Commission, *Product Liability* (1989) (Report No. 51). In general terms, all that needs to be proved under the proposed legislation is cause and effect, as the injured claimant need not prove that the product was unsafe or defective. This scheme is intended to replace the current legal mix — comprised of contract, the *Trade Practices Act* 1974 (Cth) and negligence law — itself unsatisfactory, complicated and discriminatory in its treatment of those harmed by manufacturers' goods. For example, even though a purchaser and a bystander are injured by the same product acting identically, their rights to financial compensation are subject to the different requirements of disparate legal regimes.

7 Ann's case essentially is governed by the common law. Recent legislative prescriptions, under the Motor Accidents Act 1988 (N.S.W.) and the Motor Accidents (Amendment) Act 1989 (N.S.W.) are relevant. A detailed discussion of her rights follows, below.

8 Carol's case is governed by the Transport Accident Act 1986 (Vic.). A detailed discussion of her rights under that Act follows, below.

9 Ellen's case is governed by the Motor Accidents (Compensation) Act 1979 (N.T.). A brief discussion of her rights under that statute follows, below.

10 Gina's case is governed by the Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.). A brief discussion of her rights under that statute follows, below.

'Ann and Barbara in Sydney': The Scenario

Ann is 23 years of age. On December 1, 1990, Ann had the day off work and was having dinner in Paddington, Sydney, celebrating the completion of a particularly difficult legal file on which she had been working for weeks. She had closed the file the previous day. After finishing her meal, she got into her motor vehicle and began driving. She momentarily neglected to watch the road closely and entered an intersection just before the traffic lights turned from red to green. All of a sudden, her car was hit from the left hand side by a car driven by Barbara, which had sped through the intersection. Ann was not wearing a seat belt.

Having sustained serious head injuries, Ann was taken to Sydney Memorial Hospital. The very serious skull fracture caused brain damage, memory disturbance, and a speech defect. When the collision occurred, she broke her neck and was rendered a quadriplegic. She is unable to continue her employment as an articled clerk, and her prospects of a career as a solicitor are poor. She continues to suffer a great deal of pain as a result of the accident, requires constant care and supervision, and has been hospitalized for months.

Ann graduated from Neutral Bay University Law School in 1989 with a first class law degree. She is unmarried and before the accident lived at home with her parents.

'Carol and Doris in Melbourne': The Scenario

Carol is 23 years of age. On December 1, 1990, Carol had the day off work and was having dinner in South Yarra, Melbourne, celebrating the completion of a particularly difficult legal file on which she had been working for weeks. She had closed the file the previous day. After finishing her meal, she got into her motor vehicle and began driving. She momentarily neglected to watch the road closely and entered an intersection just before the traffic lights turned from red to green. All of a sudden, her car was hit from the left hand side by a car driven by Doris, which had sped through the intersection. Carol was not wearing a seat belt.

Having sustained serious head injuries, Carol was taken to Melbourne Memorial Hospital. The very serious skull fracture caused brain damage, memory disturbance, and a speech defect. When the collision occurred, she broke her neck and was rendered a quadriplegic. She is unable to continue her employment as an articled clerk, and her prospects of a career as a solicitor are poor. She continues to suffer a great deal of pain as a result of the accident, requires constant care and supervision, and has been hospitalized for months.

Carol graduated from the Toorak University Law School in 1989 with a first class law degree. She is unmarried and before the accident lived at home with her parents.

What advice can be given to (1) Ann and (2) Carol regarding their treatment by the judicial system? Should Ann's position be different from Carol's? What are the differences in the options that are available to them? Are these differences welcome?

Advice to Ann, in Sydney

The first matter that must be recognized is the extent of Ann's injury: she is severely disabled, and will require constant care and supervision. Further, she presumably will be unable to maintain the employment for which she is trained and qualified.

Her right to any form of 'substantial' monetary payment will be restricted to an award of damages in a successful common law action, with dependence on the fault principle,[11] except for the moneys she would receive automatically in the form of disability payments under the Social Security Act 1947 (Cth), approximately $136-150 weekly to a single person in Ann's position. These are paid as a flat rate, not connected to Ann's income prior to the accident.

This form of payment has been criticized for not taking into account, at least to a small degree, differences in individuals' pre-accident employment circumstances. On the other hand, the use of flat rates is applauded in certain quarters on the basis that payments that are linked to pre-injury income simply reproduce differences in society's class structure, and this reproduction of the *status quo* is unwarranted. Unlike flat rate payments, an unrestricted damages award in a common law action is the type of financial recompense in personal injury situations most closely linked to pre-injury income. Of that connection to pre-injury income levels, Abel notes that tort law preserves the income streams of those who suffer physical injury by affirming the legitimacy of existing income distribution and proclaiming the class structure of capitalist society, based on the philosophy that you are what you own, what you earn, and what you do.[12]

Ann's success or failure in her suit will depend largely on the general vagaries of bringing any negligence action. Criticizing these actions, Windeyer J. states:

[11] Of that principle, Atiyah comments that the results it produces can be seen to be just only if attention is focused solely on the relationship between plaintiff and defendant, with no attention paid to the possibility of the loss being borne by society itself. Proponents favouring retention of the fault principle justify doing so for the following reasons: it expresses a basic notion of human responsibility and corrective justice, it plays an important role in accident prevention, and it allocates social resources efficiently as a free-market mechanism: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 414, 546.

[12] Abel, R., 'A Critique of American Tort Law' (1981) 8 *British Journal of Law and Society* 199, 206. Also note Abel, R., 'A Critique of Torts' (1990) 37 *U.C.L.A. Law Review* 785, 798-799, where he comments:

> Tort damages are not only inadequate as compensation, but also are unequal, thereby symbolizing, reproducing, and intensifying material inequalities. Because liberalism rejects status inequalities, tort law gradually has eliminated de jure distinctions . . . Yet the legal celebration of formal equality obscures the persistence of real inequality . . . Tort damages deliberately reproduce the existing distribution of wealth and income. Those who question the legitimacy of that distribution will be troubled that the state uses its coercive power to recreate inequality.

With regard to payments under most no-fault compensation schemes, usually connected to pre-injury income, Atiyah comments that the advantage of earnings-related benefits over flat-rate benefits is that they enable a victim to maintain an approximation to her or his former standard of living rather than selecting one amount — usually a low figure — for all earners. Yet, he notes that it is not obvious that the State owes any obligation to maintain disabled persons for the rest of their lives at the standard of living which they had previously enjoyed. He notes, further, that tort law's system of damages assessment is said to be the only systematic method of compensation which pays, effectively, earnings-related benefits without earnings-related contributions as a result of its practical operation in conjunction with liability rather than first-party insurance: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 169-171.

> The real consideration in my view is that the whole system of negligence actions is outmoded in ordinary accident cases. The actions are utterly unreal. We live in an insurance age, we live in a motorized and mechanical age. People are suffering from accidents which are part of the hazards of the times we live in; they arise . . . out of and in the course of our daily lives . . .[13]

Her right to *any* form of damages will be dependent on establishing her circumstances' blurry facts, and, in doing so, establishing Barbara's *fault*. Negligence, as we know it, derives from nineteenth century morality, when the establishment of liability was very much connected to the ability to prove fault; if one could not establish legal fault on the part of another individual, one had to bear one's own loss. At issue was the foundation for loss shifting, from 'innocent' plaintiff to 'guilty' tortfeasor.[14]

Even though the philosophy of the fault doctrine itself is not without its critics, Ann has no choice but to look to that doctrine to seek redress for her injuries. She is, in reality, 'fortunate', as she is among those relatively few individuals in a position of being able to bring a potentially successful lawsuit in comparatively 'simple' circumstances. In many instances the matters at issue are too complicated for accident victims to be able to litigate successfully.[15] On other occasions — including 'simple' transport-related accidents — the victim is, for one reason or another, either unable, unwilling, or incapable of litigating.[16]

[13] Windeyer J. made this statement at the Twelfth Legal Convention of the Law Council of Australia: Quoted in Government Statement, *Victoria: Transport Accident Reform* (May 1986) 39. Barry J., of the Victorian Supreme Court, commented to the same effect:

> This method of trial is wasteful and cumbersome; its hollow pretences and intricate but often meaningless dogmas made it a scandalous travesty of what the law and the courts are supposed to stand for. Its persistence is largely due to political timidity and lethargy, fostered perhaps by those who have vested interests in the continuation of the system.

Quoted in Government Statement, *Victoria: Transport Accident Reform* (May 1986) 40 (comments made to the Southern Tasmanian Bar Association).

[14] Luntz, H., *Compensation and Rehabilitation* (1975) 28. See also Fleming, J., 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131, 140, where he underlines the philosophy of the fault doctrine: the focus is on the defendant's less-than-satisfactory conduct rather than the plaintiff's disabilities. Condemning the ideological basis of the fault doctrine, Abel argues that it reproduces bourgeois ideology and the basis of that ideology, individualism; it ignores the fact that many individuals do not have control over their own fate: Abel, R., 'A Critique of American Tort Law' (1981) 8 *British Journal of Law and Society* 199, 206. In Abel, R., 'A Critique of Torts' 37 (1990) *U.C.L.A. Law Review* 785, 791, the author discusses tort law's historical connection to moral judgment, said to be its 'core'.

[15] Success in litigation generally is most precarious in legally and factually complicated cases outside the sphere of transport, workplace or other similar accident situations. Discussing the plight of the victims of the drug thalidomide, the *Sunday Times* notes that proving negligence is costly, cumbersome, virtually impossible for the individual not backed by a trade union or institution, and in complex cases is frequently beyond the capacity — financially and otherwise — of the courts and lawyers: *Sunday Times*, 'Suffer the Children: The Story of Thalidomide' (1979) 251. *Thompson v. Johnson and Johnson Pty Ltd and Another* (1989) Aust. Torts Reports 80-278 is a recent example illustrating some of these difficulties. In *Thompson*, the plaintiff, suffering from toxic shock syndrome as a result of the use of the defendant's product, instituted a negligence suit against the product's manufacturer for failure to adequately warn consumers like her of the possibility of sustaining that condition. Having failed to establish the nature of and kinds of precautions that ought to have been taken by the defendant, she lost her action at first instance. The plaintiff's appeal failed.

[16] Even in cases where the cause of the injury is transport-related, not all individuals will benefit from the right to litigate. According to the New South Wales Law Reform Commission, approximately one-third of those injured (or the families of those killed) in motor accidents are unable to obtain *any* compensation through a common law negligence action because they are *unable to prove* fault; the proportion of *severely injured* people unable to obtain damages may be even higher than this figure; nearly two-thirds of motor cycle accident victims considered by the Commission were not entitled to common law damages: New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 39.

Dependent on this 'outmoded' action,[17] it is likely that Ann will encounter several problems. First among these is the cost of litigation. It has been estimated that the total cost of launching a Supreme Court action in New South Wales is $80,000, and $60,000 in the N.S.W. District Court.[18] Aside from the personal cost Ann will endure by instituting her suit, the cost to the community as a whole should not be overlooked. These 'transaction costs' — inherent in the system — arise from the nature of the adversary relationship between the plaintiff and defendant or source of the compensation funds: the need to prove the defendant's failure to satisfy the requisite standard of care, proof that the defendant *caused* the plaintiff's injury, and the individualized assessment of damages require investigation and are contested in claims that succeed as well as those that fail; the system positively resists the possibility of economies of scale.[19]

Ann must be advised that it may take many years before her case against Barbara is litigated. One reason for this is that in cases such as hers — where serious injury has been sustained — a lengthy period of time must elapse before a confident prognosis as to the effects of the injuries can be given. Further, because damages are assessed on a once-and-for-all basis, one or both parties generally seek the stabilization of the injuries.[20] Because her injuries are so serious, there is a greater incentive for Ann as well as Barbara's insurers to maintain extreme positions.[21]

Assuming that Ann's action proceeds to trial, its success will depend on the

[17] *per* Windeyer J., *supra*. 13.

[18] This figure is the result of a study by the legal consulting group Mahlab: *Age* (Melbourne), 1 February 1990. The National Consumer Affairs Advisory Council estimates that the minimum cost associated with a day in the Victorian Supreme Court ranges from $4000-$7000 for each party, and a claim involving $1500 in the Magistrates' Court could cost each party $900: *Age* (Melbourne), 1 February 1990.

[19] Fleming, J., 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131, 139: this misallocation of resources is one of the strongest reasons for criticizing the tort system, as these transaction costs flow into the pockets of the insurance industry and legal profession rather than those of the accident victim. Luntz, concurring, also refers specifically to the cost of calling in expert witnesses to theorize on matters such as whether a broken steering shaft was the cause or consequence of the accident; the system also perpetuates the need to use scarce medical resources in order to assess the extent of the victim's disability and to predict its future course rather than to actually heal the injured; this is duplicated because of the adversary nature of the proceedings, which requires both plaintiff and defendant to have their own expert witnesses and lawyers, and takes up an inordinate amount of court time and expense — involving the appointment of otherwise unnecessary judges, and court officials: Luntz, H., *Compensation and Rehabilitation* (1975) 16. Atiyah agrees: no other compensation system is as expensive to operate as the tort system; for example, the social security systems in the United Kingdom only cost about 11% of the total amounts paid out. Singled out are the legal costs; the nature of the tort system makes it almost indispensable for a person claiming damages to have the assistance of a solicitor: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 449. *PQ v. Australian Red Cross Society, Commonwealth Serum Laboratories, and Alfred Hospital*, a decision recently heard by the Victorian Supreme Court, exemplifies the adversary system at its most costly and inefficient: a haemophiliac who had contracted the AIDS virus as a result of being treated with a blood clotting agent in 1984 is suing the defendants for treating him negligently by not advising him of the risk that he could contract the virus. Much of the evidence centres on whether or not the defendants in 1984 ought to have been aware of the risk that the AIDS virus could be contracted from blood products. The trial began in August 1990 and occupied a record 87 days in court. PQ was awarded $870,000 (the pain and suffering component is said to be the highest such award in Australia). The trial cost $15 million: *Age* (Melbourne), 23 December 1990. A cynic might well ask, 'in reality, who will benefit from this expensive, arduous process except the many barristers and solicitors representing the various parties?'

[20] Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 273.

[21] Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 273; he continues:

hazy memories of two people — she and Barbara — trying to recall their split second actions from years before. Because negligence actions usually are not tried until several years after the accident have passed, the initial inaccuracy of eye-witness evidence is exacerbated by this delay. Inevitably, doubts are raised with respect to the reliability of that type of evidence.[22]

That is, any damages award will hinge on typical problems of proof, including convincing the trier of fact that Barbara was driving beyond the speed limit to such a degree that she should be found civilly liable, and that Ann herself was not solely responsible for her own injuries by having momentarily neglected to watch the road closely. Her success will be contingent, at least partially, on her counsel's advocacy skills and competence, as well as possible deficiencies on the part of the opposing counsel. Although Barbara, a road-user, obviously owes Ann a duty to take care, the facts suggest that Ann may have great difficulty establishing that Barbara breached that duty of care. As noted earlier, this is especially true having regard to *when* the case is likely to be heard. Many years after the accident occurred, Ann cannot be assured of being able to prove, on a balance of probabilities, that Barbara conducted herself in such a way that she should be found liable.[23] The New South Wales Law Reform Commission states:

> The failure of the common law to compensate all victims is almost universally recognized as a deficiency requiring remedial action. But the shortcomings of the fault principle as a criterion for the award of compensation are not confined to the obvious fact that some victims are excluded from compensation. Problems of proof often produce quite arbitrary results. Many commentators have pointed out the difficulties of applying the fault principle to high speed traffic situations which involve varying forms of transport and drivers of uneven experience and ability. Transport accidents usually occur suddenly and unexpectedly. Consequently great difficulties may arise in ascertaining who was at fault in a legal sense. Judgments are made in respect of events which take place quickly, and which often involve split-second observations and decisions.[24]

> But it is a sombre thought, and no credit to the tort system, that the more serious a person's injuries the longer he [or she] has to wait for his [or her] compensation. If it were not for the social security system, which enables a man [or woman] to live while the settlement process meanders along its way, it is quite plain that the tort system would have collapsed long ago.

The New South Wales Law Reform Commission also considers the consequences of delay, including financial hardship, stress, and in serious cases, the settlement of claims for less than 'full and fair compensation': New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 64.

22 Luntz, H., *Compensation and Rehabilitation* (1975) 33. Luntz criticises the fact that the ability to recover damages is dependent on what witnesses can recall from a motor collision years before. McRuer J. comments in Linden (ed.), *Studies in Canadian Tort Law* (1968) 309, on the illusory ability of witnesses to remember their observations of events leading up to an accident. As to the unreliability of eye-witness evidence, also see Loftus, E., *Eyewitness Testimony* (1979). Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 430, notes: aside from what the *courts* must do to assess fault, if the case is settled by negotiation the fault system also requires parties' *advisers* to be able to assess with reasonable confidence the likelihood of a court finding fault on the basis of the witnesses' evidence. In any case, the advisers rely on witnesses' statements, which themselves might not have been taken until many months or years after the accident. In most cases, witnesses testifying years after the event had not paid close attention at the time of the accident; moreover, they generally do not have the training or experience to gauge distance or speed, which may be matters that are crucial when determining liability: the New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 50.

23 Aside from whatever responsibility Barbara may bear for the accident, arguably circumstances other than human error also should be considered, including road construction and lighting: the New South Wales Law Reform Commission, *Report on a Transport Scheme for New South Wales* (1984) 52.

24 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 50. Atiyah notes that a plaintiff often will fail to recover if there are no witnesses to the accident and the physical evidence is deficient: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 206.

The fact that Ann's right to damages is contingent on such considerations does not speak well of our legal system. Her action against Barbara typifies the 'forensic lottery'[25] at work. Luckily for Ann, if she succeeds in proving her action, Barbara is compulsorily insured for liability to third parties where they have sustained personal injuries arising from transport accidents; Barbara is the one that is 'blamed' for occasioning Ann's harm.[26]

Several other matters must be considered in the context of Ann's situation. For example, even if she were successful in establishing Barbara's liability, the potentially devastating effects of a finding of contributory negligence cannot be ignored. Did Ann fail to exercise reasonable care for her own safety?[27] That is, her own conduct may be 'faulty' enough to reduce substantially the damages that would otherwise be awarded in two different ways: first, by her actual conduct — not paying complete attention to what was happening at the intersection — and, secondly, by not wearing a seat belt.[28]

It is likely that when applied to the sum Ann would have received, the reduction for contributory negligence in actual dollar terms would be considerable enough to affect her ability to sustain herself in the future without having to rely on social security payments. Thus, a large portion of Ann's loss can be expected to be borne by Ann herself.[29] The unsuitability of such a finding in an insurance age cannot be overlooked: if Barbara is found guilty of negligence, then Ann's loss is shifted from Ann to Barbara, and is then spread throughout the community by virtue of the third party liability insurance mechanism, noted earlier. If contributory negligence is found, Ann absorbs that portion of her loss.[30]

25 The 'forensic lottery' is a phrase coined by Ison, T., in *The Forensic Lottery* (1967). In that one phrase, he has astutely encapsulated the essence of what is wrong with the litigation process in the sphere of personal injuries.

26 Notwithstanding this fact, a misguided assumption — or legal fiction — operates throughout the legal system to the effect that Barbara herself will pay any damages award to Ann, the 'innocent party'. Realities are ignored: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 216, 412. Luntz claims that at one time, negligence, in spite of its many imperfections, was intelligible in the context of a suit between an individual victim and the individual causing the victim's harm; justice seemed to require that if the victim could prove fault on the part of the defendant, the loss should be shifted, but if she could not prove fault, the loss had to lie where it fell. Today such actions are rarely between individual plaintiffs and defendants, because behind the defendant almost invariably stands an insurance company able to spread the cost of any judgment among the thousands or even millions who benefit from the defendant's activity: Luntz, H., *Compensation and Rehabilitation* (1975) 34.

27 Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.).

28 See Lord Denning M. R.'s comments regarding the non-use of seat belts and contributory negligence in *Froom v. Butcher* [1976] Q.B. 286. The general Australian position is summarized in Luntz, H., Hambly, A., and Hayes, R., *Torts: Cases and Commentary* (2nd ed. 1985) 356. Under the Motor Accidents Act 1988 (N.S.W.), s. 74, the New South Wales legislature has prescribed that a finding of contributory negligence must be made where the injured person was not wearing a seat belt at the time of the motor accident; the damages recoverable in respect of the motor accident shall be reduced by such percentage as the court thinks just and equitable in the circumstances of the case (s. 74(3)).

29 In New South Wales during 1972, 20.5 per cent of successful plaintiffs suffering permanent disability had some reduction made for contributory negligence; overall, ⅙ of successful plaintiffs had their damages reduced, and the average reduction in total damages in such cases was almost 50 per cent. Reductions ranged between 30 and 40 per cent in other States: New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 49. The Report provides examples of specific injustices attributed to contributory negligence findings.

30 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 120.

Establishing Barbara's liability — and whether or not Ann will be found contributorily negligent — do not comprise Ann's only problems. Even if liability is proven and a contributory negligence finding is not extensive, estimating the size of the damages award will be difficult. In theory, her damages assessment is made with a view to putting her back in the position she was in prior to the accident, at least to the extent that money is capable of doing so. This principle, *restitutio in integrum*, is the hallmark of such assessments.[31] The High Court identified several fundamental principles said to underlie the assessment of damages awards —

> In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible put him [or her] in the same position as if he [or she] had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him [or her]; the plaintiff is free to do what he [or she] likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he [or she] seeks damages.[32]

These principles have been criticized for a variety of reasons, including the difficulty and virtual impossibility of estimating future economic losses accurately, the danger that the awards will not be adequate, the absence of a requirement that the victim use the award in a particular way in order to provide for her future support, and the risk of double compensation by the community, whereby the victim exhausts the award and then becomes dependent on social security.[33]

With regard to the significance of the theoretical principle *restitutio in integrum*, courts themselves recognize that it is never, and cannot be, achieved in reality. This is especially so with severely disabled accident victims.[34] In fact, it is likely that Ann — seriously injured — will be undercompensated for her injuries, unlike someone sustaining a less serious injury, such as a whiplash.[35] Reasons for this phenomenon include the great delays in bringing cases to trial where the victim is severely disabled, and the pressure in those cases to settle for

31 Atiyah notes that tort law is the only compensation system which *claims* to compensate all losses fully in monetary terms, but only if one is able to prove the commission of a tort: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 162.

32 *Todorovic v. Waller* (1981) 37 A.L.R. 481, 486, *per* Gibbs C. J. and Wilson J.

33 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 54.

34 The task of making accurate predictions with respect to damages assessments is extremely problematic, and is usually conducted over a lengthy time frame; therefore, it is '. . . almost certain that a seriously injured person will be overcompensated or undercompensated for future loss': New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 54.

35 *The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) vol. I, 64 (the 'Pearson Commission') found that most severely injured accident victims were undercompensated for the harm they suffered, by comparison with less seriously disabled individuals, who were overcompensated for their injuries. The Commission investigated and documented the plight of victims of personal injuries in the United Kingdom. It was instituted as a result of the public response to the plight of thalidomide victims, the horrific consequences resulting from the use of that drug, and the victims' harsh treatment by the legal system. Fleming confirms the Pearson Commission's findings, noting that the problems of over and under-compensation are especially acute in the United States: Fleming, J., 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131, 137.

sums that later prove to be inadequate.[36] It is in the interests of insurers to settle 'nuisance value', claims, including whiplashes, rather than incurring the costs associated with aggressively contesting them in court. Unlike cases pertaining to minor claims, suits involving substantial damages awards are more likely to be subject to pronounced disputes, either at trial or in negotiations leading up to settlement.[37]

Ann faces an additional problem if she settles her claim: statistical analysis reveals that generally a settlement carries with it the systematic discrimination of women. Studies demonstrate that men's awards are larger than those of women, with the discrepancy attributed to the fact that awards are measured against earnings, where women's incomes are lower than men, as well as a general tendency for the courts simply to award lesser amounts to women.[38]

The way in which Ann's award will be assessed and the accuracy of that assessment cannot escape comment. These matters are connected to one of the most important purported advantages of the tort system: personalized, individualized assessment of loss. However, as noted earlier, this supposed advantage has been criticized for being inefficient, and a factor contributing significantly to the high transaction costs associated with tort actions. Ann's damages would be evaluated in the 'normal' way, with consideration given to traditional heads of loss. For example, her pecuniary losses include special damages — the loss of income prior to trial as well as medical expenses incurred before that date. She could recover general damages, including loss of future earning capacity and future medical expenses. The underestimation of future medical costs has been cited as a primary reason for inaccuracy in damages assessments: for instance, in many cases the victim's health deteriorates unexpectedly after trial.[39]

Another matter figuring into the calculation of her damages award are 'vicissitudes of life', embracing probable and predictable bouts of unemployment or illness, which require that the assessment be reduced. To all of these calculations, a discount rate must be applied, intended to comprise considerations of inflation, taxes, and interest earned from investing the lump sum damages award. The High Court in *Todorovic v. Waller* not only had difficulty grappling with the controversial issue of whether or not a discount rate should be

36 Luntz, H., *Compensation and Rehabilitation* (1975) 38.

37 Most tort claims are settled by negotiation between the claimant and the defendant or, in practice, the defendant's insurers, with relatively few disposed of in court: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 256. Atiyah makes a number of interesting observations about the negotiation process: the insurers participate in the process regularly, do not have an emotional involvement in the case, and can delay the process without suffering financially. On the other hand, the severely disabled victim is at a great disadvantage in psychological terms: because that person has suffered stress, is unfamiliar with the negotiating process, and is anxious to complete the process as quickly as possible, in many cases she or he settles for an unreasonably low amount of compensation. This course of conduct belies the theoretical objective of the *restitutio* principle: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 267, 270.

38 The average benefit for male claimants in the sample taken by the Victorian Government prior to its implementation of the Transport Accident Act 1986 (Vic.) was $18,932, compared to a $16,739 average for women; these figures augment and reinforce similar findings in an analysis of the pre-1985 workers' compensation system: Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 42.

39 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 55.

imposed in the first place, but also with its determination of what the amount of that rate should be if its imposition is deemed necessary. The dissentients expressed distress at using this mechanism, because it substantially and inappropriately reduces the actual sum of money awarded to the plaintiff. Its use is especially problematic in an age of rampant inflation.[40]

In reality, the assessment of pecuniary losses, where arithmetic sums are intended to be determined precisely, is undeniably speculative and nebulous. The only measurements that can be said to be accurate are those relating to special damages, reflecting the degree of the loss from the date of injury until the trial date.[41] The entrenchment of the requirement that awards be made on a lump sum basis and the non-reviewability of those awards warrant particular comment in this context. Courts themselves, although bound to estimate the individual's loss in a once-and-for-all assessment and obliged to award the damages as a lump sum, have not hesitated to express their resentment and displeasure at being so constrained. Among judicial expressions to this effect are those of Asprey J. in *Thurston v. Todd*, where he states:

> . . . it is a matter of great regret to me that a tribunal, called upon to make awards of damages in cases such as the present, is not empowered by the law to deal with many aspects of the award of damages on a periodical basis and one which is subject to a right of review in the future. Without such powers, any tribunal, placed as I am in the present case, proceeds to its verdict in the dark, forced to speculate as best it can into the far, unknown future, and compelled, as events may well turn out, either within a brief period or at the end of a long span of years, to risk injustice to one party or the other.[42]

[40] *Todorovic v. Waller* (1981) 37 A.L.R. 481. Luntz discusses the rationale for using the discount rate: future expenditure must be discounted to take account of the interest that could be obtained on the investment of the amount and for the contingency that it will in fact never be spent: Luntz, H., *Assessment of Damages for Personal Injury and Death* (2nd ed. 1983) 271. In motor vehicle accident cases, under the Motor Accidents Act 1988 (N.S.W.), s. 71, the statutorily prescribed discount rate of 5 per cent is higher than in other circumstances in which personal injuries are sustained, exacerbating the financial hardship faced by motor vehicle accident victims. The New South Wales Law Reform Commission notes the effects of inflation on future medical expenditures — the cost of wheelchairs, domestic assistance, pharmaceuticals, and the like — as an important reason for the inaccuracy of damages assessments: *Report on a Transport Accidents Scheme for New South Wales* (1984) 55.

[41] Aside from the *inaccuracy* of assessing future economic loss, such awards also are frequently *inadequate*. Their inadequacy is described in a number of case studies by the New South Wales Law Reform Commission. The individuals considered in the Report experienced considerable financial — as well as physical — hardship. New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 58.

[42] *Thurston v. Todd* (1965) 83 W.N. (Pt. 1) N.S.W. 335, 344. According to the plaintiff's mother, the one-time landmark award in that case proved inadequate: see the *Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia* (1974) Appendix 6 to Volume 1. See also *Andrews v. Grand and Toy Alberta Ltd* (1978) 83 D.L.R. (3d) 452, 458, where Dixon J., of the Supreme Court of Canada, states —

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal . . . When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award. The lump-sum award presents problems of great importance. It is subject to inflation; it is subject to fluctuation on investment . . . The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

The inappropriateness of once-and-for-all damages assessments in the form of lump sums has been criticized by law reform agencies. For example, the Manitoba Law Reform Commission, concerned with issues of non-reviewability and lump sum awards in that Canadian jurisdiction, made a number of proposals including a recommendation that legislation be enacted to authorize the courts to award damages for personal injury or death by way of periodic payment: Manitoba Law Reform Commission, *Periodic Payment of Damages for Personal Injury and Death* (Report No. 68, March 1987).

Although these principles on which damages assessment are based are ingrained at common law, it is difficult to divorce the theory as to why lump sum and once-and-for-all assessments are made — for example, in the interests of finality of litigation — from the true effects of making appraisals in this way: the speculative nature of such judgments cannot be ignored, nor can the practical difficulties associated with attempting an estimate of the future pecuniary losses of Ann, a recent law graduate.[43]

How could one presume to predict with certainty how Ann's career would have unfolded? Would she have become a partner in a law firm in five years? Eight years? Or, rather, would she have become an academic, enjoying an income far below that of a practising lawyer? Despite the impossibility of accurately evaluating pecuniary losses, courts find themselves, at common law, in the position of having to maintain the fiction that this calculation can be accomplished effectively. Section 81 of the Motor Accidents (Amendment) Act 1989 (N.S.W.) now allows for the award of damages in ways other than a lump sum on a once-and-for-all basis: for example, the court may order that damages for future economic loss (other than damages for impairment of earning capacity) be paid in accordance with such arrangements as the court determines or approves; arrangements also may be made with respect to the specific sum determined by the court for impairment of earning capacity. In making these orders, the court shall have regard to, among other matters, the ability of the plaintiff to manage and invest any lump sum award of damages. An arrangement regarding damages for impairment of earning capacity may include a provision that payment shall be made at intervals of not more than 12 months.[44]

The consequences of the non-reviewability of damages awards would be particularly serious in a situation like Ann's, as her condition could very well deteriorate in the ensuing years, in which case she will suffer undue financial hardship. However, it is possible — albeit unlikely — that her condition may improve, such that she may be said to have, arguably, been overcompensated for the harm she has suffered.[45] Whatever happens to her actual physical condition, most commentators concede that the assessment of her loss at the date of trial will not do what it aspires to do — that is, it will *not* be an accurate and precise determination of her losses for all time.[46]

43 Luntz notes that this has meant that lump-sum damages have proved inadequate to replace even the financial losses of seriously injured individuals in the long run; moreover, when the effect of contributory negligence is taken into account the common law cannot confidently be said to satisfy its objective of 'full and fair compensation': Luntz, H., *Compensation and Rehabilitation* (1975) 14. Also see Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 150.

44 Motor Accidents (Amendment) Act 1989 (N.S.W.), s. 81. A party to any such arrangements may apply to the court at any time for an order varying or terminating the arrangements (s. 81(7)).

45 The phrase 'windfall' often is employed in cases of overcompensation. Because of the implications and connotations associated with that phrase — as if the victim is a Tattslotto winner — its use should be resisted.

46 Recognizing that the task of predicting the future is extremely difficult, Atiyah states that no one can blame judges if their predictions are inaccurate; however, he criticizes the fact that even though the task is extremely difficult, subsequent correction is not possible unless Parliament intervenes with a scheme permitting variation of an award: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 151.

The unrealistic nature of damages assessments is exacerbated by efforts to gauge the amount awarded for non-pecuniary losses. These comprise loss for pain and suffering already experienced by the victim — and expected to be experienced in the future — as well as loss of amenities or enjoyment of life, and loss of expectation of life. How can a court make a satisfactory determination of the amount of pain endured by Ann, who finds herself in a desperate physical condition, in monetary or arithmetic terms? There is no monetary equivalent for an individual's non-economic loss.[47] The time has arrived whereby the impossibility of assessing non-pecuniary losses must be acknowledged and attempts to do so should cease.[48]

The New South Wales legislature recently enacted legislation restricting damages awards for non-economic losses in the sphere of transport accidents. For example, no damages are to be awarded for non-economic loss if the amount so assessed is less than $15,000.[49] Moreover, no damages are to be awarded for non-economic losses unless the injured person's ability to lead a normal life is significantly impaired by the injury suffered in the transport accident.[50] The amount awarded for non-economic loss must be a proportion of the maximum amount that may be awarded, $180,000.[51] That maximum amount may be awarded '. . . only in a most extreme case'.[52] In the present case, Ann appears to be a candidate for receipt of the maximum amount available under the statute, unlike typical transport accident victims, many of whom would not qualify for any non-pecuniary loss award.

On a practical level, Ann also must be advised — or warned — that she should exercise great care when utilizing any sum she might receive. Assuming that she is similar to many severely disabled plaintiffs who sue successfully, there is a good chance she will not make the best possible use of the damages awarded her. She may, in fact, squander a portion, or misinvest part of that sum, and therefore be unable to sustain herself financially in the future. One of the problems with a once-and-for-all lump sum award is that courts must assume that all plaintiffs

47 The New South Wales Law Reform Commission states: 'there is a fundamental difficulty inherent in the award of damages for non-economic loss; further, because standards are not defined precisely, inconsistencies arise from one case to another' New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 60. Atiyah's insightful criticism of the assessment of non-economic loss is noteworthy: because it does not appear possible to work out any relationship between the value of money (or what it will buy) and damages awarded for pain and suffering and disabilities, all awards of that nature could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th edn 1987) 183. Abel comments on the unreality and offensiveness of attaching monetary sums to intangible injuries. The by-product of turning injuries into a commodity form is dehumanization: Abel, R., 'A Critique of Torts' (1990) 37 *U.C.L.A. Law Review* 785, 803-804.

48 Windeyer, J. in *Skelton v. Collins* (1966) 115 C.L.R. 94, 136 states —

> I can only hope that some day the law will provide some better way of meeting the consequences of day-to-day hazards than by actions for negligence and a measuring of damages by unprovable predictions, metaphysical assumptions and rationalized empiricism . . .

49 Motor Accidents Act 1988 (N.S.W.), s. 79. This section also provides for a deductible amount to apply to non-economic loss assessments between $15,000-$40,000. These amounts are to be amended annually.

50 Motor Accidents Act 1988 (N.S.W.), s. 79(1).

51 Motor Accidents Act 1988 (N.S.W.), s. 79(2).

52 Motor Accidents Act 1988 (N.S.W.), s. 79(3).

will invest the award prudently, even though the court cannot control how the money is employed once it is awarded; therefore, if a plaintiff dissipates the award, or if it is not adequate because of poor investment decisions, the disabled individual will suffer hardship and the community ultimately will have to provide further support through the social security and health care systems.[53] The structured settlements that the court may order under section 81 of the Motor Accidents Act 1988 (N.S.W.) may go some way towards alleviating these problems.

One additional matter that must be considered — although it is an abstract one — is Ann's psychological and emotional constitution: she must possess qualities of fortitude and tenacity to want to pursue a common law claim, even though she is in a seriously incapacitated condition. The ability to withstand the rigours of litigation cannot be underestimated at the best of times and can be particularly grave where the incapacity is severe, as here.

The effect of common law litigation on an accident victim's rehabilitation has been the subject of debate. Operating in conjunction with the matter of Ann's emotional fortitude — wanting or being able to pursue her claim — are the physical and psychological *effects* she may suffer as a result of litigation, including compensation neurosis and other anti-rehabilitative consequences.[54] 'Compensation neurosis', which tends to lengthen the rehabilitation and recovery period until the case is concluded, should be distinguished from conscious malingering.[55] This condition arises most often where the plaintiff's sole chance of future economic well-being is contingent on proving the common law action, in cases where compensation is not available under legislative schemes. Therefore, it is possible that Ann will be motivated — unintentionally — to demonstrate as great a loss as is feasible, to be reflected in the largest damages appraisal possible. This will have serious detrimental effects on her rehabilitation.[56]

[53] In making these comments, the New South Wales Law Reform Commission had occasion to consider the plight of individuals who mismanaged or misinvested large damages awards and later experienced financial hardship: New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 59. Discussing the Commission's findings, Atiyah notes that its research confirms the fact that unwise investment (for example, in a house which generates no income) may be the result of the recipients' inexperience in the handling of large sums of money, or falling prey to tricksters. He argues that although they are entitled to do as they wish, society eventually will have to bear at least a portion of the burden of caring for these individuals if they become poverty-striken; therefore, society has some right to say *how* the moneys should be paid: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 159-160.

[54] Commenting on the condition referred to as 'accident compensation neurosis', the New South Wales Law Reform Commission states that even though considerable debate exists in medical circles about the nature of this condition and its causes, it appears to be connected closely with anticipation of a pending claim whose outcome is uncertain: The New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 61.

[55] Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 151. Criticizing compensation neurosis as a deplorable by-product of the once-and-for-all lump-sum damages award, Atiyah notes that it can cause great problems when assessing damages. For example, if it is assumed that particular disabilities are permanent and they disappear overnight, the plaintiff will have been *over-compensated*; however, if it is believed that the case is one of 'compensation neurosis' and the judge incorrectly assumes that the disability will improve after the trial, the plaintiff may be *undercompensated*: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 151.

[56] It has been contended that a purported advantage of retaining fault is the deterrent effect an unfavourable award has on defendants, as well as the plaintiff's ability to satisfy her desire for vengeance. However, as Fleming notes, this vengeance goal — whereby the victim's psychic satisfaction in making her adversary 'pay' is claimed by some legal psychologists as a significant

This consideration of Ann's case may be concluded by remembering that although she faces many hurdles in her attempt to recover a satisfactory damages award — her only chance at receiving any recompense aside from meagre social security payments — she is, in fact, a 'favoured' accident victim: she has someone to sue and therefore has the opportunity of recovering a monetary award. Moreover, because Barbara has third party insurance, Ann — if successful in proving her action — will be able to recover whatever damages are assessed.[57] As a litigant in a potentially successful suit, she is in an advantageous position by comparison with many other individuals sustaining severe disabilities.

Before considering the plight of those less fortunate than Ann, attention must be focused on Carol, in Victoria, whose injuries arose in arguably 'lucky' circumstances, based on the jurisdiction in which they were sustained and the manner in which she was disabled.[58]

Advice to Carol, in Victoria

At the outset, it is important to note that Carol incurred her injuries in exactly the same manner as Ann. The only difference is *where* their accidents occurred. Their cases are identical in all other respects: the causes of their accidents, their own conduct which arguably contributed to their injuries, the kinds of damage sustained, their current employment status and job prospects. The crucial legal difference is that Carol's circumstances are governed by Victoria's Transport Accident Act 1986 (Vic.) (The 'Act').[59] This statute dictates the options

rationale of tort liability — may be undermined by other factors, including the delays and aggravations of tort law in action. These factors probably impose such a large degree of psychological hardship and anxiety on victims that they more than make up for what little psychic satisfaction some victims receive: Fleming, J., 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131, 133.

57 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 200 cites the Pearson Commission, which reported that the types of cases receiving the preponderance of payments were those where third party insurance mechanisms backed up the awards, including cases involving road-accident and work-place victims; by comparison, it was found that 27 per cent of all injuries occurred at home, but those individuals in this category received less than one per cent of all tort damages awards. In this way, according to Atiyah, the tort system in practice is not simply a fault system; rather, because obtaining damages depends on the availability of insurance as much as on the existence of fault, it is in reality a fault *and insurance* system.

58 Atiyah comments on the remarkable disparity in treatment between (i) tort victims who obtain full compensation — in theory — for their pecuniary losses as well as damages for non-pecuniary losses and (ii) most other classes of victims of accidents and disease who rarely obtain full compensation even for pecuniary losses, let alone anything extra for non-pecuniary harm: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 191.

59 The Transport Accident Act 1986 (Vic.) came into operation on January 1, 1987. Section 3(1) states: 'transport accident means an incident directly caused by, or directly arising out of, the driving of a motor car or motor vehicle, a railway train or a tram'. Carol's case easily fits within this definition. Difficulties that had arisen previously with respect to the scope of that phrase — that is, what did or did not qualify as a 'transport accident' — were meant to be rectified by recent amendment to the Act, incorporating the word 'directly'. This amendment may have only a marginal effect in assisting the determination of which incidents are covered by the legislation; the causation problems the amendment was meant to ameliorate remain. See, for example, *Bizewski v. Transport Accident Commission* (1990) Victorian Accident Compensation Practice Guide 72-200; *Treloar v. Transport Accident Commission* (1990) Victorian Accident Compensation Practice Guide 72-201; *Pedersen v. Transport Accident Commission* (1990) Victorian Accident Compensation Practice Guide 72-202. These three 'test cases' each required the Administrative Appeals Tribunal of Victoria to determine whether the particular case's circumstances amounted to a 'transport accident'.

available to her, in terms of (i) common law rights prescribed and permitted by the Act, as well as (ii) the compensatory benefits provided under it.

(i) *Common law rights, prescribed and permitted by the Act*

Because she is 'seriously' disabled, the legislation gives Carol the right to institute common law proceedings against Doris. A 'serious disability' is presumed to be one that is greater than 30 per cent disability, according to a Table of Impairment.[60] It should be noted that although Carol easily satisfies the criterion of suffering a 'serious injury', most transport accident victims will not be able to fulfil that requirement. In fact, one of the primary rationales for implementing this legislation was to *prevent* less seriously injured individuals from suing, as part of an effort to enable *all* injured people access to compensation irrespective of whether they were able to prove someone's fault for having occasioned their harm. The right to sue was preserved in this limited way as a compromise solution to the political problems and impasse encountered by the Victorian Government when it attempted to implement a *total* no-fault transport accident scheme. What the Government succeeded in accomplishing in its compromise solution was the elimination of the inordinately costly 'whiplash' law suit.[61]

Aside from the 'serious injury' requirement, several other mechanisms have been incorporated in the legislation to prevent — and dissuade — the institution of lawsuits, including the use of threshold minima. These thresholds prescribe that if the damages assessment in a successful common law action is less than approximately $27,000 for pecuniary loss, or $27,000 for 'pain and suffering', then the court must not award damages to that otherwise successful plaintiff.[62] Like the 'serious injury' criterion, the threshold loss level will not prove problematic as far as Carol is concerned. However, it could be an insurmountable obstacle in circumstances where the income loss, for example, would be less serious than in Carol's case.

Additional disincentives to suing include the following: the repayment of certain no-fault benefits to the Transport Accident Commission where the plaintiff has succeeded in her common law action;[63] imposition of costs against parties, where, for example, no liability to pay damages is established;[64] the

60 See ss. 93(2), 93(3), 93(4), 93(17) for the statutory prescription, presumption, and definition of when one can sue, and when an injury is said to be, and presumed to be, 'serious'. According to s. 93(17) 'serious injury' means — (a) serious long-term impairment or loss of a body function; or (b) permanent serious disfigurement; or (c) severe long-term mental or severe long-term behavioural disturbance or disorder; or (d) loss of a foetus. The degree of impairment sustained by a transport accident victim is determined by utilizing the 'Guides to the Evaluation of Permanent Impairment', Second Edition, published by the American Medical Association and incorporated in the Transport Accident (Impairment) Regulations 1988, operative as of July 1, 1988.

61 In the course of proposing its total no-fault transport accident compensation scheme, the Government cited the following as one of its greatest concerns, in terms of overall cost to the community: 'Non-demonstrable injuries such as whiplash have been and are the subject of ongoing controversy.' Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 38.

62 Transport Accident Act 1986 (Vic.), s. 93(7).

63 Transport Accident Act 1986 (Vic.), s. 93(11).

64 Transport Accident Act 1986 (Vic.), s. 93(12).

court's inability to award damages for the reasonable costs or expenses associated with medical, hospital, nursing, rehabilitation and ambulance services which are provided as no-fault benefits under the Act;[65] consideration of contributory negligence in assessing and reducing damages awards.[66] It is likely that a contributory negligence finding would have a serious effect on Carol's damages award, assuming her action is successful and an award is forthcoming.

One of the most significant features of the legislation is the inclusion of ceilings on the damages that may be awarded: the maximum amounts available are approximately $615,000 for pecuniary losses and $273,000 for pain and suffering.[67] If she is successful in her suit, it is likely that Carol will be disadvantaged by these constraints; both the seriousness and nature of her injury will lead to a huge income loss and obviously will result in her experiencing severe pain and suffering. In Carol's case, the amount assessed under an unrestricted common law award would be greater than what the statute permits. In this way, she is arguably in an unfavourable position compared to Ann, as Carol's common law rights — prescribed by the statute — are relatively narrow, and it is likely that the damages awarded will be less satisfactory than what Ann could receive, at least with respect to economic amounts.[68]

It is important to highlight the fact that even though Carol may have the right to sue Doris, she still faces the critical problem Ann faced in New South Wales: the ability to prove her case successfully. Carol will encounter all the difficulties associated with common law actions, including witnesses' fading memories, delays, expense, and the anti-rehabilitative effects of lawsuits as well as the problem of accurately assessing loss in dollar terms. However, because she is in a position where she does not have the same need to litigate as does Ann, Carol may decide to opt out of the forensic lottery.

(ii) *No-fault benefits provided under the Act*

The provision of benefits on a no-fault basis is, arguably, the most important feature of the Act. 'Blame' has been eliminated, made irrelevant to Carol's ability to recover compensation, as there is now no need to establish liability. Rather, statutory benefits are provided on the basis of Carol's pre-injury income, as well as the dègree of injury she has suffered, according to mathematical formulae incorporated in the legislation. Unlike Sydney's Ann, governed exclusively by the common law[69] and her ability to sue Barbara effectively, Carol can claim the benefits available to her under Victoria's Act automatically, without having to worry as to whether or not she can succeed in an action against Doris.

65 Transport Accident Act 1986 (Vic.), s. 93(10). Also see s. 60 of the Act.
66 The Wrongs Act 1958 (Vic.), Part V.
67 Transport Accident Act 1986 (Vic.), s. 93(7).
68 Note that the maximum amount permitted by the legislation for recovery at common law of damages for non-economic loss in transport-related accidents is greater under the Victorian Act than in New South Wales.
69 The Motor Accidents Act 1988 (N.S.W.) affects the damages award only once liability at common law is established.

Carol's compensation will cover several types of expenses, including the cost of reasonable medical, hospital, nursing, and rehabilitative services.[70] She also will receive payments in lieu of loss of earnings and loss of earning capacity, linked to statutory formulae that take into account her pre-accident earnings. The amount she will receive is limited by prescribed maxima: $550 weekly for the first eighteen months after the accident,[71] and $446 weekly[72] after that initial period.

The nature of Carol's employment prior to the accident and the prospects of her future work as a solicitor exemplify one of the primary criticisms directed against the statute: the amount of compensation it provides for pecuniary losses does not come close to replacing the loss of income actually suffered and the probable future loss she will suffer, having been in the position of a potential 'high-income earner'. It may be argued, however, that prior to the accident Carol should have secured first-party sickness, accident and disability insurance to be able to supplement or 'top up' the compensation automatically available under the Act.

Carol may claim impairment benefits on a no-fault basis, both as a lump sum[73] and as an annuity.[74] The amount of the lump sum is based on the 'degree of impairment' she has endured, according to the 'Guides to the Evaluation of Permanent Impairment', noted earlier. Because Carol is so severely disabled she would receive the maximum amount obtainable as a lump sum, approximately $55,000. The size of her impairment annuity is determined both in accordance with her degree of impairment and her age: as a young, critically injured accident victim, she will receive the Act's maximum impairment annuity, $130,000. Paid periodically, this amount will be subtracted from any loss of earnings payments — total or partial — that may be forthcoming.[75] The nature of these impairment payments, made in lieu of pain and suffering and other non-pecuniary losses recoverable at common law, have been criticized because they forego, to a large extent, any individualized assessment of the victim's harm. However, a limited attempt has been made to take into account Carol's particular circumstances by linking the impairment annuity to her age and degree of disability. Further, the amount that is compensable for pecuniary losses is tied to her pre-accident income, albeit to a maximum amount.

All things considered, it appears that Carol's situation under the no-fault portion of the Act is less attractive than what *might* be available to Ann in New South Wales, at common law, where there would be an appraisal taking into account her specific situation and no ceilings imposed on the size of the economic damages award payable to her. However, a comparison favouring Ann

70 Transport Accident Act 1986 (Vic.), s. 60.
71 Transport Accident Act 1986 (Vic.), ss. 44, 45 (total loss of earnings, and partial loss of earnings, respectively).
72 Transport Accident Act 1986 (Vic.), ss. 49, 50 (total loss of earning capacity, and partial loss of earning capacity, respectively).
73 Transport Accident Act 1986 (Vic.), s. 47.
74 Transport Accident Act 1986 (Vic.), s. 48.
75 Transport Accident Act 1986 (Vic.), ss. 48, 50.

in this way must be placed in its proper context: it is premised on the precarious assumption that Ann would be successful (i) establishing Barbara's liability and (ii) proving what her losses have been and will be in the future.[76] Moreover, Carol would receive fairly extensive automatic benefits under Victoria's Act even if she had hit a tree and was responsible for her own injuries, with no one to sue,[77] unlike Ann, who must rely on a successful common law action — with all its associated hazards — for financial recompense.

Comparison of Ann in New South Wales with Carol in Victoria

Having identified several significant differences in the legal redress to which Carol and Ann are entitled, the appropriateness of the results must be questioned. Is it right, just, or fair that Carol will recover certain benefits for her injuries automatically, whereas Ann, suffering identically, must prove Barbara was to blame for her disabilities in order to recover anything? Some of the fault system's inadequacies may be highlighted by comparing Ann's plight with Carol's, restating certain points noted earlier.

Ann's recovery is totally dependent on her ability to prove Barbara's fault. Ann faces the usual risk inherent in litigation — not receiving any compensation. She may be unable to prove liability. Even if she succeeds, the amount awarded might be reduced substantially as a result of her contributory negligence. On the other hand, under the Act, Carol is assured of the full payment of compensatory no-fault benefits, notwithstanding the fact she was as much at fault in her accident with Doris as Ann was in her accident with Barbara.[78]

Ann will receive a lump sum payment, the result of considerable — and often inaccurate — speculation by the court; she may dissipate her award and be reduced to dependence on welfare payments. If she cannot sustain her action against Barbara in the first place, as well she might not, she will have to bear the loss herself. There will, no doubt, be a substantial delay between the time she is injured and the time she receives her damages, if any. Carol, however, will receive her periodically-paid compensation within a few weeks of submitting an application to the Transport Accident Commission. Further, the cost to Ann of litigating her case against Barbara will be great, by comparison with Carol's application to the Commission for benefits. Carol is, at least, assured of some

[76] The Victorian Act contains a cessation of benefits provision: if the victim is less than 50 per cent disabled according to the impairment guides, many of the Act's benefits will cease to be paid either when the sum of approximately $89,000 is reached, or 3 years after the accident, whichever occurs first: Transport Accident Act 1986 (Vic.), s. 53. Because of the severity of Carol's injuries, she will not be affected by this provision (unlike most transport accident victims).

[77] Sections 39-41 of the Transport Accident Act 1986 (Vic.) prescribe specific situations where the victim's culpable conduct may be considered and certain benefits otherwise payable on a 'no-fault' basis are consequently denied or reduced, including, for example, where the victim's own consumption of alcohol contributed — at least partially — to her or his injuries. Carol will not be affected by these provisions as it can be assumed that she has not been guilty of drinking alcohol at her celebratory dinner, and then driving; the Act's no-fault benefits will be available to her to their full extent.

[78] Any common law action she may institute would be affected by her contributory negligence in the same way as Ann's suit.

compensation under the Act and need not bear the costs of litigation nor the expenses associated with the long delay in waiting for what is merely a *potentially* favourable judgment.

If Carol wishes to pursue a common law claim by virtue of section 93 of the Act and is successful in doing so, her damages award would be greater than the no-fault payments she would receive under the statute. However, she would have to face the typical problems associated with initiating civil suits for personal injuries — the same difficulties Ann will encounter in her action against Barbara.

In this way, despite the fact that both plaintiffs are equal in all respects other than the place where they sustained their injuries, they will be treated very differently by their respective states' legal regimes, demonstrating the inequitable impact jurisdiction plays with respect to the kind of future seriously disabled individuals can expect to endure. These anomalies cannot be avoided if an accident victim's rights are determined, in part, by the particular geographic area where the accident occurs, or the specific area where a legislative scheme operates; only a national compensation scheme can overcome these inequities.[79] These distinctions cannot continue to be tolerated.[80] No logical nor moral rationale can be provided as justification for Ann being treated differently from Carol.[81]

Two other Australian jurisdictions warrant brief attention, having introduced legislative schemes unlike Victoria's. Transport accident victims in the Northern Territory and Tasmania will be treated differently from Ann and Carol.

Advice to Ellen in the Northern Territory[82]

Although Ellen is injured by Frances in exactly the same way as Ann and Carol, she cannot sue Frances for having caused her disabilities because the right to sue in motor vehicle accidents has been abolished in the Northern Territory. The Government established a total no-fault scheme, under the Motor Accidents

[79] New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 84.

[80] Luntz, H., *Compensation and Rehabilitation* (1975) 10 (referring to differences among existing compensation schemes, from one state to the next.)

[81] Recently, the Liberal Government in Ontario, Canada, initiated the enactment of a scheme similar to Victoria's, by eliminating the right to sue in all but the most serious transport accident cases; 90-97 per cent of all law-suits for personal injury arising from transport accidents would be abolished. 'Only motorists who are seriously and permanently injured or disfigured and the families of those who die as a result of car crashes will be able to sue under the new plan.' (*Globe and Mail*, November 8, 1989). The Minister responsible for the legislation argued that the changes would give victims better treatment than they receive under the existing system, by releasing benefits more quickly and assuring victims that they receive long-term care and rehabilitation. They can sue where a continuous, permanent, serious injury has been suffered. A 'threshold no-fault system' would be installed, which would fix benefits rates for all but the most seriously injured individuals. Rather than suing for pain and suffering and economic loss, most accident victims would receive increased automatic benefits under the Act. The Government contended that insurance companies will save an estimated $630 million under the scheme. Lawyers' groups, contesting this proposed revamping of automobile insurance laws, have argued that the threshold level as to when an individual can sue is set too high, eliminating the right to sue in too many cases. The Liberal Government has since been defeated in a provincial election, replaced by the relatively left-leaning New Democratic Party.

[82] Ellen has suffered the same injuries as Ann and Carol. As an articled clerk, she has identical employment prospects as the others.

(Compensation) Act 1979 (N.T.), providing compensation to transport accident victims regardless of their ability to successfully sue another individual for their injuries.[83] It has been amended several times since its introduction.

The scheme implements legislation similar to that recommended by the New South Wales Law Reform Commission, abrogating the right to sue but providing generous no-fault benefits in its place, and the total no-fault transport accident compensation regime initially envisioned by the Victorian Government in 1986 from which the Labor Government was compelled to retreat. Ellen's recompense is limited to the benefits under the statute; if she would have succeeded in a common law action against Frances, then it might be said that she has suffered financially under the legislation. However, if she had been entitled to litigate — and her suit failed — then she has benefited greatly under the Act by having compensation readily available on a no-fault basis, unlike Sydney's Ann, who will not receive damages nor compensation if she loses the suit on which her future financial well-being is totally dependent.

Advice to Gina, in Tasmania[84]

Gina is injured by Helen in Tasmania, in exactly the same way as the other transport accident victims in the jurisdictions noted above. As well as having the right to sue the allegedly faulty defendant, she will receive limited benefits automatically. Even if she were not seriously injured — a prerequisite to being able to litigate in Victoria — she would have the right to bring an action in Tasmania as that right is unlimited. Although benefits are available to all claimants irrespective of fault, they are less generous than those available to Carol, under the Victorian scheme.[85] If Gina sues Helen, she will encounter the same problems that Ann and Carol face in their common law actions, assuming Carol feels it is worthwhile instituting proceedings.

The Tasmanian scheme is similar to the limited 'add-on no-fault scheme' that existed in Victoria under the Motor Accidents Act 1973 (Vic.) from 1974 until January 1, 1987, in which an unlimited right to sue was retained in conjunction with a limited amount of compensation available to claimants on a no-fault basis. The Victorian Government made several findings with respect to that regime: for

[83] The Northern Territory is the only Australian jurisdiction that has implemented a total no-fault transport accident compensation scheme, eliminating the right to sue. The scheme initially retained the negligence action in a limited way, permitting the right to sue for non-economic losses to a ceiling level; presently, it provides a lump sum payment for permanent disabilities in lieu of the non-pecuniary common law amounts which are no longer recoverable. Benefits include: lump sum compensation for 'loss of limb or other permanent impairment' assessed in accordance with a scheduled table of maims (maximum of $55,000); compensation for loss of earning capacity; reasonably incurred medical, surgical, dental, nursing treatment expenses (other than treatment and accommodation in a Territory hospital) (maximum of $75,000); house alterations and provision of appliances (maximum of $30,000): Motor Accidents (Compensation) Act, sections 13-20 and the Motor Accidents (Compensation) Rates of Benefit Regulations 1989. Several provisions exclude or disentitle specified individuals from certain benefits (for example, if drinking-driving conduct is involved). Also see, generally, the New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) 95.

[84] Gina has suffered the same injuries as Ann, Carol, and Ellen. As an articled clerk, she has identical employment prospects as the others.

example, 65 per cent of transport accident victims did not benefit from tort compensation; there was an average delay of 28 months from the date of the accident to the date of the common law settlement and a backlog of 70,000 common law claims; 17 per cent of the costs of common law settlements went to legal expenses; legal costs were concentrated in the fault or common law area, especially with respect to settlements of less than $15,000; there was a tendency to over-compensate minor claims and under-compensate the longer-term severely injured.[86]

The Victorian scheme was discontinued for a number of reasons, the most important of which encompassed cost and equity concerns inherent in a system based on the fault principle. Individuals unable to prove fault but requiring benefits were receiving inadequate amounts of compensation; the size of the no-fault benefits could not be increased in a system where there were uncontrolled and ever-increasing common law benefits being paid to a few 'lucky' litigators.[87] This unfortunate balance as to who reaped 'rewards' was alleviated by implementing the present statute, where more victims will recover more recompense more often than was the case in Victoria prior to 1987, and is the case in Tasmania.

IDENTICAL DISABILITIES CAUSED IN DIFFERENT WAYS

Further to the comments at the beginning of this paper, jurisdictional differences are not the only ones of crucial importance in determining the rights to which one is entitled if one suffers a personal injury. The way in which the disability arises is also of enormous significance: is it due to sickness? Is it transport related? Is it the result of an accident at one's place of employment? Individuals suffering identical disabilities — for example, the same functional losses, earnings losses, earning capacity losses, and pain and suffering — but who have sustained their incapacities in different ways will be treated disparately by our legal system.

Advice to Irene, disabled due to illness[88]

She would not receive any damages at common law. Because there is no one to 'blame' for her disability, there is no one to sue. Even if Irene lived in New

[85] Under the Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), s. 23 and the Motor Accidents (Liabilities and Compensation) Regulations 1980 (Schedule 2) (amended to 1989), Gina would receive compensation for all medical, surgical, dental, or nursing expenses reasonably incurred by her to a maximum amount of $100,000; disability payments — an employed person's allowance — to a ceiling level and for a limited period; a housekeeping allowance within prescribed limits. If she successfully sues Helen, she must pay back any compensation received under the statute. Benefits are not available in certain limited situations.

[86] Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 28, 35. At pages 44 and 45, the Government comments on the problem of delays in an add-on scheme, said to be the result of the following factors: administrative difficulties in dealing with a high demand for minor claims; delivering benefits in the form of lump sum payments that require a time-consuming assessment process; the adversarial system and method of resolving disputes through protracted negotiations; scarce inferior court resources. Citing the results of a survey of practitioners published in 1985 by the Australian Institute of Judicial Administration, the Government notes that the average delays for cases of major injury, attracting awards of $100,000 or more, was 52 months.

[87] Government Statement, *Victoria: Transport Accident Compensation Reform* (May 1986) 11.

Zealand, she would not be fortunate enough to be covered by that country's comprehensive accident compensation scheme, as that regime is restricted to providing benefits to those injured as a result of an 'accident', and does not extend to individuals disabled by illness.[89] This blurry distinction — attempting to compartmentalize illness and accident — has given rise to controversy. A victim of multiple sclerosis, arguably not dissimilar from Irene, comments on the injustice faced as a result of the limited scope of the New Zealand legislation:

> If a drunken driver injures himself [or herself] hitting a telegraph pole, they call that an accident. I call it a self-inflicted injury. If a rugby player becomes a paraplegic from impact in the scrum, they call that an accident. I call it a planned risk. If a small child runs into the street because there is no fence to stop him [or her] and is hit by a car, they call that an accident. I call it a predictable consequence. If someone is crippled by multiple sclerosis, there is nothing he [or she] could possibly have done to prevent that. We don't know what causes it, so he [or she] could not possibly have avoided it. I call that a true accident. But they say he [or she] is not covered.[90]

In 1973, Woodhouse J.[91] recommended that the Australian legal system's treatment of disabilities be reformed radically: he proposed that automatic compensation be available to all Australians comprehensively, on a 24-hour-a-day basis, irrespective of where or how the disability was sustained and whether or not the opportunity to sue someone for having caused the incapacity existed.[92] According to Woodhouse J.:

> . . . needs of men and women are not mitigated by the chance visitation of sickness rather than injury. A man [or woman] hit by disease is no more able to resolve his [or her] problems than his [or her] neighbour hit by a car. In terms of equity, therefore, and as a matter of logic, there should be equal treatment for equal losses.[93]

Had the Committee's proposals been implemented, Irene would have been entitled to benefits on the same basis as anyone else incapacitated as a result of an accident, with the provision of compensation regardless of notions of fault and blame.[94]

[88] Irene has suffered the same injuries as Ann, Carol, Ellen, and Gina. As an articled clerk, she has identical employment prospects as the others.

[89] New Zealand's Accident Compensation Act was enacted in 1972, became operative in 1974, and was amended in 1982. It was the product of a 1967 Royal Commission, conducted by Sir Owen Woodhouse of the New Zealand Court of Appeal.

[90] Quoted by Ison, T. G., *Accident Compensation* (1980), 21. Not every New Zealander *wants* to be covered by the Accident Compensation Act 1982 (N.Z.). For example, see *Green v. Matheson* [1990] N.Z.A.R. 49, where the plaintiff argued that her injury fell outside the parameters of the statute: she pleaded trespass to the person, breach of fiduciary duty and negligence against several defendants, including the Auckland Hospital Board, University of Auckland, and Dr Green. She alleged that she received 'treatment' that was less than adequate and proper although it had been represented to her as otherwise. She also alleged that she was subject to a number of unnecessary procedures and was the subject of research and experimentation with respect to her cervical cancer without her knowledge and consent. She argued that the Accident Compensation Act 1982 (N.Z.) did not in these circumstances eliminate her right to bring a common law action for compensation. She was unsuccessful in her contention, at least with respect to compensatory damages, as a broad interpretation was given to the phrase 'personal injury by accident'. Further, the court held that her case fell within the concept of 'medical misadventure', covered by the Act. Her right to sue was limited to a claim for exemplary damages as well as damages associated with any act or omission complained of which arose before the enactment of the statutory compensation scheme.

[91] Woodhouse J. chaired the National Committee of Inquiry into Compensation and Rehabilitation.

[92] Luntz summarizes the Australian Woodhouse Report's philosophy and the 5 principles on which the Committee based its recommended scheme: community responsibility; comprehensive entitlement; complete rehabilitation; real compensation; administrative efficieny: Luntz, H., *Compensation and Rehabilitation* (1975) 8.

[93] Australian Woodhouse Report, vol. 1, para. 3.

[94] Fleming notes that pessimism about the political prospects of such ambitious plans — comprehensive entitlement to compensation regardless of the cause of the disability — have caused most reformers to narrow their focus, retreating to a position whereby a recommended scheme would

The number of individuals suffering severe disabilities in the near future will increase as a result of many factors, including better pre-natal and obstetric care which will preserve seriously ill infants' lives, and improved medical care for all individuals inflicted with diseases and injuries, thus resulting in lengthened life spans.[95]

> The present system will give rise to two classes of disabled people — those 'lucky' enough to have become so through the fault of an (insured) negligent defendant; and those unlucky victims who can blame only Fate, and who have to rely on their own or society's meagre resources, and handouts. Even the 'lucky' will suffer, as inflation continues to ravage large awards, and governmental infidelity makes long-term planning for the disabled impossible. The 'right' to compensation for disabling injury seems somewhat empty. It would be infinitely better to discard the fault system altogether, compensating all disabled people through a statutory scheme providing for periodical and regularly adjusted payments.[96]

Would the 'general public' support the provision of identical financial compensation to Irene, disabled as a result of illness, Carol, under the transport accident scheme and Ann, who has the opportunity to receive full economic loss damages at common law? Or, rather, would the community believe that Irene's dependence on the Social Security Act's welfare payments is satisfactory? It is impossible to state with any certainty exactly what the popular sense of justice — assuming one exists — would demand.[97] In any event, it is Parliament's responsibility to lead public opinion towards acceptance of a system which reflects equitable and uniform treatment of its constituents.

cover only *accidents* on the model of tort liability, as in New Zealand. The least ambitious plans, but politically the ones that are most negotiable and therefore attractive to legislators are compensation schemes limited to particular *kinds* of accidents, such as those arising at the workplace, as a result of criminal activity, or in transport-related incidents: Fleming, J., 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131, 138. In 1986, the Victorian Government discovered that even the enactment of a limited scheme is not without its difficulties.

95 Hayes, R. and Hayes, S., 'Permanent Disability and Common Law Rights to Compensation' (1982) 56 *Australian Law Journal* 643, 657.

96 Hayes, R. and Hayes, S., 'Permanent Disability and Common Law Rights to Compensation' (1982) 56 *Australian Law Journal* 643, 657. They continue, at 656, noting that in 1982 if an individual suffers a severe injury such as brain damage or paraplegia in a motor vehicle accident as a result of another driver's negligence, the victim could receive a sum as large as two million dollars or more [before the enactment of statutory schemes such as Victoria's Act]; if a person sustains brain damage in an accident which is no one's fault, or is the victim's own fault, she or he receives nothing; if a child is born disabled due to the negligence of a medical practitioner, the child can expect to receive substantial damages; if the child is born disabled due to an inherited congenital disability, the child receives nothing except social security benefits, although the effects of the disability may be the same: a national comprehensive compensation schemes, abolishing the tort action and existing limited compensation schemes, would be equitable in its treatment of all disabled people, and would save costs by abolishing the associated paraphernalia of the present systems; these saved costs would be more than adequate to fund a comprehensive scheme. Luntz concurs, recommending that an adequate disability pension be paid to all the disabled regardless of the cause of their disability, to compensate them for the extra costs of participation in community life, including the cost of transport, laundry, housing, and attendant needs. Conceding that such a scheme may not do 'perfect justice', Luntz notes that the present tort system clearly fails to meet that goal: Luntz, H. 'Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective' (1985) 38 *Current Legal Problems* 29, 49. Atiyah notes that the incorporation of all compensation schemes within a generous social security system would represent society's acceptance of its responsibility to support its inhabitants equally, on the basis of need, regardless of the source or nature of their disabilities; even New Zealand's scheme, frequently held up to be a model for reform, does not achieve this ideal: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 549.

97 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 467. Atiyah asks, at 467: What does the 'person in the street' think about the fact that very large amounts of compensation are paid to people injured due to some other person's fault and very little — if any — compensation is paid to persons who suffer injury, disease or disablement from natural causes or accidents not due to anyone's fault? *We do not know*.' (emphasis added)

Advice to Jane, who loses her grip as she gets out of her bathtub, slips, and falls to the floor[98]

Jane would not recover any financial recompense by way of common law damages, as she is the author of her own misfortune, with no one to blame for her disability. Recipients of tort awards, unlike Jane, are a privileged class of the disabled; in fact, generally speaking, their position has improved over the last 15 years relative to the position of other disabled persons including people like Jane, whose recovery is restricted to social security payments.[99]

Jane's circumstances illustrate one of the most controversial aspects of the negligence system, noted earlier: it discriminates between different accident victims according to the defendant's culpability, rather than reflecting the victim's specific needs; success in securing financial well-being therefore depends on an ability to pin responsibility for the injury on an identifiable agent whose fault can be proven.[1] In this way, negligence only deems those who can trace their harm to someone's wrongdoing as deserving of compensation; according to several commentators, this causes unequal and unfair treatment in a number of ways: for example, as between victims of the same kind of injury, where one can point to a responsible cause but another cannot do so; as between one person who injures herself in a car accident and another who slips and injures herself in a bathtub; as between one who can and one who cannot succeed in proving fault.[2]

As was the case with Irene, it is difficult to ascertain precisely what the community would demand in these circumstances: what *should* happen to Jane? Should her plight be treated in the same way as Ann? Should she receive automatic benefits, like Carol, under Victoria's Transport Accident Act? It is likely that the public's response would be linked closely to popular notions of blame, individual responsibility, and misconceptions as to what is involved in the establishment of fault to Jane's detriment.

If Jane lived in Auckland, she would be entitled to receive benefits under New Zealand's statutory compensation scheme, including compensation for loss of earnings on a weekly basis,[3] medical and like services,[4] pain and suffering and other non-economic losses awarded as a lump sum to a maximum amount,[5] and a lump sum maximum for permanent incapacity.[6] The greatest proportion of compensation available under that scheme is linked to pre-accident earnings, which, in Jane's case as an articled clerk, would not be inconsiderable. If she had worked as a home-maker rather than in the paid work force, then the benefits to which she would be entitled would not be substantial, as they are restricted to an

98 Jane has suffered the same injuries as Ann, Carol, Ellen, Gina, and Irene. As an articled clerk, she has identical employment prospect as the others.

99 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 192.

1 Fleming, J., 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131, 137.

2 *Ibid.*

3 Accident Compensation Act 1982, ss. 56-58.

4 Accident Compensation Act 1982, s. 80.

5 Accident Compensation Act 1982, s. 79.

6 Accident Compensation Act 1982, s. 78.

amount for non-pecuniary loss. However, the fact remains that *any* amount she would receive in New Zealand for her 'bathtub accident' is more than she would receive in any Australian state for an injury of that nature.[7]

Advice to Karen, injured at work in Laura's Melbourne factory[8]

Karen — a 'worker' — is entitled to benefits under the Accident Compensation Act 1985 (Vic.) ('Workcare'), irrespective of whether or not the accident was her employer's fault. These include benefits covering the reasonable costs of medical, hospital, nursing, and rehabilitation services,[9] loss of earnings and earning capacity compensation to a maximum amount determined by statutory formulae, paid periodically,[10] and a lump sum payment for losses akin to pain and suffering and loss of amenities, determined according to the Act's 'table of injuries', to a maximum amount.[11]

Karen's right to sue for damages at common law would be limited to a claim for non-pecuniary loss[12] to a maximum sum of $140,000,[13] paid in lieu of the amount determined in accordance with the 'table of maims' that she would otherwise receive. If Karen instituted a common law action for this limited non-pecuniary amount, her suit would be subject to the general problems associated with successfully suing for personal injuries, discussed earlier.

Advice to Mary, assaulted by Nathan, in Geelong, Victoria[14]

Mary can sue Nathan for battery. However, she is not limited to this claim, which may be somewhat difficult to sustain, given the possibility — or likelihood — of not being able to find the defendant; moreover, even if Nathan could be found, he may be impecunious, unable to satisfy the judgment when Mary attempts to execute it.

Under the Criminal Injuries Compensation Act 1983, Mary can claim for her loss of earning capacity for a period of one year to a maximum amount of $550

7 As a result of the New Zealand Law Commission's review of the Accident Compensation Act from 1987-1988, several modifications to the Act have been proposed. These amendments — including the enlargement of the mental and physical conditions for which compensation is payable and a limitation on the *types* of compensation available — are discussed in Yates, C., 'Law Commission Proposals for Accident Compensation: What Place for Personal Remedies?' (1989) 19 *Victoria University Wellington Law Review* 29.

8 Karen, employed in Laura's factory, has suffered the same injuries as Ann, Carol, Ellen, Gina, Irene and Jane. Assume, for the purposes of argument, that she is in the same financial and earnings position as the disabled individuals considered to this point.

9 Accident Compensation Act 1985 (Vic.), s. 99.

10 Accident Compensation Act 1985 (Vic.), ss. 93A, 93B: maximum sum of $500 per week, based on 80 per cent of pre-injury earnings, with specified reductions.

11 Accident Compensation Act 1985 (Vic.), s. 98: the maximum amount available on this basis is $108,640.

12 Accident Compensation Act 1985 (Vic.), s. 135.

13 Accident Compensation Act 1985 (Vic.), s. 135(3A).

14 Mary has suffered the same injuries as Ann, Carol, Ellen, Gina, Irene, Jane, and Karen. As an articled clerk, she has identical employment prospects as the others.

per week,[15] and a limited amount of compensation as pain and suffering.[16] The total amount she may recover is $50,000.[17] The compensation to which she is entitled would be reduced by the amount of any damages award she might succeed in recovering from Nathan at common law,[18] as the legislation takes into account the interaction of the common law with the benefits available under the scheme.

The payment of compensation by the Crimes Compensation Tribunal is not a right to which Mary is entitled, but, rather, a privilege bestowed upon certain claimants by the Tribunal in its discretion. Benefits are available even if the assailant, Nathan, is not apprehended. Moreover, even if Nathan is acquitted in criminal proceedings, the Tribunal may exercise its power to award compensation to Mary. As a cost-cutting measure, the Victorian Attorney-General recently stated that the Crimes Compensation Tribunal will be dismantled and its functions taken over by Magistrates' Courts.[19]

Criminal injuries compensation schemes exist in all Australian jurisdictions. Like other piecemeal measures, they have been criticized because they provide benefits to one class of injured individual but not to others, unjustifiably singling out one type of victim for special treatment. The United Kingdom's similarly patterned scheme has been subject to this criticism; arguably, this special group would not receive preferential treatment if it were not for the fact that the scheme is relatively inexpensive to operate and administer, compared with most other claims made on the State.[20]

CONCLUSION

The individuals discussed above do not enjoy identical rights to automatic compensation or to damages awards. These benefits are not available to each of them on an equal basis. The nature of the treatment they are subjected to depends on a number of factors, including the following: having a case worthy of

15 Criminal Injuries Compensation Act 1983 (Vic.), s. 16. As of 1988, a claimant may apply to the Crimes Compensation Tribunal to extend this period for two years. The amount paid is based on sections 93 and 94 of the Accident Compensation Act 1985 (Vic.) ('Workcare').

16 Criminal Injuries Compensation Regulations 1984 (Vic.), regulation 19 (amended in 1988).

17 Criminal Injuries Compensation Act 1983 (Vic.), s. 18A, and Criminal Injuries Compensation Regulations 1984 (Vic.), regulation 20 (amended in 1988).

18 Criminal Injuries Act 1983 (Vic.), s. 19(3).

19 *Age* (Melbourne), 4 September 1990. See the *Age* (Melbourne), 23 September 1990, where it is reported that in 1988 the tribunal heard 3,700 applications; this rose to 4,500 in 1989 and is likely to rise to 5,400 by the end of 1990. The comparable increase in total payouts of no-fault compensation to victims of crime has risen from $7 million in 1987-1988, to $10.3 million in 1988-1989 to $19.1 million in 1989-1990. The current waiting period for having a claim heard is expected to increase substantially under the proposed system.

20 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 293. Atiyah's criticism is directed, in part, to the intellectual confusion he believes beset the rationale for the scheme when it was introduced: the committee did not come to grips with the crucial issue, which was whether there are any grounds for compensating victims of crime other than by the normal processes of the welfare state. All special compensation schemes, including the tort system should be incorporated into a reform package in order that many of the benefits that now go to victims in particular groups are redistributed in a more equitable manner. The real difficulty lies in the fact that *this* type of injury has been singled out as worthy of special treatment, whereas others go uncompensated: Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 295.

litigation; the ability to prove that the defendant failed to satisfy the standard of care expected of that person; the defendant's insurance status; and, importantly, both *where* the harm occurred, and the *way* in which the disability was sustained. At one extreme, Irene was disabled as a result of an illness, with no one against whom she could conceivably litigate and no compensation fund from which she could draw benefits; at the other end of the spectrum are individuals such as Carol and Karen, who receive relatively extensive and generous compensation under limited legislative initiatives.[21]

Differential treatment arising from *ad hoc* compensation systems is a reality of Australian life. Aside from questioning the desirability of this state of affairs, it is worthwhile considering why it exists; that is, why have particular victims been singled out for preferential care, whereas others are not so fortunate? Further, *how* is this result justified?[22] Is it sensible to have a society where one wants to identify and be treated like Carol, rather than Irene? What has Carol done to deserve special treatment?

It is time to reevaluate the ways in which the disabled are cared for in our society, with attention focused on an examination of their needs rather than the defendant's conduct — if, indeed, there is a defendant whose conduct can be subjected to scrutiny. This alteration of perspective and emphasis would produce a caring community, one interested in the welfare and demands of all incapacitated individuals, unwilling to ignore them by relying on either the *reason* they happen to be disabled, or the *place* they incurred their disability as justifications for letting them fend for themselves.

21 Luntz notes that the main disadvantage of the present schemes is that they are piecemeal in operation; even though there may be real needs of the same nature created by similar misfortune, all victims are not treated equally; bearing in mind that all benefits depend on the particular scheme the victim happens to be governed by, not on that person's needs, this result cannot be justified: Luntz, H., *Compensation and Rehabilitation* (1975) 11, 25. The New South Wales Law Reform Commission cites the practical difficulties associated with attributing an injury to a particular cause, as well as the most serious deficiency in any limited compensation scheme: by its very nature, a limited scheme fails to compensate victims where the injuries are outside its scope; that is, many victims outside the sphere of workplace and transport-related accidents are not entitled to common law damages or any form of statutory compensation, forcing them to rely on the social security system where they have lasting incapacities. Therefore, 'only a truly comprehensive scheme, covering injury, disease and congenital abnormalities, will achieve the objectives of comprehensive entitlement and eliminate disputes over etiology.': The New South Wales Law Reform Commission, *Report on a Transport Accident Scheme for New South Wales* (1984) 84. Radical reform has been called for several times, often on the heels of unspeakable tragedy: 'What is required is not millions of dollars for a minority of victims, but equal and adequate compensation for *all* victims. Compensation should be moved entirely out of the courts and out of adversary litigation.': *Sunday Times*, 'Suffer the Children: the Story of Thalidomide' (1979) 253. One specific type of accident victim — not discussed in detail but noted earlier — is that person injured by a manufactured good; it may be some time before Parliament acts on the Australian Law Reform Commission's proposals, whereby its new piecemeal scheme governing this segment of accident victims would replace the present piecemeal regime.

22 Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 550. Atiyah continues, noting that a major obstacle to comprehensive reform is the opposition from special interest groups seeking to preserve limited schemes which benefit them; he argues that because justice is a 'slippery' concept, it is possible to make an argument justifying many of the preferences for particular groups, as presently embodied in the law. Therefore, '. . . comprehensive reform requires a firm adherence to a particular notion of social justice, and the political will to disregard the pleas of those who receive special treatment under present arrangements. Recent history does not give much cause for optimism on this score.': Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 573.

If it is accepted, on a moral basis, that a comprehensive no-fault compensation scheme is necessary to serve the needs of equity and justice, why has one not been implemented? Arguments based on cost seem to weigh heavily against the introduction of fully comprehensive schemes; political pressures have precluded their implementation.[23] New Zealand is one of the few common law jurisdictions to have moved in that direction, although the scope and limits of that scheme have not been without criticism. Is Australia now prepared to not only follow New Zealand's lead, but to go beyond that state's reforms? To do so, the matter must again be placed on the political agenda, accompanied by a concerted effort to cultivate the political will necessary to design the 'just society' *all* Australians deserve.

[23] Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed. 1987) 553.